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# MULLA
# PRINCIPLES OF
# HINDU LAW

WITH A GENERAL INTRODUCTION TO HINDU LAW
AND WITH COMMENTARIES ON
THE HINDU MARRIAGE ACT, 1955
THE HINDU SUCCESSION ACT, 1956
THE HINDU MINORITY & GUARDIANSHIP ACT, 1956
THE HINDU ADOPTIONS & MAINTENANCE ACT, 1956

FOURTEENTH EDITION

By
**SUNDERLAL T. DESAI,** B.A., LL.B., Barrister-at-Law
*Senior Advocate, Supreme Court of India*
*Formerly Chief Justice of the High Court of Gujarat*

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on the four Acts—S. T. DESAI


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# PREFACE TO THE FOURTEENTH EDITION

A number of important decisions have been given by the Supreme Court and also by the various High Courts after the last edition came out. In revising the book for the present edition, I have taken care to incorporate the same.

I am thankful to Mr. A. K. Sarkar, M.A., LL.B., Advocate, for his assistance in the preparation of this edition.

*Supreme Court*
*New Delhi*
*March, 1974*

SUNDERLAL T. DESAI

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# PREFACE TO THE TWELFTH EDITION

Since the publication of the last edition of this work fundamental changes and substantial modifications have been brought about in Hindu law by a series of enactments, intended to ensure a uniform civil code of personal law for Hindus in the whole country. History of legislation by democratic processes presents no parallel to basic changes in any system of personal law of the nature of the extensive alterations made by the recent legislation embodied in the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956. These Acts abrogate and over-ride all the rules of Hindu law previously applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of matters dealt with in them. These Acts also supersede any other law contained in any Central or State legislation in force immediately before they came into operation, in so far as such legislation was inconsistent with the provisions contained in them. Bentham wrote of 'law reform' by codification and its stimulating and humanising effect. Bentham's conception of codification was that it should be a complete digest of the law on the subject dealt with and its style should be characterised by force and harmony. It should cause the debates of lawyers and the bad laws of former times to be forgotten and commentaries, if written, should not be read. This is indubitably an ideal to be pursued by any law-maker. It will be for the reader to judge how far Parliament has succeeded in giving complete self-sufficing enactments which, as Bentham phrased it, "should not require schools for their explanation or casuists to unravel subtleties". Bentham probably underrated the difficulties of carrying codification into execution.

The editing of another author's work is always a delicate task and more so when it has long been recognised as a standard work on its subject. This is especially true of a work when good deal of the law on the subject has undergone unmatched transformation and radical changes and the editor hopes to serve the need of the reader, who turns to it for the new law, and of the reader who only wants the old law with notes and citations to date, as well as of one whose requirement touches both the new and the old law. I hope that in my efforts to meet these requirements I have not in any manner impaired the high authority of this work.

The outstanding feature of the changes made in the law is that all disparity in the rights of men and women and disabilities based on caste or sex are eliminated in matters of marriage, succession and adoption. Even though some of the changes may seem to break violently with the past it cannot be denied that the fast moving conditions and the social, economic and political upheaval in the country had rendered imperative substantial and radical alterations in Hindu law. Far-reaching and fundamental changes had become inevitable, for they alone could furnish fair and equable solutions to some of the most controversial questions relating to the law of marriage and succession.

These recent enactments could not be and are not (except on certain matters expressly so stated) retroactive in their operation and even in respect of past matters to which they apply it will often be necessary to know the law as it previously existed. A part of Hindu law and usage as has hitherto been applicable—for instance, much of the law affecting joint family and joint family property—remains unabrogated by statute. Moreover these recent enactments leave an undetermined residue and the importance and necessity of knowing the entire system cannot be minimised. Reference to the recognised sources of Hindu law including the texts of the Smritikars and the authoritative works of the Commentators and Nibandhakars will, therefore, continue to be made.

These considerations and the unusual nature of the changes brought about in the law by these recent enactments are my apology for adding to this work a General Introduction to Hindu law with particular reference to the sources of Hindu law and the great juristheologians and jurisprudentes who compiled the Smritis and composed Commentaries and Digests of which the leading ones have acquired almost *ex cathedra* character. Otherwise I would deem it presumptuous on the part of an editor like me to write an Introduction to this standard work of Sir Dinshah Mulla. I dedicate the General Introduction to Hindu law and the Commentaries on the new enactments which I have written to the memory of the Right Honourable author of this work.

One inevitable consequence of the new legislation is a considerable increase in the length of this edition as compared with its predecessor. This is mainly due to the General Introduction added to this work and the Commentaries on the four recent enactments. The arrangement and text of the previous edition have been preserved though on a number of points the matter has been condensed. Despite changes in the law most of the text of the work of the eminent author and the illustrious editors of the previous editions will continue to be of the same usefulness and guidance until the lapse of a considerable time when the old law and in particular the old law of succession ceases to be of current importance. I have generally revised the book and it has been my endeavour to bring it up to the date of its going to press by reference to all the relevant cases reported since the last edition. The new statutes and commentaries on the same have been added as a separate part of the book though in the text of the original work I have taken care to draw attention to the new law wherever it was felt necessary to do so. I have also added some short preliminary notes to the Chapters of the original work.

The volume of case law that has grown up since the publication of the last edition is considerable. The Hindu Women's Rights to Property Act, 1937, introduced far-reaching changes in the law of succession. It was ameliorative in character and enacted to carry out important social reform but unfortunately the rules of devolution set out in it were so penned that there have arisen anomalies and a number of conundrums and an attempt to resolve one difficulty has often caused misconceptions and equally great if not greater difficulties in other cases and raised problems which do not admit of logically consistent answers. Although that enactment is now

repealed by the Hindu Succession Act of 1956, a number of questions affecting succession and titles to property governed by that enactment, some of them hard to deal with, have arisen since the last edition and there is a mass of case-law on the subject. These questions even now continue to crop up. This has required a new arrangement and § 35 has been rewritten so as to analyse and interpret the sections of that Act in the light of a number of recent decisions on the subject.

A number of important decisions of the Supreme Court and some Full Bench decisions of High Courts were given after the last edition came out. Although they do not come strictly within the category of judicial pronouncements which have totally altered the law on the topics dealt with in them they did require remodelling and recasting of a number of paragraphs in the text of the work.

It is difficult for me to say anything about the contents of the General Introduction to Hindu law and the Commentaries I have written on the new enactments or to draw attention to any features of the same, though tradition permits it and perhaps requires it to be done in a preface. But I may say that I have striven hard and long to write what I hope may be found dependable.

I am thankful to Mahamahopadhyaya Dr. Kane for reading and discussing with me the Introduction and making valuable suggestions. I am also thankful to Mr. Hemendra K. Shah, M.A., LL.B., Advocate (O.S.) and Mr. K. S. Shavaksha, Barrister-at-Law, for their assistance in the preparation of this edition.

High Court
BOMBAY
November 1958

SUNDERLAL T. DESAI

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# ADDENDA

Cases reported upto November 1972 have been incorporated in the main text-book. Cases reported after the manuscript of the main text-book went to the press have been noted in this Addenda. Cases included in this Addenda are from December 1972 to December 1973.

Reference to Pages and Articles is to the Pages and Articles of this Edition. Reference to Section is to the Section of the respective Act.

## CHAPTER I

**(1) Page 81, Art. 14:** In foot-note (*d*) add:

*Madhai Kumhar* v. *Sabi Bewa,* (1973) A. Pat. 160;

*B. C. Gope* v. *Manjura,* (1973) A. Pat. 208.

**(2) Page 83, Art. 17(3):**

Even in the case of a very small community found in a small local area, where many cases are not likely to reach the Court, the principle that before a custom can be held as having been proved merely on the basis of earlier decisions, those decisions should have been based on evidence adduced in respect of the cases cannot be ignored. *Kaliamma* v. *Janardhanam,* (1973) A. S.C. 1134.

## CHAPTER IV

**(3) Page 93, Art. 35:** Add after (*h*):

As Coorg was not a Governor's province but a Commissioner's province at the relevant time, a Centrally Administered Area, the Act would apply to and regulate the succession to agricultural lands in the territory of Coorg. *P. A. Machiah* v. *M. B. Ponnava,* (1973) A. Mys. 1.

**(4) Page 96, Art. 35:** In foot-note (*x*) add:

Also see *Tukaram* v. *Mathurabai,* (1973) A. Bom. 37.

## CHAPTER IX

**(5) Page 166, Art. 107(2):** In foot-note (*o1*) add:

*Pakkiriswamy* v. *Krishnaswamy,* (1973) A. Mad. 36.

## CHAPTER XI

**(6) Page 255, Art. 205:** In foot-note (*r1*) add:

Also see *Radhey Krishna* v. *Shiv Shankar,* (1973) A. S.C. 2405.

## CHAPTER XII

**(7) Page 270, Art. 223:**

As to the meaning of "ancestral property" under the Punjab custom and proof thereof, see the undermentioned case. *Sham Kaur* v. *Hari Singh,* (1973) A. Punj. 71.

**(8) Page 276, Art. 226:** In foot-note (*s1*) add:

*Tirupurasundari* v. *Kalyanaraman,* (1973) A. Mad. 99 (case of a son executing a settlement deed in favour of his mother, held invalid).

**(9) Page 276, Art. 227:** In foot-note (*y*) add:

*B. Subba Reddy* v. *B. Nagireddy,* (1973) A.A.P. 184.

**(10) Page 278, Art. 227:** In foot-note (*g*) add:

*Gyarsibai* v. *J. Moolchand,* (1973) A.M.P. 75.

**(11) Page 285, Art. 233(2):**

When a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions, then a presumption arises that the acquisitions standing in the names of the persons who were in the management of the family property are family acquisitions. *Baikuntha Nath* v. *Sashi Bhusan,* (1972) A.S.C. 2531.

**(12) Page 285, Art. 233(2):**

If a fairly reasonable portion of the amount has been found to come out of the joint family property, it will not be open to split up the property purchased into two parts in proportion to the amounts representing the two funds and holding that one part is joint family property and the other self-acquisition. *B. Subba Reddy* v. *B. Nagireddy,* (1973) A.A.P. 184.

**(13) Page 286, Art. 233(2):** In foot-note (*h1*) add:

*Budhia* v. *Raghu,* (1973) A. Or. 85.

**(14) Page 296, Art. 236:** In foot-note (*r*) add:

*A. Kunjipokkarukutty* v. *A. Revunny,* (1973) A. Ker. 192.

**(15) Page 298, Art. 239:**

Even in case of a Mitakshara family once division in status has taken place, the erstwhile coparceners are in the position of joint owners of property or are tenants-in-common and a person entitled to a share can file suit for rendition of account only. *Meyappa Chettiar* v. *Shanmugham Chettiar,* (1973) A. Mad. 260.

**(16) Page 300, Art. 242(2):** In foot-note (*h*) add:

*Ramdayal* v. *Bhanwarlal,* (1973) A. Raj. 173.

**(17) Page 305, Art. 243A:**

Where sale is effected for the purpose of migrating to another village and purchasing lands there which are more productive, it is not enough for the purchaser to make *bona fide* enquiries about the sale of the property for migration and purchase lands which are more productive, but he should further be satisfied that the proceeds have been applied for purchasing properties in the other village. *D. J. Prasad* v. *D. V. Subbaiah,* (1973) A.A.P. 214.

**(18) Page 306, Art. 244:** In foot-note (*k*) add:

*Ramdayal* v. *Bhanwarlal,* (1973) A. Raj. 173.

**(19) Page 306, Art. 244:** In foot-note (*o*) add:

*Rulia* v. *Jagdish,* (1973) A. Punj. 335.

**(20) Page 308, Art. 245:** In foot-note (*b*) add:

*Rulia* v. *Jagdish,* (1973) A. Punj. 335.

**(21) Page 311, Art. 248:** After (*b*) add:

Both the conditions must be satisfied, i.e. the managing member must act with *bona fides* and, at the same time, the compromise must secure some demonstrable benefit and advantage to the family. *P. R. Nallathambi* v. *V. Raghavan,* (1973) A. Mad. 25.

**(22) Page 312, Art. 248B:** In foot-note (*f1*) add:

Also see *S. Narayanamma* v. *K. Venkatasubbaiah,* (1973) A.S.C. 2114 (case of construction of document relating to family arrangement).

**(23) Page 316, Art. 252(9):**

When a promissory note is executed in favour of Karta and his two minor sons, Karta can sue for the recovery of the debt alone. *Bijoy Kumar* v. *Lahori Ram,* (1973) A. Cal. 465.

**(24) Page 321, Art. 258:** Add after (*t*):

The consent may be express or implied. *T. Rattamma* v. *T. V. Subbamma,* (1973) A.A.P. 226.

**(25) Page 323, Art. 261:** In foot-note (*h*) add:

*Sundaramurthi* v. *Kesava,* (1973) A. Mad. 96.

**(26) Page 323, Art. 261:**

A direction of staying the execution proceedings for a certain period, in respect of a decree of possession obtained by another coparcener, to enable the purchaser from a coparcener to file a partition suit and if such a suit is filed within that period, to stay the execution till the decree in the partition suit, can be legally given where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener. *Ramdayal* v. *Manaklal,* (1973) A. M.P. 222, F.B.

**(27) Page 328, Art. 261(8):** In foot-note (*c*) add:

See also *Ramlal* v. *Kanhaiyalal,* (1973) A. M.P. 97.

**(28) Page 333, Art. 265 (2)(c):**

The father's power to sell the son's share for his personal debts ceases when his son's share is attached by the creditor either for antecedent debts not tainted by illegality or immorality or the son's debts or both and that being the case, the Official Receiver, whose powers are only co-extensive with that of the father under sec. 28-A of the Provincial Insolvency Act, will have no more powers than the father to deal with the son's share for distributing it among the creditors. *M. V. Narayudu* v. *T. Subba Rao,* (1973) A.A.P. 113

## CHAPTER XIII

**(29) Page 348, Art. 279:**

The fact that two of the brothers of the deceased are living separately and a third brother is living jointly with him is immaterial for the purpose of succession to him under the Dayabhaga law; all the three brothers will succeed equally, the one living jointly with the deceased cannot claim to be the sole heir by survivorship. *Mool Chand* v. *Renuka Devi,* (1973) A. Raj. 63.

## CHAPTER XVI

**(30) Page 394, Art. 303:** In foot-note (*a*) add:

See also *Dina Nath* v. *Mansa Ram,* (1973) A. Punj. 253 (a case of common court-yard and staircase).

**(31) Page 395, Art. 304:**

If a member of a joint Hindu family has volunteered to pay funeral expenses for the performance of obsequial ceremonies of his deceased father or mother, he cannot claim any contribution from the other members of the joint family. To saddle the joint family estate or other members with liability it must be proved that there was an agreement amongst the members to share such expenses or the member who made such expenses did so under circumstances which could bind the joint

family estate or the members of the joint family. *Dhanuben* v. *Zaverbhai,* (1973) A. Guj. 194.

**(32) Page 396, Art. 305(3):** In foot-note(*z*) add:

*Budhia* v. *Raghu,* (1973) A. Or. 85.

**(33) Page 397, Art. 307:** In foot-note (*j*) add:

*Tuklya* v. *Tgya,* (1973) A. Mys. 4.

**(34) Page 423, Art. 328(6):** In foot-note (*n*) add:

See also, *Kishan Chandar* v. *Board of Revenue,* (1973) A. Raj. 171.

## CHAPTER XXI

**(35) Page 482, Art. 408:**

Dedication may be proved by the existence of the idol, architecture and situation of the temple, visit to and offer of worship by the members of the public where the deity is installed and regular performance of puja. Earlier statements and admissions by the parties are also relevant. *Veerbasavaradhya* v. *Devotees of Lingadagudi Mutt,* (1973) A. Mys. 280.

**(36) Page 484, Art. 410:**

Where the Moolavar (deity) of an old temple that was in existence could not be traced, but the Utsavar (who comes out) was available and was installed in a new temple, it was held that the old temple could be renovated because the Moolavar was apparently embedded in the site of the old temple and that was enough to justify the renovation of the old temple. *Raghavachari* v. *Narayana Iyengar,* (1973) A. Mad. 323.

**(37) Page 486, Art. 413:**

*Gurdwara.*—A Gurdwara is a juristic person which can own property and can bring a suit in its name to protect the property owned by it through its manager. *Shri Guru Granth Sahib Khoje Majra* v. *Nagar Panchayat,* 71 Punj. L.R. 844; *Piara Singh* v. *Shri Guru Granth Sahib Madnipur,* (1973) A. Punj. 470.

**(38) Page 487, Art. 414:**

An archak or poojary in a temple is not a shebait as the said expression is understood in Northern India or a dharmadarshi as it is understood in Southern India. A poojary is always appointed by the shebait or dharmadarshi or dharmadhikari for the purpose of conducting worship. *Veerbasavaradhya* v. *Devotees of the Lingadagudi Mutt,* (1973) A. Mys. 280.

**(39) Page 489, Art. 415:** In foot-note (*a*) add:

*Kalmath* v. *Vishnu Deo,* (1973) A. Mys. 207.

**(40) Page 490, Art. 415(2):**

A lease of land belonging to a Gurdwara granted to the relatives of the mohunt for 20 years to clear the antecedent debts of the Guardwara is not as such invalid when the lease is for sufficient consideration and the mohunt is not a drunkard, profligate or spendthrift. *S.G.P. Committee, Amritsar* v. *Sewa Singh,* (1973) A. Punj. 414.

**(41) Page 498, Art. 421:**

To a family arrangement entered into between the daughter-in-law of the founder of a trust for charities, after the death of her husband issueless, with the lineal descendants of the founder's brother, which secured the due performance of the charities and preserved the charity properties, principles of family settlement in general would equally apply. If such a family arrangement embodied in a compro-

mise decree has been acted upon by the parties for a long time, it would become binding on the representatives of the various branches and they should not be allowed to go behind the arrangement or challenge its validity. *Thiagarajan* v. *Ganesan*, (1973) A. Mad. 411.

**(42) Page 499, Art. 422:** In foot-note (*d*) add:

*Badri Nath* v. *Punam*, (1973) A. J. & K. 7 (F.B.).

**(43) Page 503, Art. 425:**

Generally suits by the worshippers of an idol, not based on any right to the property in the idol or to an office, against its custodian to locate it in a particular temple instead of another or to adorn it at certain seasons or a suit to establish a right to recite sacred texts in a temple without a claim to any office or emoluments are all suits relating merely to religious rights and ceremonies and are not cognizable by civil Courts. Article 25(1) of the Constitution of India guarantees only right to freedom of conscience and the right freely to profess, practise and propagate religion which, as interpreted by the Supreme Court, includes not merely religious beliefs but also religious ceremonies. This, however, does not mean that a person who wants to practise his religion according to his ideas can prevent other people from practising that very religion according to their ritual in that religion. *Ramchandra Keshav* v. *Gavalaksha Gangadhar Swami*, 75 Bom. L.R. 668.

**(44) Page 505, Art. 426:**

Where the manager transfers a part of the property belonging to an endowment on the basis that it belongs to him, it is not void *ab initio* and a suit for possession will come under art. 134-A and not under art. 144 of the Limitation Act, 1908. *Veerbasavaradhya* v. *Devotees of Lingadagudi Mutt*, (1963) A. Mys. 280.

## CHAPTER XXIII

**(45) Page 540, Art. 471(2)(a):**

One *A* a Hindu died leaving a son *T* and his widow *G*. *T* had two sons, *B* and *R*. *T*, *B* and *R* died leaving *M*, the widow of *R*. *M* re-married and thereafter *G* adopted the plaintiff to her deceased husband. On the question, whether in such circumstances *G*'s power to adopt has been extinguished, the Bombay High Court held that as when *G* adopted the plaintiff, there was no one to continue the line of *A*, her husband, the adoption of the plaintiff was valid. *Vaijoba Shamrao* v. *Vasant Abaji*, 75 Bom. L.R. 633.

**(46) Page 551, Art. 480, Custom:**

According to the tribal custom amongst Santhals of Santhal Paraganas it is permissible for a man with daughters and no son to take a son-in-law into his house as a *ghar-jamai* and to give him thereby all the rights of a son. The adoption of the *ghar-jamai* should leave no room for doubt as to the father-in-law's intention and resulting in *ghar-jamai's* cutting off all connection with his family so far as his rights to property is concerned and becoming to all intents and purposes the son of the father-in-law. Such *ghar-jamai* inherits the property of his father-in-law even when his wife dies during the life-time of his father-in-law and he will not be divested by his subsequent remarriage during the life-time of his father-in-law. *Kandan Soren* v. *Jitan*, (1973) A. Pat. 206.

**(47) Page 562, Art. 500:** In foot-note (*o*) add:

*Dugginallakshmana* v. *D. Lakshmi Katamma*, (1973) A. A.P. 302.

## CHAPTER XXV

**(48) Page 593, Art. 546:** In foot-note (*e*) add:

*Khanta Moni* v. *Shyam Chand*, (1973) A. Cal. 112.

**(49) Page 602, Art. 559:** In foot-note (*b1*) add:

*Dugginallakshmana* v. *D. Lakshmi Katamma,* (1973) A.A.P. 302.

## HINDU MARRIAGE ACT

**(50) Page 672, Sec. 2:**

Section 1 read with sec. 2(1)(a) and 2(1)(b) makes it clear that as regards the intra-territorial operation of the Act it applies to all Hindus, Buddhists, Jains or Sikhs irrespective of the question whether they are domiciled in India or not. Section 2(c) contemplates extra territorial operation in this sense that persons domiciled in other territory to which the Act may extend if governed by Hindu law even though residing outside the territory would come under the purview of the Act. Gorkhas of Nepal are normally regarded as Hindus. *Prem Singh* v. *Dulari Bai,* (1973) A. Cal. 425.

**(51) Page 698, Sec. 9:**

Cruelty which preceded the withdrawal of one spouse from the society of the other is of importance; cruelty subsequent to such withdrawal may at the most be relevant evidence to indicate intention or may be taken into consideration for appreciation of the evidence. *Surrinder Kaur* v. *Gurdeep Singh,* 75 Punj. L.R. 63, (1973) A. Punj. 134.

**(52) Page 698, Sec. 9:** In foot-note (*ee*) add:

*Surrinder Kaur* v. *Gurdeep Singh,* 75 Punj. L.R. 63, (1973) A. Punj. 134.

**(53) Page 698, Sec. 9:** In foot-note (*e4*) add:

*P. S. Ramarao* v. *P. R. Krishnamani,* (1973) A. Mad. 279.

**(54) Page 698, Sec. 9:** In foot-note (*e6*) add:

*Kanchangauri* v. *Chandulal,* (1973) A. Guj. 275.

**(55) Page 699, Sec. 9:** In foot-note (*g3*) add:

See, however, *Surrinder Kaur* v. *Gurdeep Singh,* 75 Punj. L.R. 63, (1973) A. Punj. 134 (delay occasioned in endeavour to secure society of the wife).

**(56) Page 710, Sec. 10(*a*):**

Where the appellant was pleading to the respondent to have her back on any terms and at any cost and the respondent completely neglected her, it was held that he was guilty of constructive desertion. *Ambujam* v. *T. S. Ramaswamy,* (1973) A. Del. 46.

**(57) Page 722, Sec. 10(b):**

A wife may even put up with beating but after a long course of ill-treatment if the wife is beaten then that may create a reasonable apprehension that it would be injurious or harmful for her to live with her husband. *Jagannadham* v. *Savithramma,* (1972) A.A.P. 377.

**(58) Page 723, Sec. 10(b):**

If *interruptus coitus* can be cruelty then complete denial will be more so. *Ambujam* v. *T. S. Ramaswamy,* (1973) A. Del. 46.

**(59) Page 723, Sec. 10(b):**

Marriage without sex is an anathema. If either party to a marriage refuses to have sexual intercourse it would amount to cruelty entitling the other party to a decree. It would not make any difference in law whether the denial of sexual intercourse is the result of sexual weakness or wilful refusal, because in either case the result is the same, namely frustration and misery of the other party. *Nijhawan* v. *Nijhawan,* (1973) A. Del. 200.

**(60) Page 732, Sec. 11:**

A petition under sec. 11 can be filed by one spouse after the death of the other. *Tulsan Devi* v. *Krishna Devi*, 75 Punj. L.R. 346, (1973) A. Punj. 442.

**(61) Page 735, Sec. 12(1)(a):**

Having regard to the meaning of the expression "consummation" it is proper to conclude that potency in the case of males would mean the power of erection of the male organ and its full penetration: the discharge of the semen in the wife's body is not necessary for a complete coitus. *Chanchal Kumari* v. *Kewal Krishan*, (1972) A. Punj. 474.

**(62) Page 735, Sec. 12(1)(a):**

It has to be positively proved that the husband-respondent was impotent at all material times, i.e. right from the time of marriage and it continued to be so until the institution of the proceedings. Even if it could be shown that the marriage was consummated just once during this period a decree of nullity cannot be granted. The burden of proving that the respondent was impotent at all material times is on the appellant. *Nijhawan* v. *Nijhawan*, (1973) A. Del. 200.

**(63) Page 738, Sec. 12(b):**

Burden to prove the lunacy lies on the petitioner. Medical evidence may not always be given in all cases or may not be in all circumstances a determining factor but nonetheless it is one of the most important elements of evidence. *Kartik Chandra* v. *Manjurani*, (1973) A. Cal. 545.

**(64) Page 741, Sec. 12(2)(b)(ii):** In foot-note (*g*) add:

*Rangaswamy* v. *Nagamma*, (1973) A. Mys. 179.

**(65) Page 744, Sec. 13(i):** In foot-note (*j1*) add:

See also *Narayanan* v. *M. Parakutty*, (1973) A. Ker. 171.

**(66) Page 749, Sec. 13(1A):**

In the absence of any indication in the provision of the section to the effect that it shall apply whether decrees for judicial separation have been passed before or after the amendment, it cannot be held that it applies to decrees obtained prior to its amendment. In such cases the prior law should apply, that is to say, only the decree-holder can maintain a petition under the section. *Raghbir Singh* v. *Satpal Singh*, 75 Punj. L.R. 70, (1973) A. Punj. 117.

**(67) Page 750, Sec. 13(1A):**

Section 13(1A) refers to an existing state of affairs, that is to say, in a case for judicial separation there has been no resumption of cohabitation for a period of two years or upwards and in case of a decree for restitution of conjugal rights, there has not been restitution for a similar period. The provision does not refer to a matrimonial offence or wrong. Though in granting relief under this sub-section the Court must take into consideration sec. 23(1) and consider the conduct of the petitioner subsequent to the passing of the decree for judicial separation or restitution of conjugal rights and deny relief to a party who is taking advantage of his own wrong, it has got no reference to the wrong which led to the decree for judicial separation or restitution of conjugal rights. *Madhukar* v. *Saral*, (1973) A. Bom. 55, 74 Bom. L.R. 496.

**(68) Page 768, Sec. 19:**

Sections 19 and 21 of the Hindu Marriage Act, 1955, do not bar conferment of an extended jurisdiction by the application of the Civil Procedure Code, 1908. *M. Gomathi* v. *S. Natarajan*, (1973) A. Mad. 247.

**(69) Page 769, Sec. 19:**

A casual visit or a temporary visit with an intention other than to reside does not confer jurisdiction on the Court under this section. *Supriya* v. *Vasudeo,* (1973) A. All. 94.

**(70) Page 795, Sec. 23(d):** In foot-note (*b1*) add:

*Nijhawan* v. *Nijhawan,* (1973) A. Del. 200.

**(71) Page 797, Sec. 23(2):** In foot-note (*e1*) add:

*Raghunath* v. *Urmila Devi,* (1973) A. All. 203.

**(72) Page 807, Sec. 25:**

The Kerala High Court overruling its previous decision in *Raja Gopalan* v. *Rajamma,* (1967) A. Ker. 181, has now held that the Court has jurisdiction to grant maintenance in cases of judicial separation because of an act of adultery. The conduct of the parties can be taken into consideration in fixing the quantum of maintenance. *K. Kunhikannan* v. *Malu,* (1973) A. Ker. 273.

**(73) Page 807, Sec. 25:**

The discretion vested in a Court under this section is very wide and is not controlled by the provisions of the Hindu Adoptions and Maintenance Act, 1956, though in dealing with an application under this section the Court should bear in mind the principles governing the award of maintenance in s. 23 of the latter Act. *Seeta Ram* v. *Phooli,* (1972) A. Raj. 313.

**(74) Page 812, Sec. 25:**

Where in the written statement and in the reply notice, unfounded allegation of unchastity is made by the husband against the wife, the Court can take that into consideration even though the wife herself did not base her claim on that ground. The Court is entitled to take into consideration the subsequent events in moulding the relief. *Jagannadham* v. *Savithramma,* (1972) A.A.P. 377.

**(75) Page 817, Sec. 28:** In foot-note (*r6*) add:

*Nirmala Devi* v. *Ram Dass,* (1973) A. Punj. 48.

**(76) Page 818, Sec. 28:**

The High Court of Bombay, disapproving of its prior decision in *Prithvirajsinji* v. *Shivprabhakumari,* 62 Bom. L.R. 47, (1960) A. Bom. 315, (1960) Bom. 164, has now held that an order passed under sec. 24 granting maintenance and expenses of proceedings is appealable. It has held that the words "under any law for the time being in force" only regulate the forum as to where an appeal has to be filed and do not restrict or qualify the right of appeal. *Madhukar* v. *Malti,* 74 Bom. L.R. 311, (1973) A. Bom. 141.

**(77) Page 818, Sec. 28:** In foot-note (*r13*) add:

*Mira Bose* v. *Santosh Kumar,* (1973) A. Cal. 483.

**(78) Page 818, Sec. 28:**

The Act is a self-contained enactment. Section 28 itself is the source for appealability of all decrees and orders made under the Act. The words "any other law for the time being in force" refer only to procedure relating to appeal. *Suresh Prasad* v. *Manorama,* (1973) A. Pat. 321.

## HINDU SUCCESSION ACT

**(79) Page 837, Sec. 2(2):**

The Act is not applicable to members of a Scheduled Tribe, namely Boro Borokachari in Assam. *Satish Chandra* v. *Bagram,* (1973) A. Gau. 76.

**(80) Page 845, Sec. 5:** Add after (*k1*):

The section does not expressly exclude from the operation of the Act the right of a Hindu to share in the offerings made at a religious place. *Badri Nath* v. *Punam*, (1973) A. J. & K. 7 (F.B.).

**(81) Page 851, Sec. 6, Expln. I:**

The legal fiction which brings about such notional partition does not lead to the disruption of the coparcenary. It is only the interest of the deceased coparcener which is separated. The coparcenary minus the interest of the deceased continues with its own incidents. *Chandradatta* v. *Sanatkumar*, (1973) A. M.P. 169.

**(82) Page 855, Sec. 6:** In foot-note (*n2*) add:

See also *Chandradatta* v. *Sanatkumar*, (1973) A. M.P. 169.

**(83) Page 855, Sec. 6, Expln. II:**

This Explanation should be confined only to those cases where a coparcener has gone out of the family on account of his voluntary act. It should not be extended to a case where by operation of law certain persons (such as, for example, the widowed daughter-in-law) become entitled to a share of the joint family property of a deceased person. Thus the claim of a widowed daughter-in-law who has filed a suit for partition against her father-in-law before his death cannot be defeated; her claim arises by operation of law. *M. V. Shivaji Rao* v. *Rukhminiyamma*, (1973) A. Mys. 113.

**(84) Page 860, Sec. 7(3):**

The sub-section applies to cases where among the members of a family either the male or female member has got exclusive right to become *sthanees*.

The words "held by him" do not indicate that the *sthanee* should have actual control over the *sthanam* properties at the time when devolution opens. The sub-section does not validate unauthorised alienations and imprudent transactions in relation to *sthanam* properties by a *sthanee*. Therefore, it cannot be said that if property is alienated or leased by a *sthanee* in excess of his powers, such property is not *sthanam* property "held" by the *sthanamdar* and that property falls outside the scope and ambit of the sub-section.

Normally, a lease executed by a *sthanee* in office should terminate with his life; it cannot be binding on a successor *sthanee*. *Sankarappa Gounder* v. *Gopalan*, (1973) A. Ker. 149 (F.B.).

**(85) Page 869, Sec. 8:** In foot-note (*w1*) add:

*Annapurna* v. *Kalpana Debi*, (1972) A. Gau. 107.

**(86) Page 871, Sec. 8, Mother:**

The fact that the mother has married many years before the death of her son does not make her lose the right to succeed to her son and what she gets is an absolute estate. *Gurdit Singh* v. *Darshan Singh*, (1973) A. Punj. 362.

**(87) Page 887, Sec. 13:** In foot-note (*t5*) add:

*T. Naicker* v. *Kuppamal*, (1973) A. Mad. 274.

**(88) Page 897, Sec. 14:**

Once a widow succeeds to the property of her husband and acquires absolute right over the same under this section, she would not be divested of that absolute right on her re-marriage and sec. 2 of the Hindu Widows' Remarriage Act, 1856, will not be attracted on account of the overriding effect given to the provisions of this Act under sec. 4. *Jagdish Mahton* v. *Mohammad Elahi*, (1973) A. Pat. 170.

**(89) Page 901, Sec. 14(1):**

Even if a widow inherits property prior to the coming into effect of the Hindu Women's Right to Property Act, 1937, from her husband, she will still become absolute owner thereof after the coming into force of the Hindu Succession Act. *Champa* v. *Chandrakanta,* (1973) A. Guj. 227.

**(90) Page 902, Sec. 14:** In foot-note (*k4*) add:

*P. A. Machiah* v. *M. B. Ponnava,* (1973) A. Mys. 1.

**(91) Page 902, Sec. 14:** In foot-note (*k7*) add:

*Sonekali* v. *Bahuria Akashi,* (1973) A. Pat. 477.

**(92) Page 904, Sec. 14:**

If a Hindu male dies intestate prior to the coming into operation of the Hindu Succession Act, 1956, and is succeeded by a female heir who dies after its coming into force, the succession will be governed by the Act. The reversioner most nearly related to the last male holder at the time of the death of the female holder will become entitled to the property. *Shanmughasundarathammal* v. *N. Konar,* (1973) A. Mad. 335.

**(93) Page 907, Sec. 14(2):**

Where in a will the testator bequeathed all the property to his son with a direction that "my son will provide residential accommodation to . . . (her mother, that is, testator's wife) either at Ludhiana, or Narangwal or wherever he might like" it was held that as the son could make the mother reside anywhere he liked, the right to reside became subject to the son's licence or permission and after the coming into force of the Hindu Succession Act, 1956, that estate of the mother did not enlarge into an absolute estate but was governed by sub-sec. (2) of the section. *Raj Kumar* v. *Prem Prakash,* (1972) A. Punj. 458.

**(94) Page 908, Sec. 14:** In foot-note (*n*) add:

*Ram Sarup* v. *Toti,* (1973) A. Punj. 329;

*Kempanna* v. *Shantarajiah,* (1973) A. Mys. 66.

**(95) Page 908, Sec. 14(2):**

An estate allotted to a Hindu female in recognition of her earlier right to maintenance does not fall under this sub-section. *Chanamma* v. *Lingamma,* (1972) A. Mys. 333.

**(96) Page 946, Sec. 24:**

The provisions of secs. 25 and 27 of the Act apply only to succession under the Hindu Succession Act and not to succession under other enactments, such as the U.P. Zamindari Abolition and Land Reforms Act, I of 1951. Law of succession laid down therein cannot be altered or changed by any rule of principle not contained in the statute itself. *Jamuna Das* v. *Board of Revenue,* (1973) A. All. 397.

**(97) Page 950, Sec. 30:**

The power conferred by this section upon a member of a joint family to make a will in respect of his interest in the joint family property cannot be extended to a case of gift. *M.S.B.Y. Board* v. *Subramania,* (1973) A. Mad. 277.

## HINDU ADOPTIONS AND MAINTENANCE ACT

**(98) Page 1016, Sec. 16:**

A presumption under this section can be raised if the adoption is made under the Act. *Shamsher Singh* v. *Dy. Custodian General,* (1973) A. J. & K. 89 (F.B.).

**(99) Page 1016, Sec. 16:**

The words "unless and until it is disproved" appearing at the end of the section clearly make out that the presumption which may be made under this section is a rebuttable presumption. *Modan Singh* v. *Sham Kaur,* (1973) A. Punj. 122.

**(100) Page 1018, Sec. 18:**

The power to make an interim order is implicit, ancillary and a necessary corollary of the power to entertain a suit and pass final orders therein. The mere fact that sec. 18 does not make a provision for granting interim maintenance cannot negaive the claim for interim maintenance. *D. Udayar* v. *Rajarani,* (1973) A. Mad. 369.

**(101) Page 1033, Sec. 25:**

Where the right to maintenance itself is relinquished by the maintenance holder before the coming into force of the Act, an enhanced amount on the ground that the income from the family properties has increased cannot be entertained under sec. 25. There is a difference between an agreement fixing the right of maintenance and an agreement extinguishing such right; the section applies to cases where the right of maintenance is subsisting on the day of the Act. *Kondamma* v. *Sethamma,* (1973) A.A.P. 319 (F.B.).

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# INTRODUCTION

Wherever the laws of India admit the operation of a personal law the rights and obligations of a Hindu are determined by Hindu Law that is his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by statute. Hindu Law, it is now generally agreed, has the most ancient pedigree of any known system of jurisprudence. The study of any developed legal system requires a critical and analytical examination of its fundamental elements and conceptions as also the practical and concrete details which go to make the contents or body of that law. It also requires consideration of the line of development it has pursued. The abstraction and exposition of the principles or distinctions necessarily involved in Hindu Law and the consideration of the line of development which it has pursued are the appropriate matters of jurisprudence and legal history. The concrete legal system which deals with the contents or body of Hindu Law is a matter of positive law and the questions that arise for consideration at the outset are: What is Hindu Law? What are the sources from which knowledge of that law must be derived?

*Dharma.*

Law as understood by the Hindu is a branch of *Dharma*. Its ancient framework is the law of the Smritis. The Smritis are Institutes which enounce rules of *Dharma* and the traditional definition of *Dharma* is: "What is followed by those learned in the Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection" (*a*). *Dharma* is an expression of wide import and means the aggregate of duties and obligations religious, moral, social and legal (*b*). In Sanskrit, there is no term *strictissimi juris* for positive or municipal law dissociated from the ethical and religious sense. In a system of law necessarily influenced by the theological tenets of the Vedic Aryans and the philosophical theories which the genius of the race produced, and founded on the social and sociological concepts of a pastoral people, the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between matters secular and religious because certain questions such for instance as marriage and adoption had the aspects of both. Any attempt, therefore, to isolate completely any secular matter from its religious adjuncts would fail to give a comprehensive idea or proper perspective of the true juridical concepts of Hindu Law.

Secular Law and Religious Ordinances.

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(*a*) Manusmriti II. 1. Medhatithi one of the earliest commentators on Manusmriti explains the term 'Dharma' as duty: *Dharmashabdah kartavyata vachanah* VII. 1.

(*b*) Cf. Ulpian's statement of the Commandments of the law, containing a broad summary of a lawful man's duties, preserved in the introductory chapter of Justinian's Institutes: *"Juris precepta sunt haec: Honeste vivere, alterum non laedere, suum cuique tribuere."*

Smritis: the basic structure.

Where not modified or abrogated by legislation Hindu Law may be described to be the ancient law of the Hindu rooted in the Vedas and enounced in the Smritis as explained and enlarged in recognised Commentaries and Digests and as supplemented and varied by approved usage. Its basic structure was the law of the Smritis and it was from time to time supplemented and varied by usage. That was its early character. Then it made remarkable progress during the Post-Smriti period (commencing with about the seventh century after Christ) when a number of explanatory and critical Commentaries and Digests (*nibandhas*) were written on it and which had the effect of enlarging and consolidating the law. A body of law so developed it bears upon it many marks of its origins. Unfortunately many ancient works on law are not available in their integrity and a number of them are probably irretrievably lost. But historical research by orientalists both European and Indian during last more than hundred years has brought to light a wealth of variegated material that had contributed to the growth of this ancient system of law.

Legal literature.

Smritis in part based on immemorial customs.

The ancient law promulgated in the Smritis was essentially traditional and the injunction was that time-honoured institutions and immemorial customs should be preserved intact. The law was not to be found merely in the texts of the Smritis but also in the practices and usages which had prevailed under it. The traditional law was itself grounded on immemorial custom (*c*) and provided for inclusion of approved custom that is practices and usages that from time to time might come to be followed and accepted by the people (*d*). The importance attached to the law-creating efficacy of custom in Hindu jurisprudence was so great that the exponents of law were unanimous in accepting custom as itself a constituent part of the law.

Era of Legislation.

It would be pertinent here to note one or two matters of more practical importance. The last century and a half of judicial decisions has, though not in theory but in effect, remodelled on many points both textual and customary law. Many of the important points of Hindu law are now to be found in the law reports.

Moreover, material and substantial changes and modifications in the law have recently been brought about by a number of enactments, which aim to ensure a uniform civil code of personal law for Hindus in the whole country. The changes, no doubt radical, proceed on the principle of equality stressed in the Constitution for the purpose of evolving a just social order after taking due note of existing conditions and ideas. Of those enactments it

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(*c*) Manusmriti states: 'Here the sacred law has been fully stated . . . and also the traditional practices and usages of the four varnas' I, 107. A popular verse from the Mahabharata is: "Dharma has its origin in good practices and the Vedas are established in Dharma": *Acharra sambhavo dharmo dharme vedah pratishthitah;* Vana Parva 150 Ch. 27. Vasishtha observes: "Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed in the absence of rules of revealed texts" 1, 17 (S.B.E. Vol. XVI).

(*d*) *Athatah samayacharikan dharman vyakhyasyamah*: We shall now propound the acts productive of merit (obligations) which are sanctioned by tradition and current usage —Apasthamba Dharmasutra, I, 1. 1. 1. Haradatta explains this by stating, *samayacharikah pau risheyi vyavastha*—current practices and conventions of the people.

will suffice here to draw attention to the Hindu Marriage Act, 1955, and the Hindu Succession Act, 1956. The outstanding feature of the changes effected in the law of marriage is that monogamy is now the rule and dissolution of marriage is permissible in certain cases. The outstanding feature of the alterations made in the law by the latter enactment is that in effect it eliminates all disparity in the rights of men and women in matters of succession and inheritance. These most recent enactments from their very nature cannot be and are not (except on few matters expressly so stated) retroactive in their operation and even in matters where they apply retrospectively it will become necessary to know the law as it previously existed. Besides even now a part of Hindu law and usage, as has hitherto been applicable, remains unabrogated by statute and the importance and necessity of a study of the entire system cannot be minimised. Of this more hereafter (*e*).

Sources of Hindu law.

The sources from which knowledge of Hindu law is to be derived or the indices of *Dharma* have been stated by Hindu jurisprudentes. The Veda, the Smriti, the approved usage, and what is agreeable to good conscience are according to Manu (*f*), the highest authority on this law, the quadruple direct evidence (sources) of *Dharma*. Law did not derive its sanction from any temporal power; the sanction was contained in itself. The Smritikars and those who preceded them declared and emphasized the divine origin and sanction of the rules of *Dharma*. "Since law is the king of kings, far more powerful and rigid than they, nothing can be mightier than the law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong . . ." (*g*). The minutest rules were laid down for the guidance of the king. It was his duty to uphold the law and he was as much subject to law as any other person. He did not claim to be the lawmaker; he only enforced law. One of his chief duties was described to be the administration of justice according to the local usage and to written Codes (*h*). It was obligatory on him not only to enforce the sacred law of the texts but to make authoritative the customary laws of the subjects as they were stated to be. These included customs of countries, districts, castes and families: So also of traders, guilds, herdsmen, moneylenders and artisans, for their respective classes (*i*).

Shruti.

It was an article of belief with the ancient Hindu that his law was Revelation, immutable and eternal. *Shruti* which strictly means the Vedas was in theory the root and original source of *Dharma* (*j*). It was the fountain-head of his law. *Shruti* means, literally, that which was heard. It was supreme to the early Hindu like the de-

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(*e*) See pp. 68-70 *infra*. Also see Introductory Notes to the two enactments *post*.

(*f*) Manusmriti II, 12. The variant text of Yajnavalkya adds one more source "desire sprung from due deliberation." See p. 23 *infra*.

(*g*) Shatapatha Brahmana. XIV, 4.2.26—*Tadetat Kshatrasya Kshatram yaddharmah tasmat dharmatparannasti athovaleeyannavaleeyan samashante dharmena*.

(*h*) Gautama XI, 19, 20 (S.B.E. Vol. II); Manusmriti VIII, 41, 46.

(*i*) Brihaspati II, 26-31 (S.B.E. Vol. XXXIII); Manusmriti VII, 203; VIII, 41.

(*j*) *Shrutistu vedo vijneyo dharmashastram tu vai smritih: Manusmriti* II, 10.

calogue to the later Christian. The Vedas (*k*), however, do not contain much that alludes to positive or municipal law. The few statements of law that are to be found in the Vedas are mostly incidental. Smriti means, literally, recollection. The *Shruti* was accepted as the original utterings of the Great Power. The Smritis though accepted as precepts emanating from that source were couched in the words of the Rishis or sages of antiquity who saw or received the revelations and proclaimed their recollections (*l*). The authority of these two primordial sources is described by Manu: "By *Shruti*, or what was heard from above, is meant the Veda. By Smriti, or what was remembered from the beginning, the body of law —from these two proceeds the whole system of duties" (*m*). Theoretically if a text of the Smriti conflicted with any Vedic text it had to be disregarded: "Where there is a conflict between the Vedas and the Smriti—the Veda should prevail" (*n*). But as there was not much of positive law in the Vedas an equation was established whereby the Smritis were understood as having been based on lost or forgotten *Shrutis*. By an inflexible rule of Hindu jurisprudence, the Smritis were in practice never understood as in discord with the Vedas. For all practical purposes, therefore, the Smritis were accepted as the effective source of Hindu law (*o*).

Smriti.

Three stages of the legal literature.

Considered chronologically, and having regard to the stages of its legal literature, Hindu law falls under three epochs:

(i) The Vedic epoch. This is also referred to as the Pre-Sutra period.

(ii) The era of the Dharmashastras. This is often sub-divided into—

  (a) The Sutra period.

  (b) The Smriti period.

(iii) The Post-Smriti period.

The fixation of the chronology of the Vedic period is a matter of which it is indeed difficult to say anything definitely. The authentic history of this period of Hindu civilization and Hindu law has not been preserved. The philosophic doctrines of the ancient Hindus did not encourage any desire to leave historical records for posterity and the Aryans or Indo-Aryans did not preserve any

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(*k*) The Vedas comprise (1) *Rig-veda*, the veda of the verses; (2) *Sama-veda*, the veda of chant consisting of prayers composed in metre; (3) *Yajur-veda*, the veda of sacrificial formulae; and (4) *Atharva-veda* consisting *inter alia* of incantations, imprecatory formulae and prayers for averting calamities. The Vedas are of composite origin and include hymns by many generations of the early Aryans. Originally they were transmitted orally by preceptor to disciple. The Vedic language was related to the classic Sanskrit as Attic was to Homeric Greek.

(*l*) According to Blackstone all human laws rested on the twin foundation of the law of revelation and the law of nature. The theory of Canonical law, which affected all European systems of law, was that the fundamental rules of law had been derived from a divine source. The Muslims believe a part of the Quoranic law to contain the *ipsissima verba* of the divine revelation and the rest to be inspired by God but expressed in the Prophet's own words.

(*m*) Manusmriti II, 10. See f.n. (*f*) above.

(*n*) Vyasa 1, 4. Also see Manusmriti II, 13, 14.

(*o*) The formula affirming this equivalence was critically discussed by the leading mimansakars and particularly by Kumarila. The practical summation of Kumarila in his Tantra-Vartika is—*Tena sarvasmritinam prayojanavatee pramanyasiddhih.*

Vedic or Pre-Sutra Period.

evidence comparable to the Tablets of the Babylonians or the Papyrii of the Egyptians; nor have we anything comparable to the Annals of Livy. There has been considerable diversity of opinion amongst the Western and many Indian scholars on the question of the chronology of the Vedic or Pre-Sutra period. The former have given later dates while the latter have accepted much earlier dates. After the archæological discoveries at Mohenjo-daro and Harappa and the most recent discoveries at Lothal and Rangpur and in the southern Narmada Valley some added support has been lent to the opinion of scholars who had assigned a hoary antiquity to the Rig-Veda age. It is not difficult now to accept the view expressed by many Indian jurists and scholars that the age of the Vedic Samhitas and other works of the Pre-Sutra period was approximately 4000-1000 B.C. "It is possible that some Vedic hymns may have been composed at a period earlier than 4000 B.C. (*p*).

Vedas.

The Vedas were the outpourings of the Aryans as they streamed into the rich lands of the Punjab and the Doab from their ancient home beyond the Hindu Kush mountains (*q*). Totalitarian claims apart, it is now established history that those early Aryans were a vigorous and unsophisticated people full of the joy of life and though not given to much intellectual broodings —the era of the Yoga system of philosophy of cordial harmony between God and man was yet to come—had behind them ages of civilized existence and thought. The dedication in Rig-Veda appropriately states: "To the Seers, our Ancestors, the first path-finders". Those early Aryans primarily invoked the law of Divine wisdom, by which according to their theological conceptions all things in heaven and earth are governed. Their appeal was to the Divine Law and the universal order (*r*) to judge of their rectitude or obliquity. This was Natural law or the law of Reason; the unwritten law. Then came to be stressed the conventional and customary law which was a body of rules dealing with right and wrong and rights and duties and obligations as established and accepted by the people for themselves but with greater stress on duties and obligations. There is intrinsic evidence in the *Shrutis* that those Aryans of the Vedic age had robust concepts of a lawful man's duties. The emphasis was on the practice of *Dharma* an expression which came to signify "the privileges, duties and obligations of a man, his standard of conduct as a member of the

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(*p*) Mahamahopadhyaya Kane, History of Dharmashastra—Vol. II, Pt. I, p. XI. In the opinion of Sri B. G. Tilak, "the traditions recorded in the Rig-Veda unmistakably point to a period not later than 4000 B.C. when the vernal equinox was in Orion". The same view was expressed by Jacobi.

(*q*) In a conglomeration of what may seem stereotyped bucolic hymnology there are to be found some natural outpourings of the heart in language which is sheer lyric poetry: *Ritasya jihva pavate madhuh*, Rig. IX 75: 2. One prayer is: 'Lord, be near us, hearken to us and make our speech truthful', Rig. I, 82: 1. 'O Faith, endow us with belief'.

(*r*) The expression chosen for the universal order and law was 'Rita'. "The dawn follows the path of Rita, the right path; as if she knew that before. She never oversteps the regions. The sun follows the path of Rita" *Cf.* "He gave to the sea his decree, that the water should not pass his commandment": Proverbs 8.29. The expression Rita also came to mean the fountain of justice and the path of morality to be followed by men. One prayer was: "O Indra, lead us on the path of Rita, on the right path. . . ." Rig-Veda X 133: 6.

Aryan community, as a member of one of the castes and as a person in a particular stage of life" (*s*).

Vedas, primordial source.

Although the Hindus appeal to the *Shrutis* as the primary source of their law and religion, the *Shrutis* do not contain much that can be regarded as positive or lawyers' law. The references in these to secular law are mingled with matters ethical and religious and direct statements of law are rather few. A number of rules of law to be found there are incidental and at times metaphorical. The extant Dharmashastras belong to the second period. But we find references in the Dharmashastras to previously existing laws and customs. It is obvious that for many centuries there existed Gathas which are mentioned in the Manusmriti and the Sutras of Gautama, Vasishtha and others but of the original form of those Gathas we know very little. The Smritikars are agreed and common traditions have always accepted that the earliest exponent of law was Manu. The Smritis purport to embody one traditional law, namely the pronouncements of Manu (*t*). The Rig-Veda enjoins observance of the ancient rules of Manu: "Do not take us far away from the path (rules of *Dharma*) prescribed by Manu and come down to us from our forefathers" (*u*). The material of that period available to this day does not render much assistance in collating an authenticated account of that body of original law, traditionally accepted as Manu's law, which indubitably existed. It was the unsophisticated age during which were composed a catena of Sutras simple and naive yet adequate for the purposes of a pastoral people and their corporate life. Those early Sutras, composed at a time when knowledge was imparted catechetically, are so far matters of legendary history and what we know of them is only from references to some of them in the extant Dharmashastras. Jurisprudence in the Vedic age was nascent and creative. There is ancient literature reflecting the continued cultural existence of many centuries during the Vedic period but we do not have that abundant data requisite for the purposes of the history of that epoch and we know much less of its legal history. The initial difficulty has been the lack of any genuine works of hystoriography and no historical survey of that first epoch of legal literature has so far been accomplished. There is, however, reliable data of a long period of transition between the first epoch and the era of the Dharmashastras. The *Brahmanas* (*v*) which form the second part of the Vedas and deal with rituals and sacrificial rites belong to this period during which were formed numerous Shakhas or Schools of the Vedas and greater emphasis was placed on the supremacy of the Vedas and observance of castes and stages of life. All these and the rise in power and

Early Gathas.

Early Sutras.

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(*s*) Even when later on rights were naturally the topic of forensic discussion the accent was on obligation rather than on rights. Curiously enough there is no equivalent expression in Sanskrit for the word rights as used by modern writers on jurisprudence.

(*t*) See p. 19 *infra*.

(*u*) *Ma nah pathah pitrayan manavadadht dooram naishta parvatah:* Rig-Veda, VIII 40 : 3.

(*v*) The *Brahmanas* are theological treatises in prose attached to the Vedas. The principal *Brahmanas* are Aitareya, Shatapatha, Panchavimsa and Gopatha. They mainly deal with rituals and efficacy of sacrifices.

dominance of the priestly caste are the features of this period of transition. In the ancient Brahminical society had been formed several groups called Charanas. Each of these Charanas had its own Shakha (branch) of the *Veda* and had its own ritualistic and legal codes. Every Charana had also *Kalpa Sutras* which included the *Shrauta,* the *Grihya* and the *Dharmasutras* (*w*). The Charanas of the Vedic period were called the Sanhita Charanas. There were similar Charanas also in the *Brahmana* period that followed. After that came the period of the Sutra Charanas. The Charanavyuha, the writings of the early mimansakars and the available Kalpasutras are full of references to those early works and draw attention to that mass of early literature in the form of *Grihya* Sutras in which were stated the duties and obligations of the Aryan as an individual and as a householder. During this period of priestly dominance a good deal that was written was full of elaborate sacrificial technique and religion assumed a stereotyped form verging on syncretism. But it was also the age of protest against that rigid formalism and the time when the older Upanishads (*x*) were composed. The bold philosophical speculations embedded in the *Brihadaranyaka* and other early Upanishads are a reminder of the long journey from naturalistic polytheism to almost cabalistic ritualism and ultimately to monism. The emphasis now was on self-realisation (*y*). In the field of law also there was progress. A number of Sutra-works written during the later part of the Vedic epoch dealt with legal injunctions and customs. There are quoted in Yaska's Nirukta a series of legal maxims in Sutra style (*z*). There is also data which shows that towards the end of the Vedic epoch philosophical and at times legal disputations were carried on in learned assemblies or parishads. These debates were responsible for the rise and development of Schools of philosophers, principles of reasoning (dialectics) and the practice of the art of discussion. A parallel to this may be noticed in the use of the art of debate by Socrates for the purpose of eliciting the truth and in the logical treatises of Aristotle. But of those legal disputations in the Parishads of the learned no record has been preserved just as no record exists of those early Sutra-works from which only a few quotations are to be traced. All that is known today is that there existed in the Vedic epoch rules of *Dharma* traditionally regarded as promulgated by Manu and Sutra-works containing aphorisms on law. It would be a misnomer, therefore, to call this as even a bare outline of the legal literature of that first epoch of Hindu Law.

Period of transition.

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(*w*) See p. 12 *infra*.

(*x*) The Upanishads are philosophical discourses described as "ancient rhapsodies of truth" and denominated as the Vedanta or the concluding treatises of the Vedas. Schopenhauer made it clear that his philosophy was shaped by the fundamental ultimates of the Upanishads. He stated: "From every sentence, deep, original and sublime thoughts arise. . . . It has been the solace of my life, it will be the solace of my death"

(*y*) One supplication was for the removal of the veil or obstacle that hides the Real. The obstacle was described in one of the most quoted of the Upanishads as "The golden lid that covers the face of Truth"

(*z*) Yaska who is very ancient himself quotes earlier grammarians and etymological exegetes. Manu emphasized the importance of Nirukta, XII, III.

Era of Dharma-shastras.

The golden age.

In the three periods stated above are discernible successive strata of legal thought, progressive evolution and expansion and growth of a system of traditional law claiming its foundation in the law of Revelation and having the Smritis as its ancient frame-work. The era of the Dharmashastras was the golden age of Hindu law. No doubt the more critical period was the Post-Smriti period when the system became more refined and ampler, but this second was the productive period of Hindu Law. It was synchronous with the age of some of the leading Upanishads which are instinct with a spirit of inquiry and a passion for the search of truth about the hidden meaning of things. "Truth wins ever; not falsehood" was the favourite axiom (*a*). And the famous invocation was: "Lead me from the the unreal to the real: Lead me from darkness to light: Lead me from death to immortality" (*b*). The spirit of the time was naturally reflected in the aphorisms of law then promulgated and the influence on secular matters of the philosophical impulses and tendencies is easily discernible. But care was taken, in laying down the minimal standards of conduct appropriate to the society that was being governed, to see that ethical judgment should not be allowed to control the operation of every rule of universal application. Even modern jurisprudence according to which the functions of law and ethics must be different does not require that laws must be ethically neutral.

Nature of Smritis.

The Hindu jurisprudence regards the Smritis, which are often designated as Dharmashastras, as constituting the foundation and an important source of law. The term 'sources of law' used in many legal treatises on Hindu Law and in decisions of the Privy Council is somewhat ambiguous. Possibly it was borrowed from that department of Roman Law entitled 'De juris fontibus'. It has in any case been found convenient and useful because in one acceptation of the term, sources of law are the earliest extant monuments or documents by which existence and purport of the body of law may be known (*c*). The Smritis or Dharmashastras are the earliest extant treatises from which our knowledge of the line of development which Hindu law had pursued during the second epoch of its history is derived. Mostly in metrical redactions and in some cases both in prose and metre the Smritis are collections of precepts handed down by Rishis or sages of antiquity. Composite in their character the principal Smritis blend religious, moral, social and legal duties. They contain some metaphysical speculations, matters sacramental and also ordain rules of legal rights and obligations. Ethico-religious obligations were regarded by these exponents of *Dharma* as of more importance than legal obligations. The Smritikars were not always punctilious about stressing a clear distinction between the positive or lawyers' law and moral law, but this is not to suggest that they were unmindful of this distinc-

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(*a*) *Satyameva jayate nanrutam.*

(*b*) *Asato mam sadgamaya; tamaso mam jyotirgamaya: mrityor mamritamgamaya.*

(*c*) The expression used by many Smritikars is *Dharmamoola* which is also used by Manu. *Dharmasya Lakshanam* is another expression used by Manu which means direct evidence of *Dharma.*

tion. When necessary they took care to define this distinction as for instance in the case of the pious and legal obligation of a son to pay the debt of the father when the debt was not for an immoral or illegal purpose. The charge levelled by some Western scholars against the authors of the Smritis of a want of precision and discrimination between moral and legal maxims is unreasonable and unfounded but it is unnecessary now to take any serious notice of the same. The Smritis are Dharmashastras enouncing rules and precepts of *Dharma*, an expression understood in a broad and comprehensive sense. A clear perspective of Hindu law is not possible unless it is properly appreciated that the blending of religion and ethics with law by these juris-theologians was in a large measure the natural results of a philosophy of life which laid emphasis on the supremacy of inward life over things external. The acceptance by a corporate society of the connotation of duty (*Dharma*) which associated religious and ethical concepts with secular matters was bound to be projected into its codes of positive law. There are to be found, however, numerous texts in the Smritis illustrative of the distinction between law and morality applicable to questions where it was felt necessary to emphasize any such point of distinction. The distinction when not observed was because the best rule was regarded as that which advanced *Dharma* (*d*). Religious injunctions and legal precepts were at times apt to be mingled up unless the rules of logic and certain accepted canons of construction were brought in aid of the ascertainment of the distinction which nevertheless obtained (*e*). It may also be observed that Yajnavalkya and some other Smritikars divide their treatment of subjects into three sections, *Achara*, *Vyavahara* and *Prayashchitta*. The first and the last relate to rules of religious observances and expiation. The early writers laid greater stress on these rules than on rules of *Vyavahara*, that is of civil law. The later Smritikars mentioned above have treated of *Vyavahara* in separate sections (*Prakaranas*) and exhaustively considered rules of positive law and Narada and some Smritikars have compiled rules only of *Vyavahara* (*f*). The shrewd practical insight of the Hindu Rishis who were both sages and virtually lawmakers left very little that was undefined. At a very remote period they treated of law under eighteen heads and one hundred and thirty-two sub-divisions and laid down rules of law both substantive and adjectival. Founders of their own jurisprudence these philosophical jurists enunciated and expounded a system of law which does not suffer in comparison with Roman law which inspired the continental codes and much of English case-law.

Vyavahara: Positive law.

By the Austinian principles of jurisprudence or theories of Bentham much of the traditional law of ancient India would be termed as 'morality' because that law was not "a direct or circuitous command of a monarch or sovereign number to persons in a state of subjection to its author". The Smritis some of which deal

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(*d*) *Cf. Summa ratio est quae pro religione facit.*

(*e*) See pp. 40-41 *infra*.

(*f*) *Vyavahara* embraces forensic law and practice as well as rules for private acts and disputes.

exhaustively with various topics of law and are generally referred to as Institutes or Codes were not codes in the strict sense in which a code is now understood, that is a single comprehensive legislative document on any particular topic or branch of law. The extant Smritis were compiled at different times and in different parts of the country but they all purported to record one traditional law. The Smriti was not autonomic law which is the result of a true form of legislation or is promulgated by the State in its own person. It was not imposed by any superior authority *in invitos*. There was no dogmatic insistence upon any fundamental notions of command of a sovereign and habit of obedience to a determinate person. What was accepted was the rule-dependent notion of what ought to be done as agreeable to good conscience and in conformity with the cherished Article of belief that the fundamental rules of law had been derived from a Divine Author. A legal system is a system of rules within rules; and to say that a legal system exists entails not that there is a general habit of obedience to determinate persons but that there is a general acceptance of a *constituent rule*, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. One should think not of the sovereign and independent persons habitually obeyed but of a rule providing a sovereign or ultimate test in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constituent rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the laws (*g*). The general effective motive, according to these Smritikars, was observance of *Dharma* and the sanctions recognised by the people themselves. Enforcement of law (*Danda*) in the nature of things proceeded from the sovereign but one view of the genesis of legal institutes was that the king and the law were created by the people. Medhatithi and Vijnaneshvara as also the Mahabharata and the Arthashastra of Kautilya maintain the view that law as enjoined in the Vedas and the Smritis was of popular origin. It was law by acceptance—*jus receptum*—and constituted in part of recollections of precepts claimed as of divine origin and in part of conventional and customary law. The law rested on the quadruple sources already mentioned and the sanction behind that law was not the will of any supreme temporal power but that which was inherent in the law itself and the nature of and sanctity attached to its sources.

Law by acceptance: *jus receptum*.

Smritikars.

The Rishis who compiled the Smritis did not exercise temporal powers nor did they owe their authority to any sovereign power. The authority or imperative character of their legal injunctions was partly derived from the reverence in which they were held and the accepted principle that what they laid down was agreeable to good conscience. What the Smritikars said was regarded as the principal direct evidence of *Dharma*. The Smritikars did not arrogate

(*g*) See Professor Hart's Introduction to Austin's Province of Jurisprudecne Determined, pp. xi-xiii. Prof. Hart also refers to the general criticism of Austin's Doctrine of Sovereignty by Bryce, Kelsen and Salmond.

to themselves the position of law-makers but only claimed to be exponents of the divine precepts of law and compilers of traditions handed down to them and clung to that position even when introducing changes and reforms. Changes in the law were primarily effected by the process of recognition of particular usages (unless they were repugnant to law) as of binding efficacy. Brihaspati ruled that "immemorial usage legalises any practice" and that "a decision must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice" (*h*). Acting on these principles the Rishis abrogated practices which had come to be condemned by the people and ordained and prescribed rules based on practices and customs which had come to be recognised and followed by the people.

Smritikars were great jurists.

The Smriti texts evince profound and acute thinking of the sages and jurisconsults responsible for them. A remarkable instance of this is furnished by their treatment of 'ownership' and its comprehensive signification. Salmond in defining ownership states that 'ownership' in its wide sense "extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam*, in *re propria* or *in re aliena*. . . ." There are a number of texts in the Smritis on the subject of ownership which show that the jurisprudential concepts reflected through them remarkably accord with the views of the most modern writers on jurisprudence. The basis of what we know as Holland's theory of 'ownership' as "plenary control over an object" and the necessary qualification to the same that the right of ownership must be enjoyed without interfering with the rights of others has been logically considered by the Smritikars and those who followed them (*i*) with due regard to the refinements implicit in this theory. Another remarkable instance was the recognition of 'prescriptions'. Although the Roman Law accepted extinctive and acquisitive prescriptions as sanctioned by jurisprudence, modern western lawyers, as pointed out by Sir Henry Maine, viewed them "first with repugnance, afterwards with reluctant approval". Law, it was said by these Smritikars, should help those who were vigilant in asserting, their rights and not those who slumbered over them. In their treatment of the law of prescription, these law-makers evinced practical insight and legal acumen of a high order. Yajnavalkya laid down a period of twenty years for the recovery by the lawful owner of land and ten years for the recovery of a chattel enjoyed by a stranger (*j*). And Brihaspati ruled that in case of continuous and uninterrupted possession of land for the prescriptive period there would even as against the original owner be created possessory title in favour of the person in actual possession (*k*). Thus lapse

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(*h*) Brihaspati II, 26, 28 (S.B.E. Vol. XXXIII). See f.n. (*h*) on p. 62.

(*i*) There is an instructive dissertation by Vijnaneshvara on the juridical concept of 'ownership' in Ch. II of the Mitakshara.

(*j*) Grounds of legal disability were recognised. Thus for instance there was exemption from operation of limitation in case of minors, property of the king and deposits involving the element of trust.

(*k*) Brihaspati IX, 6, 7 (S.B.E. Vol. XXXIII).

of time was recognised both as destructive and creative of title. A further instance is equally remarkable. "A fact", it was said in an apophthegm, "cannot be altered by a hundred texts" (*l*). An act done and finally completed, though it may be in contravention of a hundred directory texts (as distinguished from any mandatory text), will stand and the act will be deemed to be legal and binding. This maxim of Hindu law has been recognised and applied by the Courts in cases of certain questions relating to the validity of marriage and adoption. The doctrine of Roman Law corresponding to this maxim was *factum valet quod fieri non debuit*. Also notable was the logical acumen of the Smritikars and those who followed them to harmonise rules not easily reconcilable. The fallacy of rigid literal construction was not overlooked. Synthesis was as far as possible achieved by in effect rejecting that meaning which was apt to introduce uncertainty, confusion or friction (*m*). In their desire to adapt the more ancient law to progressive conditions, they sometimes resorted to the favoured contrivance of the jurist by evolving a number of beneficent and elegant fictions. To mention only one, they announced the identity of the husband and wife and on that assumption rested the rule that in case of a person who died sonless his widow could succeed in preference to all other heirs recognised by law (*n*). A maxim that found favour was that reason and justice are more to be regarded than mere texts. Some of the ancient rules of law propounded by these lawmakers surprise us by their strikingly modern character and remarkable insight into jurisprudential concepts, for insight does not depend on modernity.

Smritis sometimes divided into Dharmasutras and Metrical Smritis.

The Smritis or Dharmashastras are divisible into two classes. The first of these are the Sutras. Complete Sutra works contain aphorisms on sacrifices (*Shrauta*); aphorisms on ceremonies requiring domestic fire (*Grihya*); and aphorisms on law and custom treating of temporal duties of men in their various relations (*Samayacharika*). The last only of these three kinds of Sutras are referred to as Dharmasutras (*o*). Some of them were written in prose and some both in prose and verse (*p*). The extant Dharmasutras though part of the Smritis or Dharmashastras, being more ancient, are sometimes differentiated from the metrical versions more specifically referred to as the Smritis. The principal extant Dharmasutras are those of Gautama, Baudhayana, Apastamba, Harita, Vasishtha and Vishnu. The Smritis more specifically so called, namely, the Institutes of Manu, of Yajnavalkya and of

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(*l*) There has been some conflict of opinion among Indian Jurists on the question of the correct meaning of the maxim as stated by *Jimutavahana: Vachanashatenapi vastunonyathakaranashaktch.* Also see Ch. XXII § 434 *infra.*

(*m*) See pp. 40-41 *infra.*

(*n*) *Yo bharta sa smritangana,* Manusmriti IX, 45. *Jeevatyardhashareerertham katham anyah samapnuyat . . . Asutasya prameetasyo patnee tadbhagaharenee: Brihaspati* cited in Smritichandrika, Mysore Series No. 48, p. 673 The provisions of the Hindu Women's Rights to Property Act, 1937, adapted this *fictio juris.*

(*o*) The expression means strings or threads of rules of *Dharma.*

(*p*) The objective of the Sutras or aphorisms was to give in a compressed style of composition principles and rules with the utmost brevity. The aphorismic style helped to avoid overburdening the memory. A trite saying was "an author rejoiceth in the economising of half a vowel as much as in the birth of a son".

Narada and the Smritis of Parashara, Brihaspati, Katyayana and others belong to the second category of Dharmashastras and are later in age than the Dharmasutras. The Dharmasutras are sometimes divided into *Purva* and *Apara* Sutras, the former being the more ancient of them, but no list is intended to be exhaustive. The sutras generally bear the names of their authors and in some cases the names of the Shakha or School to which the authors belonged. It will suffice to refer only to some of them in the present context. The Gautama Dharmasutra belonged to the Samavedins. The Vasishtha Dharmasutra belonged to the Vasishtha group of Rigvedins and the Apastamba and the Baudhayana to the Taittiriyas. The rituals of the groups differed in details. The Dharmasutras, however, dealt mainly with duties of men in their various relations and in course of time began to be accepted as of authority by members of all the groups.

Dharmasutras.

The Dharmasutras of Gautama, Baudhayana, Apastamba, Harita and Vasishtha are now considered and accepted to be the most ancient of the extant recorded aphorisms on law and custom treating the duties of men in their various relations. "Though the texts of the Dharmasutras have not always been preserved with perfect purity, they have evidently retained their original character. They do not pretend to be anything more than the compositions of ordinary mortals, based on the teachings of the Vedas, on the decisions of those who are acquainted with the law, and on the customs of virtuous Aryans. . . . It is further still possible to recognise, even on a superficial examination, for what purpose the Dharmasutras were originally composed. Nobody can doubt for a moment that they are manuals written by the teachers of the Vedic schools for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that they were later only acknowledged as sources of the sacred law" (*q*). The Dharmasutras were fascicular rules which came to be accepted as records of the one traditional law. They were not bodies of law struggling with each other for recognition. Composed in different parts of the country and at different times they did not present any anomaly but tended to slide into each other. In common with most of the Dharmashastras, they mingled religious and moral precepts with secular law. Some of them are remarkable for the manner and vigour of their expression and the multifariousness of the subjects of living interest covered by them. Some of these teachers give the impression that they were free willed, creative, ideal-harbouring human beings who did not feel bound by everlasting orthodoxies. In their texts there are no urgings to docile and sedulous conformity to every authoritarian mandate of the ritualists. If anything, they suggest that confining and endless conformity is bad for the human spirit. The authors of these Dharma-

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(*q*) Dr. Buhler: Introduction to 'The Laws of Manu', Sacred Books of the East Series, Vol. 25, p. XI. The Smritis of Manu and some others were largely based on law which had partly been systematised by the Sutrakars. The Dharmasutras supplied the ground-plan for those works.

sutras took the law from earlier Gathas and Sutras and customs which had grown up bit by bit and reduced them to some sort of order and symmetry. Some of these Sutrakars have evolved idioms of expression and contributed a significant quota to the language of law.

Apastamba.

The Apastamba Sutra is probably the best preserved of these Sutras. In a distinguished manner not free from archaic phraseology, Apastamba treats certain aspects of the law of marriage and of inheritance and criminal law. A notable feature of this Sutra is the clarity and forcefulness of its language. Untampered with by later redactors, it is one of the most quoted of the Sutras and accepted as high authority. Apastamba hailed from the South and it is believed that in his work were embodied the customs of his part of the country. Haradatta has written a commentary on this work. It is entitled Ujjvala. Apastamba emphasizes the traditional view that the Vedas were the source (*pramana*) and nucleus of all knowledge. He takes care, however, at the end of his work, to impress his pupils with the statement: "Some declare that the remaining duties (which have not been taught here) must be learnt from women and men of all castes" (*r*). He also states: "The knowledge which . . . women possess is the completion of all study" (*s*). Haradatta explains this as in part referable to the science of useful arts and other branches of arthashastra which latter expression he uses as embracing all general knowledge. The classical Sanskrit writers including Kalidasa endorse this pithy maxim in some choice phrases. The expressions 'knowledge' and 'completion of all study' were presumably used by Apastamba bearing in mind the rule that wide and comprehensive meaning must be attributed to words if they are fairly susceptible of it.

Gautama.

The Gautama Dharmasutra is probably the oldest of the extant works on law and as already pointed out belonged to the Samavedins. The injunction that it was the duty of the king to preserve intact the time-honoured institutions of each country and make authoritative the customs of the inhabitants of different parts of the country just as they are stated to be, favoured by Manu, Brihaspati, Devala (*t*) and other writers of the metrical smritis, does not appear to have been quite established at the time of Gautama (*u*). It would seem, however, that by the time of Baudhayana the rule was firmly established (*v*). Gautama Dharmasutra is in prose and treats extensively of matters legal and religious. These include questions of inheritance, partition and Stridhan. Gautama attaches adequate importance to tradition and practices and usages of cultivators, traders, herdsmen, moneylenders and artisans (*w*). Haradatta has written a commentary also on the work of Gautama.

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(*r*) II, 11, 29, 15.
(*s*) II, 11, 29, 11.
(*t*) *Yasmin deshe pure grame traividye nagarepiva: yo yatra vihito dharmastam dharman na vichalayet.*
(*u*) Gautama, however, does say that the laws of countries, castes and families should be recognised in administering justice XI, 20.
(*v*) See Baudhayana I, 1, 2, 1-8.
(*w*) Gautama, XI, 21.

Baudhayana. Baudhayana Sutra is not available in its integrate form. What we have is a dismembered work which according to the researches of Dr. Burnell consists of four *Prashnas* of which the last would seem from intrinsic evidence to be an interpolation. There is evidence both internal and external to suggest that Baudhayana Sutra is older than Apastamba. Dr. Buhler has examined various arguments which go to establish the high antiquity of this work (*x*). Budhayana is rather elaborate in his treatment and discursive. He himself says: "This teacher is not particularly anxious to make his book short." Baudhayana treats of a variety of subjects including inheritance, sonship, adoption and marriage. He mentions a number of usages and practices of the people and refers to certain customs prevalent only in the South one of them being marriage with the daughter of a maternal uncle. He also mentions some customs which were peculiar to the people living in the North, two of them being trading in arms and going to sea (*y*). He also speaks of the levy of sea-customs *ad valorem* (*z*) and of imposition of excise duty on traders by the king (*a*).

Harita. Harita is another Sutrakar whose work deserves special notice. One of the most quoted of the early exponents of law, he is mentioned as an authority by Apastamba and some other compilers of Dharmasutras and possibly his work is one of the oldest Dharmasutras so far known to be in existence. His treatment follows the same pattern that is adopted by the early Sutrakars. Harita is freely quoted also by the Commentators. A verse ascribed to Harita is reminiscent of the stage of progress that Hindu law had made even during the first period of the era of the Dharmashastras: When the defendant avers that the matter in controversy was the subject of a former litigation between him and the plaintiff when the latter was defeated the plea is a plea of former judgment—*prag nyaya*. This is similar to the doctrine of *res judicata* and the *exceptio rei judicatae* of Roman Law.

Vasishtha. Of the Dharmasutra of Vasishtha, not much is extant. He deals *inter alia* with sources and jurisdiction of law and rules of inheritance, marriage, adoption and sonship. Vasishtha stresses the importance of usage and describes it as a supplement to law. A number of manuscripts of this Sutra have been translated and published and opinion is divided on the question of the authenticity of certain chapters. Vasishtha gives an interesting description of Aryavarta (the country of Aryas). He adds that, according to many writers, its northern and southern boundaries were respectively the Himalayas and the Vindhya range (*b*) and goes on to state that customs which are approved in any country must be everywhere acknowledged as authoritative (*c*).

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(*x*) S.B.E. Vol. XIV, p. xxxvii.
(*y*) I, 1, 11, 1-4.
(*z*) I, 10, 18, 14.
(*a*) I, 10, 18, 15.
(*b*) I, 8, 9, 12, 13.
(*c*) I, 10, 11: Provided they are not contrary to the policy of law.

Vishnu.

Vishnu is another sutrakar whose collection of aphorisms is entitled to consideration among the ancient works of this class which have come down to our time. Vishnu is one of the smritikars mentioned in the enumeration of Yajnavalkya (*d*) but an examination of the extant work clearly shows that its author has copiously borrowed from Manusmriti and other standard works and must have adopted as the basis of his work an ancient collection of aphorisms intituled Vishnusutra. The bulk of the extant work consists of rules in prose composed in the laconic style of the early sutrakars but most of the chapters conclude with metrical verse. It deals with rules of criminal and civil law, inheritance, marriage, debt, interest, treasure trove and various other subjects. Nandapandita, himself an erudite writer on law, has written a commentary on Vishnusutra known as the Vaijayanti (*e*).

Some other authors of Dharmasutras.

Of the other ancient authors of Dharmasutras very little is known although the aphorisms of some of them, mostly remnants, are to be found mentioned in the works of later compilers of the Dharmashastras. Of those, mention must be made of the brothers Shankha and Likhita the co-authors of a Dharmasutra bearing their names. In an oft-quoted verse from Parasharasmriti, the Dharmasutra of Shankha-Likhita is given considerable prominence. The Dharmasutra of Ushanas is mentioned by Yajnavalkya in his enumeration. The author appears to have ascribed his work to Ushanas (*f*) who is probably Shukra the mythological preceptor and the regent of the planet Venus. An oft-quoted text of Ushanas is that the son is under no pious obligation to pay a fine or the balance of a fine or a tax (or toll) due by the father; nor is he bound to pay a debt due by the father which is not proper (*g*).

Importance of the Dharmasutras.

The great importance of these works today is not so much in their texts as in the concepts of jurisprudence reflected through their medium and the historical value of their contents and the reference that is traceable in them to previously unrecorded custom, and crystallization in the form of precepts of usages and practices and the transformation of these into constituent law. Gautama in enumerating the sources of the sacred law speaks of the Vedas and the tradition and practices of those who know (the Vedas). Gautama in the Chapter on duties of a king also states that his administration of justice shall be regulated by the Veda, the Institutes of the sacred law and the laws of countries, castes and families provided they are not repugnant to the sacred records (*h*). There are similar express texts recognising custom as a source of law (*dharmamoolam*) and also references both direct and implied to various customs in the Dharmasutras mentioned above showing that the law was traditional and that custom

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(*d*) See p. 18 *infra*.

(*e*) See p. 49 *infra*. A translation of Vishnusutra by Dr. Jolly was published in the S.B.E. Series (Vol. VII).

(*f*) Ushanas is mentioned as an ancient seer in the Bhagavad Gita, Discourse X, 37.

(*g*) *Na vyavaharika*.

(*h*) I, 1, 2; XI, 19-21 (S.B.E. Vol. II).

was a constituent part of it (*i*). It may be of interest to underline some of the liberal rules relating to the status and rights of women which found favour with these early exponents of law. Remarriage of widows and divorce are recognised in some of the old texts (*j*). In Vishnusutra it is stated that on partition between brothers after the father's death not only are the mothers entitled to share equally with their sons but unmarried sisters also are entitled to their aliquot shares (*k*). These teachers of the Vedic Schools brought a virile mind to the deposits of the legal thought and traditions of the past. Acclaimed propounders of the early Smriti law these Sutrakars primarily sought to express the *communis sententia* of the Indo-Aryans and were unanimous in their appeal to customary law. This adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices and family usages prevailed and were preserved is one of the outstanding features of Hindu jurisprudence.

Chronology of Dharmasutras.

Of the Dharmasutras we have some reliable history though the task of the historian in fixing the chronology of these works has been indeed hard. But the problem of determining the dates of the leading Dharmasutras and Smritis was so fascinating and opened up such a vast field for reconstruction that during the last hundred years some jurists and scholars both European and Indian have critically and with meticulous care examined the available data and relevant criteria and assigned the approximate dates of the compilation of these works. There have been many handicaps to the task of fixation of the dates of the various Dharmashastras. A number of early Dharmasutras are not available. Nor are available the complete texts of all the extant Smritis. Then again some texts attributed to some of the ancient exponents of law are to be gathered only from later works which quote them as authority. Of the available Dharmashastras some quote with approval previous works but do not throw any light on the question of their age. In case of some of these Dharmashastras, it is not possible to rule out the existence of interpolations and in case of one or two of them there are manifest indications of subsequent remodelling of the texts. In these circumstances the conclusions reached must often of necessity rest with the fixation of the approximate century during which the particular Dharmashastra must have been compiled. There was a sharp controversy amongst some earlier Western and Indian scholars on the question of the chronology of the Dharmashastras. There is even now some difference of opinion amongst the Indian jurists and scholars themselves as to the time when some of the Dharmashastras were first reduced to writing in the form in which they are extant. According to some of the earlier Western writers, the Smritis were reduced to

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(*i*) According to Roman jurisprudence 'customary law' obtains as positive law by virtue of the *consensus utentium*. Justinian states: *Nam quid interest, populus suffragio voluntatem suam declaret, an rebus ipsis et factis?* Digest 1, 3, 32.

(*j*) Vasishtha XVII, 72-74 (S.B.E. Vol. XIV). This was in consonance with *Rigveda* 10M, 18, 7.

(*k*) *Matarah putrabhaganusarena bhagaharinyah anudhhashcha duhitarah:* Vishnu 18, 35.

writing some centuries later than the dates assigned to them by Indian jurists and scholars. It has been the opinion of the Indian critics that on this point those Western scholars often indulged in *a priori* reasoning and based their conclusions on unsound analogy. An analysis of the reasons in support of their conclusions given by some eminent jurists and scholars both European and Indian would suggest that the Dharmasutras of Gautama, Baudhayana, Apastamba and Vasishtha must have been recorded between about 800 B.C. and 300 B.C. Dr. Jolly has tried to prove that the Apastamba Sutra is the oldest of these. Mahamahopadhyaya Kane puts the time of Gautama Dharmasutra before the spread of Buddhism and his opinion is that this Sutra cannot be placed later than the period between 600-400 B.C. (*l*). The age of Chandragupta Maurya which is reliably fixed as 321 B.C. to 297 B.C. is the sheet-anchor of Indian chronology. Almost equally useful is the date of Panini who lived "probably soon after 500 B.C." (*m*). Some Sanskritists on the other hand have made claims of greater antiquity for some of the extant Dharmashastras. They also rely on certain data. But it seems unnecessary to join in the desire to go as far back as possible for the purpose of enhancing the importance of these ancient authorities on law.

**Yajnavalkya's enumeration of Smritis.**

In a verse of Yajnavalkya are enumerated twenty of the Smritis all bearing the names of the Rishis to whom their authorship was ascribed. Manu, Atri, Vishnu, Harita, Yajnavalkya, Ushanas, Angiras, Yama, Apastamba, Samvarta, Katyayana, Brihaspati, Parashara, Vyasa, Shankha, Likhita, Daksha, Gautama, Shatatapa, and Vasishtha are mentioned as founders of Dharmashastras (*n*). The verse obviously was penned by a later redactor and the list is illustrative and not exhaustive. Narada, Baudhayana and other Smritikars not mentioned here are among the recognised compilers of law (*o*).

**Smritis supplementary to each other.**

Of the numerous Smritis the first and foremost in rank of authority is Manusmriti or the Institutes of Manu. There is a striking resemblance and agreement among the Smritis on many questions and they purport to embody one traditional law. All the Smritis in course of time came to be regarded as of universal application. No greater authority was attached to one than to another Smriti, except in case of Manusmriti which was received as of the highest authority. It was not as if any one Smriti was taken as in substitution for another on any particular aspect or branch of law or as of greater authority in any part of the country but they were all treated as supplementary to each other.

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(*l*) Vol. I, p. 19.

(*m*) Macdonell *India's Past*, p. 136. Panini is the author of a work on grammar described as "a monument of thoroughness and algebraic brevity". Panini gives some data of considerable importance to the historian (Dr. R. K. Mookerji, *Hindu Civilization*, Ch. VI).

(*n*) *Dharmashastraprayojakah* I, 4, 5. In his Nirnayasindhu, Kamalakara refers to over 100 Smritis. Many of those mentioned by him have not been found.

(*o*) The Padmapurana lists thirty-six compilers of law. The name of Atri mentioned in Yajnavalkyasmriti is not mentioned. To the other nineteen are added Marichi, Pulastya, Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Paraskara, Lokakshi and Kuthumi.

Manusmriti.

Manusmriti or Institutes of Manu is by common tradition entitled to place of precedence among all the Smritis. The other Smritikars themselves subscribe to this view. Opinion, however, is divided on the question of the identity of Manu. It seems impossible to offer any strong data one way or the other on the somewhat fascinating riddle as to the identity of the original law-giver or to point out the specific rules of law promulgated by him and preserved as part of the extant Code. There is a striking resemblance and agreement among the Smritis and they purport to embody one traditional law often stated to be the pronouncements of Manu who was accepted as the first expositor of law and often reverently referred to by the Smritikars in the *pluralis majestatits*. The ancient law existed before writing was invented and human memory had to be its sole repository. It was not static but a growing system and was handed down for centuries from preceptor to disciple in succession. In course of time had come the Gathas and Sutras of the *Brahmana* period. And after that came the *Dharmasutras*. All these were supplementing, altering and gradually moulding the ancient traditional law into system. This evolution was going on for many centuries and so also was going on the process of lawmaking with a body of customs taking shape and receiving recognition from time to time and itself forming a constituent part of the traditional law. The rules of law attributed to Manu the first Patriarch were bound to come up continuously for consideration and application and the exponent or interpreter of law had to take account of the law at the time extant and also attach adequate importance to growing usages and customs. The accretions were naturally accepted as part of the same law and having the same obligatory force as the original rules. The fixation of these rules was obtained when the Code itself was compiled and bore the name of Manu the original exponent of law. The Code is not in the language of Vedic times and it is obvious that it was reduced to writing at a later period. The date of this compilation in its extant form can now fairly reliably be fixed as about 200 B.C. but there is little historical data about its actual author. The Code contains interesting parallels with other works and the author, whatever his real identity was, appears to have compiled an exhaustive code binding on all and identified it with the most familiar and venerated name of Manu, the primeval legislator. The Dharmashastras right down from the Rig-Vedic age copiously refer to the opinions of Manu and of Manu Svayambhuva. Then again there are references made to Prachetasa Manu and Vriddha Manu. References are also made to Manavadharmasutra. Evidence about Manu traditionally accepted as the first exponent of law cannot altogether be said to be scanty, nor is there any conclusive data to establish his identity. There is not much reason, however, for the student of Hindu Law to make himself uneasy over the paucity or uncertainty of evidence regarding the identity of the real author of the extant Manusmriti or of the original Manu whose name it

Manu the first Patriarch.

Identity of the actual compiler of the Code is not known.

bears. What is of importance and consequence is the paramount authority of Manu. It has been repeatedly asserted and affirmed that the authority of the precepts contained in the Manusmriti was beyond dispute.

*Corpus Juris* of ancient India.

The extant Code of Manu compiled in about 200 B.C. was obviously an answer to a long-felt desideratum because the legal literature of the Dharmasutra period had not produced any work which could meet the requirements of a compendium of law in all its branches. The unique position acquired by it as the leading Smriti and effectually of the most authoritative reservoir of law was due both to its traditional history and the systematic and cogent collection of rules of existing law that it gave to the people with clarity and in language simple and easy of comprehension. Analogy, though imperfect, of the Codex Theodosianus, a compilation promulgated in A.D. 429 and the Codex Justinianus compiled in A.D. 528 may serve to give an idea of the purpose achieved by the institutes of Manu (*p*). Virtually amounting to a recasting in a convenient and easily accessible form of the whole of the traditional law it appears to have in practice replaced on matters covered by it the use of the rules of law stated in earlier Gathas and Sutras and the Chapters on *Vyavahara* in the Dharmasutras most of which it had practically embodied. The Code is divided into twelve chapters. In the eighth chapter are stated rules on eighteen subjects of law—intituled titles of law—which include both civil and criminal law (*q*). In later treatises other Smritikars have mostly followed this division and the nomenclature adopted in the Code except that the ninth division of Manu was dropped and the title of *Prakirnaka* (miscellaneous) was supplemented (*r*). The author of the extant smriti may not have been the originator of the famous division but it appears to have been a traditional classification accepted and popularised by him. The rules of law laid down in Manusmriti and its most characteristic doctrines have today their practical importance in this that the Code is a landmark in the history of Hindu Law and a reservoir to which reference may at times become necessary for the proper appreciation of any fundamental concept or any question involving first principles. Law of inheritance, property, contracts, partnership, master and servant are some of the branches of law comprising the Code. The Code records many genuine observances of the Ancient Hindu and gives a vivid idea of the customs of the society then extant. The ordi-

**Eighteen titles of law.**

(*p*) An examination of the departments of law dealt with in Manusmriti will show that it was a complete code embracing all branches of law and was suitable to conditions then prevalent and the exigencies of the time. The Colonial expansion of India at one time embraced almost the whole of South-East Asia. And it may be of some interest to notice that the name of Manu was authoritatively associated with the laws of many countries in that vast region. On the facade of the legislature building in Manila, the capital of the Philippines, are four figures representing the culture of that country. One of the figures is of Manu.

(*q*) Manusmriti VIII 4-7. The eighteen titles are I. Recovery of Debts. II. Deposit and pledge. III. Sale without ownership. IV. Concerns among partners. V. Resumption of gifts. VI. Non-payment of wages or hire. VII. Non-performance of agreements. VIII. Rescission of sale and purchase. IX. Disputes between master and servant. X. Disputes regarding boundaries. XI. Assault. XII. Defamation. XIII. Theft. XIV. Robbery and violence. XV. Adultery. XVI. Duties of man and wife. XVII. Partition (of inheritance). XVIII. Gambling and betting.

(*r*) For instance, see Naradasmriti XVIII.

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nances of Manu are based on ancient usages. Predominance was to be given to approved usage in all matters: "Let every man, therefore . . . who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom." "Thus have the holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety good usages long established." "A king. . . . must inquire into the law of castes (*jati*), of districts (*Ganapada*), of guilds (*Shreni*), and of families (*kula*), and settle the peculiar law of each" (*s*). In his survey of the duties of the king, Manu stresses the importance of *danda* which connotes the sanction behind the power of the king to restrain transgressions of law and to inflict punishment on offenders. The *danda* "alone governs all protected beings, alone protects them, watches over them while they sleep; the wise declare it (to be identical with) the law" (*t*). Other leading Smritikars echo this punitive element of the theory of kingship. Of the numerous English translations of the Code, the one that has often been referred to is that by Dr. Buhler which was published in the Sacred Books of the East Series in 1886 (*u*). A number of commentaries were written on Manu's Code during the Post-Smriti period by Medhatithi, Govindaraja, Kulluka and others. Kulluka's text has been referred to for centuries in India and Dr. Buhler's translation was made from a recension of Manu given by Kulluka. Mahamahopadhyaya Sir Ganganath Jha has published volumes on the Manusmriti with Medhatithi's commentary.

Commentari on Manusmr

Of the commentaries on Manusmriti, the most notable is Manvarthamuktavali of Kulluka. In the preface to his translation of Manusmriti, Sir William Jones observed: "It may perhaps be said very truly that it is the shortest yet the most luminous, the least ostentatious yet the most learned, deepest yet the most agreeable, commentary ever composed on any author, ancient or modern." Obviously this was superlative praise. Kulluka freely quotes Medhatithi and Govindaraja and attacks some of their explanations and comments in a trenchant manner. He directed the shafts of his sarcasm against them and his remarks when he derides them are spiced with malice and made in poor taste. He refers to some of the observations of Govindaraja with sarcastic mockery and in a manner reminiscent of some of the neatest and most pointed of the eighteenth century English Satirists. There was no limitation to Kulluka's egoism as might be seen from his own assessment of his exposition and ability as a commentator (*v*) but it cannot be gainsaid that he was a legist of the first rank. His forte was an ability to reduce difficult rules to the simplest language and logic. There is no obscurity about his style. Master

Kulluka.

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(*s*) Manusmriti VIII, 41, 46.
(*t*) VII. 18.
(*u*) Mention may here be made of the translation of Manusmriti by Sir William Jones which came out in 1794. In his preface he observed: "The style of it (Manusmriti) has a certain austere majesty, that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God, and the harsh admonitions even to kings, are truly noble. . . ."
(*v*) *Vyakhyatarah na jagurapareepyanyato durlabham vah.*

of his subject, he is not altogether free from sophistry in his reasoning. There can, however, be no doubt that the merits of Kulluka's work and of his original technique as a critic are outstanding. His elucidations and amplifications of some laconic expressions and curious terms used by Manu and the occasional obscurity of Manu's texts have for centuries been of great assistance and his Manavarthamuktavali is a very valuable production.

Medhatithi.

Of further commentaries on Manusmriti, which are many, reference may only be made to those of Medhatithi and Govindaraja. Medhatithi although he shows great veneration for Manu states that the Prajapati Manu of the Smriti was "a particular individual perfect in the study of many branches of the Veda, in the knowledge of its meaning and in the performance of its precepts, and known through the sacred tradition which has been handed down in regular succession" (*w*). Medhatithi sometimes resorts to general propositions which expose him to the attack that he is begging the question. In matters of law, general statements, unless they weld a formidable mass of particulars, can rarely be convincing. They merely convey 'nothing but a benevolent yearning'. Kulluka does not fail to criticise Medhatithi for this tendency of his. As a rule Medhatithi's interpretations and comments are instructive and dependable although sometimes he indulges in casuistic subtlety as for instance when he explains away the oft-quoted verse of Manu permitting remarriage of a widow. This is not to disparage the merit of his work which is copiously informative and a landmark in the legal history of Hindu law. And it seems only right to add that most of his broad propositions are the result of reflective generalisations. Medhatithi shows perfect mastery of the Mimansa rules and admirable legal acumen. In his Manubhashya he cites freely from earlier Dharmasutras. His citations are apposite and selected only for the purpose of elucidation and at times for extracting principles. The

Govindaraja.

Manutika of Govindaraja despite some lapses gives a faithful explanation of the texts of the Smriti and is a reliable commentary. There is not much subtlety. But there is depth. Govindaraja sometimes illustrates the obvious and is rather elaborate in his treatment. He is patiently analytic and pedestrian but sound in his exposition.

Yajnavalkya Smriti.

Yajnavalkyasmriti or the Institutes of Yajnavalkya, it would seem from relative criteria, must have been compiled in about the first century after Christ. According to one tradition Rishi Yajnavalkya was the grandson of the redoubtable royal sage Vishvamitra. In the introduction to the Code it is mentioned that it was in an assembly of sages that this Dharmashastra was pronounced by Yajnavalkya. It is also stated in this Smriti that the compiler was the same person who was the author of the Brihadaranyaka Upanishad (*x*). The more acceptable view seems to be that the Code was not authored by the sage of that Upanishad but was the

(*w*) I, 58.

(*x*) Yajnavalkyasmriti III, 110.

work of a follower of Yajnavalkya who hid his identity behind the name of the venerated rishi. Support is to be derived for this view from a statement in the Mitakshara of Vijnaneshvara, the celebrated expository treatise on this Smriti. The Code contains many parallels with other smritis and draws upon and quotes from a number of them. Yajnavalkya states that the ordained foundations of *Dharma* are: "The *Shruti*, the Smriti, the approved usage, what is agreeable to one's self (good conscience) and desire sprung from due deliberation" (*y*). The last part of this text would seem to add one more source of law to those enumerated by Manu (*z*). The oft-quoted words of Manu: "*Yet Karma Kurvatosya syat paritoshantaratmanah . . .*" (*a*) which emphasize satisfaction of the inner self as one of the indices of *Dharma* and the expression "desire sprung from due deliberation" have no bearing on positive law and must be read as having reference to *Dharma* in its ethical sense. The "self-satisfaction" mentioned in this context is not any one's self-satisfaction but of those good persons who were learned in the Vedas (*b*). The words "desire sprung from due deliberation" do not incorporate any doctrine of private judgment in law.

Yajnavalkya is more liberal than Manu.

The Code of Yajnavalkya is in the main founded on Manusmriti but the treatment here is more logical and synthesized. On a number of matters and particularly on the question of status of shudras, of women's right of inheritance and to hold property, and of criminal penalty, Yajnavalkya although a follower of conventional conservatism is decidedly more liberal than Manu. The influence, though not direct, of Buddha "the enlightened" and Buddhism on the *Vyavahara* part of *Dharma* of this Smriti and the Smriti of Narada cannot be minimised. Buddha's teachings and particularly his message of universal compassion naturally had effect on certain invidious and rigorous aspects of the law and this is reflected in the Smriti of Yajnavalkya. Punishments prescribed in this Code are comparatively less severe in case of a number of offences. There is greater recognition of the rights of women and of the status of shudras. Yajnavalkya deals with a number of subjects and deals exhaustively with the law of mortgages and hypothecation. He also deals with partnership and associations of persons interested in joint business ventures: "A number of traders, carrying on a trade for making profit, shall share profit and loss according to their respective shares, or according to the compact made between themselves. If any member of a company does an act, forbidden by the general body, or without their permission or negligently, and thereby causes a loss, he shall have to indemnify the others for the same" (*c*).

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(*y*) I, 7. Yajnavalkya enumerates in a well known verse fourteen sources of knowledge and *Dharma:* The four Vedas; their six Angas or subsidiary sciences; the Dharmashastras, the Mimansa containing rules of exegesis; the *Nyaya* or dialectic philosophy; and the *Puranas* or records of antiquity (I, 3).

(*z*) Manusmriti II, 12.

(*a*) Manusmriti IV, 161. Also see p. 3, *supra.*

(*b*) Madhatithi II, 6.

(*c*) II, 262, 263. *Cf.* Voet: "*Societas est contractus jurisgentium, bonoe fidei consensu constans, semper re honesta, de lucri et damni communione.*"

Development of law of procedure.

Adequate importance has not been given in Mànusmriti to rules of procedure. There are quite a number of verses in Yajnavalkyasmriti which show that the law of procedure and evidence to be followed in civil disputes had made considerable progress by the time of Yajnavalkya. There are no arid technicalities but it is clear that by that time some elements of strict procedure had been found necessary and desirable. Yajnavalkya endorses the rule of pleading which insists upon all material facts on which a party relies being set out in his statement of claim or defence. "That which is not alleged does not in the eye of law exist even though as a matter of fact it might so exist" (*d*). Yajnavalkya does not confine justiciable matters to the eighteen titles popularised by the author of Manusmriti. *Vyavaharapada*—a cause for judicial proceeding—arises if any right of a person is infringed or any wrong is done to him by another in contravention of the Smritis or customary law (*e*). There are some remarkable verses in Yajnavalkyasmriti which challenge any possible assertion of Divine Right of Kings. He exhorts the king to be modest, even-minded and righteous, to give himself in service of his subjects and to daily look after the administration of justice. The injunction is: "Whether a brother, a son, a preceptor . . . none can escape from the punishment of the king, if he deviates from the performance of his own duties" (*f*).

Vyavaharapada.

Yajnavalkya on the whole is scientific and constructive. Although he is at times unduly elaborate there is in his work on most of the matters rigorous exclusion of inessentials. Most of his legal precepts though succinctly stated are full of juridical meaning and import (*g*). Sometimes he introduces in his language an audacious trick of phrase. He has enriched the vocabulary of law with some expressions remarkable for their precision and significance (*h*). It is true that the authority of Yajnavalkyasmriti was greatly enhanced by the edifice of Mitakshara raised upon it by Vijnaneshvara and which commentary is today of pre-eminent importance in the greater part of India (*i*). That does not, however, detract from the merits of the work which has always been accepted as one of the three principal Codes among the Dharmashastras and referred to as high authority by commentators of repute and in decisions of the Privy Council.

Naradasmriti.

Naradasmriti, also known as Naradiya Dharmashastra, was compiled in about A.D. 200. Narada purports to accord with the ancient writ when he professes merely to be a compiler of the tradi-

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(*d*) Mitakshara II, 19.

(*e*) I, 5 *Smrityachara vyapetena margena-dharshitah paraih: Avedayati chedragne vyavaharapadam hi tat.*

(*f*) I, 358.

(*g*) For instance, the verses relating to partition and the texts about partition *per stirpes* between the members of different branches of a joint family. Division of property *rebus sic stantibus* is implicit in those rules. Also the rule about priority of the title in case of successive hypothecations of sales II, 23. And the rule about ascertainment of shares of partners II, 259.

(*h*) In stating the familiar examples of Act of State and Act of God resulting in frustration of a contract he uses only one word namely, the compound expression *Rajn-Daivika*. For 'sources of law' he used the significant expression *gnapakahetun*.

(*i*) For other important commentaries on Yajnavalkya see pp. 48-49 *infra*. For Mitakshara see pp. 44-48 *infra*.

tional law handed down from the times of Manu (*j*). In the introduction to his Code, Narada states that it is an abridgment of the larger work of Manu said to have originally been in one hundred thousand verses. The Code of Narada has come down to us in its integrity. It begins with an introduction and the treatment of the subject is divided into two parts. The first deals with judicature and the second enumerates and discusses with remarkable clarity the eighteen titles of law contained in the Manusmriti. Clarity and fidelity to the texts of Manu are not, however, the only merits of the Code. Although there is a faithful similitude with certain texts of Manu, Narada differs from him on a number of interesting and important points. He is categorical and emphatic in his statement that custom is powerful and overrides any text of the sacred law (*k*). His work is systematised and he is exhaustive in his treatment. He does not show any servile adherence to the views of his illustrious predecessors; nor does he shrink from stepping in and declaring rules in conformity with the changes that had taken place in social, economic and political conditions. One great merit of this smriti is that it states the law in a straightforward manner in a logical sequence which is readily assimilated and in a style which is both clear and attractive. There is euphony in a number of verses of Narada but he never sacrifices precision to euphony. Narada is renowned for the advanced and progressive views expressed by him on a number of matters. A feature of his Smriti is that it deals solely with law (Vyavahara) and does not contain sections on Achara or Prayaschitta. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts and partnership. He also treats *inter alia* of the age of majority (*l*), shares of widow and unmarried sisters on partition between sons, and recognises separation and remarriage by a woman in certain circumstances (*m*). Narada gives some detailed rules relating to payment of interest. After stating the general rules relating to interest, he adds that there can be special rules recognised by usage. There are some rules founded on principles which are recognised as sound under the modern law on the subject of interest. In certain cases of loans where no interest is stipulated interest can begin to run from the date of demand (*n*). Narada condemns usury (*o*).

Advanced and progressive views of Narada.

An outstanding feature of this Smriti is that it lays down a series of rules relating to pleading, evidence of witnesses and procedure. These rules make interesting reading and reference may be made to some of them. Narada speaks of the plaint as of the essence of a law-suit and stresses the rule that it must disclose

Rules of pleadings.

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(*j*) The colophon in one manuscript in Nepalese character examined by Prof. Jolly *"Iti Manavadharmashastre Naradaproktayam Samhitayam"*.

(*k*) See f.n. (*g*) on p. 39. Justinian's compilations are collectively referred to in modern legal literature as the Corpus juris civilis. In the *Digest*, which is a part of the same, sometimes called the *Pandects* is stated: Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tactito consensu ominium per desuetudinem abrogatur—

(*l*) Narada uses the expression *Vyavaharajnah* to denote one who is *sui juris*.

(*m*) XII. 96-101.

(*n*) I, 105, 108, 109.

(*o*) I, 110, 111.

a proper cause of action (*p*). In dealing with the defendant's reply he states: "The defendant immediately after having become acquainted with the tenor of the plaint, shall submit in writing his answer, which must correspond to the tenor of the plaint" (*q*). "An answer is fourfold: a denial; a confession; a special plea; and that which is based on a plea of former judgment" (*r*). Reverting to the pleading of the plaintiff he adds: "Before the answer to the plaint has been tendered by the defendant, the plaintiff may amend his own statements as much as he desire" (*s*). "These are called the defects of a plaint: if it relates to a different subject; if it is unmeaning; if the amount (relief) has not been properly stated; if it is wanting in propriety; if the writing is deficient or redundant . . ." (*t*). "He who forsakes his original claim and produces a new one, loses his suit, because he confounds two plaints with one another" (*u*). As to burden of proof he rules: "What the claimant has declared in the plaint that he must substantiate by adducing evidence at the trial" (*v*). "Where the defendant has answered the plaint by means of a special plea, it becomes incumbent on him to prove his assertion, and he is placed in the position of a claimant" (*w*). Referring to the decree of the court Narada says: "The victorious party shall receive a document recording his success, and couched in appropriate language (*x*).

Asahaya's commentary on Naradasmriti.

Asahaya, who is himself quoted with esteem in a number of treatises and digests, has written the Naradabhashya which is a very useful commentary on Naradasmriti. Asahaya lived in about the beginning of the seventh century and is probably the earliest of the leading commentators. A translation by Dr. Jolly of the larger of two versions of Naradasmriti, now generally accepted as the authentic text of the Code of Narada, was published in the Bibliotheca Indica in 1876. In his edition of Naradasmriti published in the Sacred Books of the East Series, Dr. Jolly has used Asahaya's commentary. Asahaya shares with other early commentators the peculiarity of giving illustrations taken from everyday life of his period, which help to throw light on the practical working of the law in those times. The available commentary of Asahaya has not been preserved in its original shape and is not complete (*y*).

King-made laws.

A striking feature of Naradasmriti is that it is the first of the Dharmashastras to accept and record the principle that king-made laws could override any rule of law laid down in the Smritis. The most glorious chapter in the history of ancient India had commenced with the reign of the Maurya dynasty (founded by Chandragupta in 321 B.C.). Ashoka, *devanampriya* as he is described in his Edicts, was another Mauryan Emperor who ruled an empire the

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(*p*) Intro. I, 6: *Sarastu vyavaharanam pratijna samudahruta.*
(*q*) Intro. II, 2.
(*r*) Intro. II, 4.
(*s*) Intro. II, 7.
(*t*) Intro. II, 8.
(*u*) Intro. II, 24.
(*v*) Intro. II, 27.
(*w*) Intro. II, 31.
(*x*) Intro. II, 43.
(*y*) S.B.E. Vol. XXXIII, pp. XIXXX.

boundaries of which extended from the Himalayas to the Vindhyas and the eastern ocean to the western ocean (*z*). Other emperors and powerful kings succeeded the Mauryas. Those Mauryan and other emperors and kings, while theoretically subscribing to the tradition that law (*Dharma*) was mightier than the king, promulgated many laws and edicts and from the nature of things the king-made laws were bound to be enforced (*a*). The monarchs who flourished in that age might well have said like their Roman contemporaries '*Regia voluntas suprema lex*' but as a rule they took care not to say it aloud. Narada concedes the high authority and sanction of king-made laws (*b*). He also adds: "As the king has obtained lordship he has to be obeyed. Polity depends on him" (*c*).

A leading Code.

Naradasmriti affords great help in deriving reliable knowledge of the line of evolution which Hindu law and jurisprudence had pursued during the remarkable era of the Dharmashastras, it being in point of time the last of the three leading Codes. Bryce has observed: "The law of every country is the outcome and result of the economic and social conditions of that country as well as expression of its intellectual capacity for dealing with these conditions." There is intrinsic as well as other evidence to show that the work was compiled after there had been remarkable political, economic and social progress in the country, when the highest intellectual capacity of the people had already produced the philosophy of the Upanishads out of which had been developed the doctrine of Karmayoga, and when considerable advancement had been made in Hindu jurisprudence.

Identity of this and other smritikars not known.

The compiler of Naradasmriti, according to Dr. Jolly, probably lived in Nepal (*d*). This smritikar seems to have attributed the authorship of his compendium to Devarshi Narada, one of the great Rishis of antiquity. That the authors of this and other important smritis should not express their real identity has baffled some writers and the question has at times been posed as to whether some of them were not dilettanti. One reason suggested for this anonymity, a reason not very complimentary, was that by fathering their smritis on ancient rishis in the opening stanzas of their works, they tried to get meretricious authority and age which would not otherwise have been their portion. The more acceptable reason for these jurist-theologians ascribing their works to others seems to be that they were unconcerned about personal fame and the fruits of their efforts and yet anxious to give the people standard works on *Dharma* when they fathered their Institutes on the time-honoured sages of the past some of whom were regarded as the "first path-finders". The names of many great thinkers of the Upanishads remain similarly undisclosed.

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(*z*) The country was often called *Aryavarta* and sometimes a part of it was mentioned as Brahmavatra: Manusmriti II, 17.

(*a*) Naradasmriti XVIII, 25. Also see pp. 34-35.

(*b*) Intro. I, 11-11.

(*c*) "It is for the establishment of order that various laws have been proclaimed by kings. A royal order is declared to overrule such laws even": *gariyo rajashasanam* XVIII 24. Also see XVIII, 25.

(*d*) There is no reliable data for this opinion.

Parashara.

Parashara Smriti is mentioned in the enumeration of Yajnavalkya. Parashara also gives a list of the law-givers. Most of the names in Parashara's list are to be found in the enumeration of Yajnavalkya. He does not mention Yama, Brihaspati and Vyasa but includes instead Kashyapa, Gargya and Prachetas. The author of this Smriti appears to have adopted the name of a revered sage of antiquity who is referred to in the work as the father of Vyasa. Parasharasmriti deals only with the subjects of Achara and Prayashchitta and omits discussion of Vyavahara. Adverting to civil law, Parashara says that certain questions are to be determined by the decisions of a *parishad* or an assembly of the learned. This statement is interpreted by Mr. Mandlik to mean that Parashara found the civil law of the smritis so considerably modified by usage that he felt it unsafe to refer his readers to those works, and therefore invested the verdicts of the parishads or conclaves of the learned versed in the current usages of the country with great authority (*e*). Whatever be the reason for the omission by Parashara to treat specifically of Vyavahara in his work, it does appear that Parashara recognised current usages and customs of the people as transcendent law.

Madhaviya.

Madhavacharya's commentary on this smriti is known as Parashara Madhaviya and is often mentioned as the Madhaviya (*f*). Being a great scholar and also a prime minister of the great Vijayanagar kingdom, his work is accepted as one of the leading authorities in the South (*g*). Madhavacharya in his commentary deals with *Vyavaharapada* as well as the religious matters treated in the smriti of Parashara.

Brihaspati.

The smriti of Brihaspati is unfortunately not available in its integrity. Brihaspati like Narada who preceded him is comparatively very unorthodox. A comparison of his work with Naradasmriti and other relative criteria would suggest that it must have been compiled one or two centuries after Narada and at a time when in many branches of it the law had made further strides in its line of development. There are verses on the subject of "concerns of a partnership" which illustrate this, though it is clear from the available texts that a number of Brihaspati's rules on the subject have not been traced. The element of mutual agency in partnership which is a product of the same commercial necessities as ordinary agency, requires that the business must be carried on by the partners or some of them acting for all. Brihaspati rules that every partner is in contemplation of law the general and accredited agent of the partnership: "Whatever property one partner may give (or lend) authorized by many, or whatever contract he may execute, all that is considered as having been done by all" (*h*). He also deals with the right of a partner to be

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(*e*) Hindu Law, p. 310.

(*f*) An English translation of the law of inheritance and succession from this treatise was published by Mr. A. C. Burnell. Other translations of the same are to be found in the publications of Ghosh, Vol. II, and Sethur.

(*g*) *Subbaramayya* v. *Venkatasubbamma*, I.L.R. (1941) Mad. 989, 1000. *Collector of Madura* v. *Mootoo Ramalinga* (1868) 12 M.I.A. 397, 437.

(*h*) Brihaspati XIV, 5 (S.B.E. Vol. XXXIII).

indemnified by the firm in respect of acts done by him in an emergency for the preservation of the common stock and the obligation of a partner in his turn to indemnify his partners for any loss caused to them by his negligence (*i*). Brihaspati distinguishes civil wrongs and crimes from other titles of law: *Dvipado vyavaharashcha dhanahinsa samudbhavah.* The content of the incomplete and somewhat scattered rules of this smriti available to us is abundant proof of the reason for the lasting influence of this illustrious authority on Hindu law. Brihaspati gives a number of general principles on a variety of subjects. He is in full accord with the salutary rule that the meaning of words should be such as has been received by common acceptation (*j*) and the preferable exposition of any rule of law should be that which is approved by constant and continual use and experience; *optima enim est legis interpres consuetudo.*

Rules of adjectival law.

The rules of procedure and particularly those relating to pleadings laid down by Brihaspati are a great advance on the adjectival law in operation before his time and which had to be gathered from the sporadic rules of Manu on matters of procedure, the Yajnavalkyasmriti and the more elaborate rules in the texts of Narada. Brihaspati speaks of four stages of a judicial proceeding: The filing of the Plaint; the filing of the Reply; trial of the suit having regard to burden of proof and passing of the decree (*k*). The requirements of a plaint stressed by Brihaspati are that the pleading must be precise in words; reasonable; brief; rich in content; unambiguous; free from confusion; and devoid of improper arguments (*l*). Of a written statement he says: One should not cause to be written an answer which wanders from the subject; or which is not to the point, too confined or too extensive, or not in conformity with the plaint, or not adequate or absurd or ambiguous (*m*). Disposal of a suit *ex parte* was discouraged and if possible the defendant was by processual law to be compelled to make his reply (*n*). One of the processes adopted has its analogue in the writ of early English law *Capias ad respondendum* under which an absconding defendant in a civil action was arrested or obliged to give special bail. Brihaspati laid down that it should be only in case of the failure of the process of law that the decision should go against the defendant and give to the plaintiff the relief sought by him (*o*). He gives a set of rules regarding witnesses and documentary evidence and also treats of estoppel (*p*) and adverse possession (*q*).

Insistence on precision.

The author of this Smriti appears to have adopted not inappropriately the name of Guru Brihaspati the venerated Rishi who

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(*i*) Brihaspati XIV, 9, 10 (S.B.E. Vol. XXXIII).
(*j*) "The sense attached by current usage is to prevail", *Budhiyogamapaharati.*
(*k*) Brihaspati III, 12 (S.B.E. Vol. XXXIII).
(*l*) Brihaspati III, 5, 6 (S.B.E. Vol. XXXIII).
(*m*) Brihaspati IV, 8 (S.B.E. Vol. XXXIII).
(*n*) Brihaspati IV, 2, 3 (S.B.E. Vol. XXXIII). There are some texts on procedural law which are ascribed both to Brihaspati and Katyayana.
(*o*) Brihaspati IV, 4 (S.B.E. Vol. XXXIII).
(*p*) Brihaspati IX, 9.
(*q*) Brihaspati Ch. IX.

according to Hindu mythology was the preceptor of the Gods and whose name was immortalized by associating it with Guru the largest planet on the solar system. That planet, it may not altogether be amiss to observe, is believed to be concerned with law. Brihaspati does not state masses of verses to be learnt by rote. He does not revel in the use of words but prefers exactitude and his definitions are verily definitive. His rules are coherent and consistent and he does not give any undifferentiated details. Many of his original pronouncements are vested with concrete significance and he takes a spinozistic view of the whole system of law. Though available in parts which are incomplete and in some cases broken off it is one of the most readable of the smritis and is written in an arresting style. There is remarkably skilful use of assonance in some of the verses of Brihaspati but nothing is given up to the exigencies of metre. In a verse of fundamental importance he perfected the doctrine about invoking the aid of equity and enjoined that a decision must not be made solely by having recourse to the letter of the written codes (*r*). M. Kane has observed that the complete Smriti "will be, when discovered, a very precious monument of ancient India, exhibiting the high watermark of Indian acumen in strictly legal principles and definitions" (*s*). Dr. Jolly undertook the arduous task of reconstruction of this smriti from the available sources and collected and arranged the legal texts (verses) attributed to Brihaspati from the works in which they were quoted. An English translation of those verses is published in the Sacred Books of the East Series. Dr. Jolly has observed: "The fragments of Brihaspati are among the most precious relics of the early legal literature of India" (*t*).

**Katyayana.**

The Smriti of Katyayana also is unfortunately not available in its integrity. Texts from this smriti are copiously quoted in all the principal commentaries. A noteworthy feature of this smriti is the variety of subjects dealt with in it and the rules of adjectival law there stated and which go to show the progress made in that branch of the law by the time of Katyayana (fourth or fifth century after Christ). The topics dealt with by Katyayana have a wide range. In procedural law they range from judicature and pleadings to means of proof and probative value of different types of evidence. Another notable feature of this smriti is that the king despite his lordship over the land is not accepted as the owner of the soil. Ownership in land is declared to belong to the subject and the king is not entitled to claim anything more than one-sixth of the produce by way of land revenue (*u*). Katyayana is emphatic when he says that the king should resort to the dictates of the Dharmashastra and exhorts him not to be guided by considerations of policy favoured by the Arthashastra (*v*). The most striking feature of this smriti, however, is its treatment of the law of Stridhan. The

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(*r*) See f.n. (h) on p. 62.
(*s*) Vol. I, p. 207.
(*t*) S.B.E. Vol. XXXIII, p. 211.
(*u*) *Bhootanam Swamitwam.*
(*v*) S.B.E. Vol. XXXIII, p. 271.

whole law relating to the rights of a woman over her stridhan has been evolved from a text of Narada and certain texts of Katyayana (*w*). The available verses of Katyayana relating to woman's property and her power of disposal over the same became the subject-matter of elaborate critical study by later commentators as he was probably the first of the Smritiwriters to discuss the subject in some details. There is discernible here a blend of empiricism and rationalism.

Rules of adjectival law.

There are many interesting verses of Katyayana dealing with adjectival law. Rules of the law of pleadings from Katyayana-Smriti quoted by the commentators clearly go to show that this Smriti marks an advanced stage of development in adjectival law. In a verse in the Mitakshara, Katyayana is quoted as enumerating the form and nature of a Reply (written statement): "a confession, a denial, a special exception and a plea of former judgment (*res judicata*) are the four sorts of answers" (*x*). Katyayana is more liberal than his predecessors in the matter of allowing amendments in pleadings. In considering probative value of evidence Katyayana states that positive oral testimony should carry more weight than a mere inference and documentary evidence speaks louder than oral testimony (*y*). He treats of judicature at some length and lays down the requisite qualifications of a Judge (*z*) and jurors who it seems assisted the judge in certain types of cases both civil and criminal. In dealing with adverse possession and limitation he draws the necessary distinction between possession *de facto* and mere ostensible possession by any person amounting really to custody (*a*).

Wide appeal of this Smriti.

There are numerous verses of Katyayana which bear the impress of the rules laid down by Narada and Brihaspati and it is clear that he has rephrased, clarified and expanded a number of texts from their smritis. Katyayana maintains unimpaired the distinctive qualities of the smriti of Brihaspati to which he freely refers. His exposition is authoritative and remarkable for its freshness of style and vigorous approach. There can be little doubt that this smriti must have been brought into line with current law. It must have commanded a wide appeal as may readily be gathered from the profuse manner in which it has been quoted in all the leading commentaries (*b*). The Smriti Chandrika (*c*) alone, it has been reckoned, quotes nearly six hundred verses of Katyayana. The arduous task of collecting all the available texts of Katyayana from numerous commentaries and digests was accomplished by Mahamahopadhyaya Kane who collated and published in 1933 about

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(*w*) See § 113 *post*.

(*x*) Katyayana describes these four answers in detail. Also see Narada I, 4.

(*y*) *Anumanad guruh sakshi: Sakshibhyo likhitam guruh.*

(*z*) Some of these are that he should be well-equipped in law, impartial, balanced and firm, temperate, industrious, free from anger, merciful and intelligent.

(*a*) Enjoyment by any such person does not create any title in him. *Bhogat tatra na siddhi syat.*

(*b*) There are some texts which are ascribed both to Brihaspati and Katyayana.

(*c*) See pp. 54-55 *infra*.

one thousand verses of the smriti on Vyavahara with an English translation.

Other metrical smritis.

There are a number of other smritis none of which can be said to have come down to us in a complete form. Praiseworthy efforts and research by Western and Indian jurists and scholars during the last hundred years have resulted in the collection of a number of old manuscripts. Unfortunately only fragments of some of these Smritis have been traced and in case of some others all that we have are isolated references to and stray quotations from them in the Commentaries and Digests (*d*). The authentic existence of most of these is not in doubt in view of the fact that they are mentioned in other Dharmashastras and referred to as recognised authorities by the Commentators. Of these mention may be made of the smritis of Vyasa, Samvarta and Devala. Vyasa and Samvarta are included in the enumeration of Yajnavalkya (*e*). Vyasa and Devala appear to have adopted the names of very ancient and venerable seers mentioned in Hindu scriptures (*f*). The Smriti Chandrika is plentiful in citations from their works (*g*). Apararka also quotes freely from these smritis in his massive treatise (*h*). According to Vyasa all wealth given to a wife by her husband was her absolute property (*i*). As to the contents of judgment and decree of a Court, he states that it should give an abstract of the pleadings, of the evidence on record, discussion of the questions that arise for determination and the law applicable to the same. Devala (*j*) is one of those progressive and liberal smritikars who recognised remarriage of a woman in certain events (*k*). Texts from his smriti and particularly those relating to partition of heritage and succession have been quoted in a large number of works and in numerous decisions of Courts. Texts from the smriti of Samvarta are cited in many works. This Smritikar laid down some equitable rules relating to the law of interest.

Arthashastra of Kautilya.

No conspectus howsoever brief of the sources from which knowledge of Hindu law may be derived and of the stages of its legal literature can omit to notice the Arthashastra of Kautilya who according to the most firmly established tradition was the celebrated Chanakya whose praenomen was Vishnugupta. The work is not a Dharmashastra but a masterly treatise on ancient Indian polity and a veritable reservoir of rules *inter alia* relating to the duties of a king, his administration including administration of justice, laws, courts of law, legal procedure, taxation, rights of women, marriage, divorce and numerous other matters which

(*d*) It may be of some interest to the reader to mention that in the seventh century after Christ, Hsuan-tsang, the most famous of the Chinese travellers who came to India, and qualified as a Master of Laws at the Nalanda University, wrote in a letter to an Indian friend "Among the Sutras and Shastras, that I, Hsuan-tsang, had brought with me I have already translated—in all 30 volumes"—India and China by Dr. P. C. Bagchi. Hsuan-tsang spoke highly of the administration of justice in India. A number of works taken by him were lost on the way.

(*e*) See p. 18 *supra*.

(*f*) Bhagavad Gita Discourse X, 13.

(*g*) See p. 54 *infra*.

(*h*) See p. 49 *infra*.

(*i*) *Yachcha bhartra dhanam dattam sa yathakamaam apnuyat.*

(*j*) He is mentioned in the list of smritikars given in the Padmapurana: See f.n. (*o*) at p. 18 *supra*.

(*k*) See Introductory Note to the Hindu Marriage Act, 1955, *post*.

would form the subject-matter of philosophy (*l*), sociology, economics and hygiene. In discussing the duties of a king, Kautilya says: "In the happiness of his subjects lies his happiness; in their welfare his welfare; whatever pleases himself he shall not consider as good, but whatever pleases his subjects he shall consider as good" (*m*). Arthashastra means the science of polity (*m*1). The word "Artha" is at times understood in a mundane and derogatory sense but the connotation of Arthashastra is of *dandaniti* or the science of Government. The compendium deals with matters wordly as distinguished from religious and principally with the State and its governance. Kautilya stresses the importance of *dandaniti* and observes that according to the school of Ushanas, "there is only one science and that is the science of Government; for they say, it is in that science that all other sciences have their origin and end". A number of Kautilya's precepts and maxims having bearing on the welfare of the State and the king are founded solely on considerations of policy. With scientific application of principles of utilitarianism, he builds up his theory and science of governance. Some of his tenets proceed on the assumption that human nature consisted not of social benevolence but of self-love, the instinct of self-preservation and of self-seeking activity. Like Hobbes the English political philosopher, he would have the State supreme in all matters affecting the mutual relations of men and like the Leviathan encompass all living beings. He endorses empiricism in philosophy and utilitarianism in politics and law. In some matters of politics he endorses unscrupulous statecraft like the Florentine author of *del Principe*. It is not necessary, however, to refer here to any of his machiavellian propositions on the subject of policy.

Monumental work.

The authentic text of the Arthashastra of Kautilya—although it was mentioned and extracts from it were quoted in numerous ancient works and historical monographs—was not available until its discovery in 1909 when it was translated and published by Dr. Shamasastri. Dr. Jolly and Dr. Schmidt alsc brought out an edition of Kautilya's Arthashastra. This monumental work has since its first publication started controversies about the work itself, its date and the identity of its author. Most historians are agreed that it was Vishnugupta Chanakya the author of Kautiliya-Arthashastra who successfully helped and guided Chandragupta Maurya in establishing a mighty empire in the fourth century before Christ. Megasthenes the Greek ambassador at the Court of Chandragupta, Justin the Greek writer and some others refer to Chandragupta as Sandrocottos. When Alexander conquered the Punjab a large part of Northern India remained under the sway of the last of the Emperors. The Nandas were exterminated by Chandragupta,

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(*l*) Kautilya speaks of philosophy as "the lamp of all the sciences, the means of performing all the works, and the support of all the duties."

(*m*) Bk. I, Ch. XIX, para 39.

(*m*1) For a conspectus of the relation between Arthashastra and Dharmashastra see the Article by Justice Gajendragadkar in A.I.R. (1963) Journal pp. 24-26.

who also defeated Seleukos, the general of Alexander, who on the death of Alexander had inherited the eastern countries conquered by the latter. Justin and many historians are agreed that India shook off the yoke of servitude soon after the death of Alexander in 323 B.C. and that the author of this liberation was Chandragupta. In his work Kautilya points out how a foreign ruler drains the country of its wealth (*apavahayati*) and squeezes out of it as much as possible by exaction and taxation (*karshayati*). At the end of his work Kautilya claims that he had liberated the country from misrule and further states: "Having seen discrepancies in many ways on the part of the writers on the Shastras, Vishnugupta himself has made (this) Sutra and commentary." His approach being always practical, he is averse to theoretical speculations. He does not offer his homage to a number of earlier doctrines in matters of law and carries his legal propositions to their logical consequences.

Edicts of kings and Dharma-shastras.

One of the controversies that arose after the discovery of the Arthashastra was whether at any time king-made law had higher authority than the law promulgated in the Dharmashastras. Some scholars were emphatic in their view that such was the case. The relevant text in the Arthashastra is: "Sacred law (*dharma*), evidence (*Vyavahara*), History (*Charitra*), and edicts of kings (*Rajashasana*) are the four legs of law. Of these four, in order, the later is superior to the one previously named" (*n*). The question really falls within the purview of legal history. It may not be amiss, however, to observe that the Arthashastra was written at a period in the history of India during which law and politics were not accepted as wholly and strictly controlled by ancient rules of *dharma* but as matters to be dealt with severally and freed from religious domination. In actual practice the edicts and ordinances of the powerful Mauryan emperors like Chandragupta and Ashoka (*o*) and the kings who succeeded them, were from their very nature and by reason of the sanction behind them, bound to be accepted and enforced without any challenge even when they did not accord with the Smriti law. Administration of justice (*Danda*) vested in the King and those emperors and kings laid down numerous laws according to their own judgment and to suit the felt necessities of the people over whom they ruled at a time of remarkable political, economic and social progress. Yajnavalkya, although he does not recognise the authority of king-made law does refer to the same: *Dharmo rajakritaschayah* meaning, "the law that is promulgated by the sovereign" (*p*). Similarly Narada, as has already been pointed out (*q*), concedes the high authority and sanction of king-made laws. Kautilya himself subscribes to the view that the king and the laws were created by the people and that laws were of popular origin. According to him, the King at the time of his coronation affirmed that his prerogatives and powers emanated from the people and his oath was really an

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(*n*) III, Ch. I, para 150.
(*o*) See p. 26 *supra*.
(*p*) II, 186.
(*q*) p. 27 *supra*.

oath of service to the people: "May I be deprived of heaven, of life, and of progeny, if I oppress you." Narada, after stating that the king had been appointed to administer justice and decide law-suits, adds "Avoiding carefully the violation of either the sacred law or the Arthashastra, he should conduct the trial attentively and skilfully" (*r*). This and other relevant data would seem to indicate that as far as possible the edicts and ordinances of the kings so operated as not to disturb any fundamental concepts or rules of law embodied in the Dharmashastras. And it would seem from the Arthashastra itself that theoretically at least Kautilya regarded king-made law and rescripts as a set of rules and announcements operating within the matrix and framework of the traditional law embodied in the Dharmashastras.

Not a source of law.

The work is not a Dharmashastra and is not to be understood as a source of Hindu law. Its very great importance, however, is that it throws a flood of light on a number of matters including law and its administration before the time of the metrical smritis. It gives invaluable information on a variety of subjects such as social stratification and organisation of matters of administration internal and foreign, civil, military, commercial, fiscal and judicial. The work is divided into 15 Books (*adhikaranas*) and 150 chapters which are admirably arranged. Book III deals with *dharmasthiya* that is with matters "concerning law". In Book IV are discussed numerous matters affecting administration of justice including "measures to suppress disturbance to peace", crimes and punishment in case of various offences. It may be of interest to note that some of the matters treated in this masterly compendium relate to municipal administration; co-operative undertaking; juvenile delinquency; investigation in case of sudden death; vagrancy; and superintendence of slaughter-houses, liquor shops, passports, etc. Punishments prescribed for certain offences relating to morality and social hygiene were severe and in some cases gruesome and unspeakable. Caste entered in a conspicuous manner and privileges and disabilities of caste are reflected in the nature of offences mentioned in the Arthashastra and the punishments to be meted out to offenders. Kautilya, however, adds "Whoever imposes severe punishment becomes repulsive to the people; while he who awards mild punishment becomes contemptible; but whoever imposes punishment as deserved becomes respectable; . . . punishment when ill awarded under the influence of greed or anger or owing to ignorance, excites fury even among hermits and ascetics dwelling in forests, not to speak of householders."

Style of a Precisist.

The work is in the Sutra style. Kautilya prefers prose to verse and comparatively the number of verses in the Arthashastra is not large. There is economy of language which is easily perceptible. There are some expressions which the author admits to have been coined by him and some expressions which are antiquated. The work bears on its face the evidence of skilful and

(*r*) I, 37.

masterly treatment and clearly shows that it is by an authority second to none on the subject. The style is singularly lucid and at the same time felicitously forceful. Kautilya's generalizations are as precise as possible and many of his observations are of absorbing interest.

Judicature.

Judicature was a head to which some importance was attached by the authors of the metrical smritis though it is from the Arthashastra of Kautilya that it is possible to get more vivid and detailed information on the subject. Constituted judiciary as now understood did not exist in the Vedic era and there is hardly any data available on the subject of judicature from the literature of the Pre-Sutra period. In ancient India the bulk if not the whole administration of justice was carried on in popular assemblies known as the *Sabha* or *samiti*. These were deliberative bodies assembled for discussing public business and also served as the forum for the purpose of judging the cases which were brought before them (*s*). The king mentioned in the very ancient works is not a ruler of a large State but the head of any autonomous clan. There is no reliable history of the territorial kingdoms which flourished before the establishment of the empire of the Mauryas with its strong central government and duly constituted courts of law. Nor do we find any exposition of the subject of judicature in the Dharmasutras. Gautama, the earliest among the authors of the extant Dharmasutras, speaks only of the exercise of *danda* and of administration of justice by the king in conformity with the Institutes of the sacred law (*t*). Vasishtha enjoins the king to punish those who transgress the law and inflict punishment in accordance with the precepts of the sacred records and with precedents (*u*). There is no reference to any centralised judicial system and there seems to have been little interference by the kings with the traditional local tribunals which functioned in matters of local importance including dispensation of justice.

*Sabha* and *Samiti*.

Administration of justice in the time of Kautilya.

The Arthashastra of Kautilya was written when India was politically and administratively unified and there was consolidation of power in the hands of the emperors (*v*) whose writ ran in the whole country. Here we have a comprehensive account of administration which shows that no *a priori* limitation was set on any State activity. Kautilya gives a vivid description of the king's courts of justice. There was the court for the *sangraha* which was for a group of ten villages; there was the court for the *dronamukha* which was for a group of four hundred villages; and there was the court for the *sthaniya* which was for a group of eight hundred villages; and there was above them all the court presided over by the king's judges. A remarkable feature of the treatment of the subject by Kautilya is that he does not attach any importance to the local jurisdictions which had been functioning for many

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(*s*) A very exalted position was ascribed to the *Sabha* and *Samiti* in the Vedas: *Sabha cha ma samitischavatam prajapaterduhitarau samvidane* (Atharvaveda VIII, 12).

(*t*) XI, 28; XI, 19.
(*u*) XIX, 8, 10.
(*v*) See p. 34 *supra*.

centuries. He does not expressly mention any supplementary jurisdictions and only speaks of the establishment of the king's courts. The traditional local authority (village community) represented a national system of local self-government and local jurisdiction. It would seem that though a net-work of king's courts was established the local jurisdictions had not disappeared. There was a certain amount of institutional continuity although the king's courts were naturally superior in their universal extent and stability and the sanction behind them.

Hierarchy of Courts mentioned in the smritis.

During the Smriti period there was remarkable progress in and unification of law both substantive and adjectival. This is noticeable in many texts of Manu and Yajnavalkya but we get a much better idea of the adjectival law including judicature from the smritis of Narada, Brihaspati and Katyayana. Manu speaks of the royal court (Sabha) staffed by experienced councillors and directs the king to administer justice in the Sabha and to decide cases which fall under the eighteen titles of law according to principles drawn from local usages and from the Institutes of the sacred law (*w*). Manu also speaks of administrative units consisting of one, ten, twenty, hundred and thousand villages (*x*) and from this and other texts of these smritikars we get some information about the hierarchy of courts with the king as the final arbiter. The tribunals set forth by Yajnavalkya (*y*) and other later smritikars as *kula*, *shreni* and *puga* were not forums of private arbitrament but they functioned as tribunals noticed and approved of by the leading smritikars and accepted as part of the judicial machinery both by the king and the people. Broadly speaking *Kula* means an assemblage of persons of the same family or community or tribe or caste or race. The meaning of the expression in the present context is a family council. But the word 'family' is to be understood as one of wide import and as inclusive of members of a caste or tribe. *Shreni* means a corporation or company of artisans following the same business: It also means a guild or association of traders in any branch of commerce. It may be observed *en passant* that by the time of Yajnavalkya there was unprecedented progress in trade and industry and we read of Indian merchantmen sailing the seven seas. *Puga* in its broad sense means an association or a union or an assembly. The expression in the present context has the element of habitance and means persons living in a village or town or city. Narada uses the parallel expression *gana* instead of *puga*. The leader of the local assembly was designated *ganapati*. Narada says: "Gatherings (*kula*), corporations (*shreni*), assemblies (*gana*), one appointed (by the king) and the king himself, are invested with the power to decide lawsuits; and of these, each succeeding one is superior to the one preceding in order" (*z*). Brihaspati also refers to this network of courts. He speaks *inter*

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(*w*) Manusmriti VIII, 1, 3-8: Also see VIII, 9-11.
(*x*) Manusmriti VII, 115.
(*y*) Yajnavalkya II, 30.
(*z*) Naradasmriti: Introduction, 7.

*alia* of courts of itinerant judges functioning from place to place and describes the court headed by the King's Chief Justice as *mudrita* (*a*). The last mentioned court had the privilege of using the king's seal. He states: Let the king or a member of a twice-born caste officiating as Chief Judge try causes, acting on principles of equity, and abiding by the opinion of the judges, and by the doctrine of the sacred law. "When a cause has not been duly investigated by *kula*, it should be decided after due deliberation by *shreni*; when it has not been duly examined by *shreni* it should be decided by *puga*; and when it has not been sufficiently made out by *puga*, it should be determined by appointed judges. Judges are superior in authority to *kula* and the rest; the chief judge is placed above them; and the king is superior to all" (*b*). The king's court was the ultimate court and in theory presided over by the king though in practice it must have mostly been headed by the Chief Justice (*Pradvivaka* or *Dharmadhyaksha*) (*c*). These different component parts of the judicial machinery show that even under centralized strong government considerable autonomy was left in matters of local and village administration and in matters solely affecting traders, guilds, bankers, and artisans. The stubborn vitality of these functional jurisdictions of the village community and the guilds of merchants withstood strong central government and anarchy alike because they were deeprooted in tradition. It is of some significance to note that modern legislative theory encourages arbitrament by domestic forum in case of members of commercial bodies and associations of merchants and recent legislation in India confers jurisdiction on village panchayats to try certain causes. What at first sight may appear to have been parallel or competing jurisdictions were really functional organizations rooted in autonomy and so dovetailed as to remain homologous with the supreme authority of the king's courts in the administration of justice. It is not possible to say from the texts of the extant smritis or from the expositions of the leading commentators that we have a complete picture of the subject; and it is true that none of the extant treatises gives complete rules of adjectival law. But it would be inaccurate to say that they give nothing more than haphazard collections of precepts and precedents as it would be inaccurate to suggest that they give an adequate and exhaustive code of co-ordinated rules affecting judicature and procedure.

**Adjectival law scanty on some topics.**

However ponderous or exhaustive a code might be, it cannot provide for all varieties of matters and all situations that might crop up for consideration and this is particularly so of rules of procedure. Attention has already been invited to some important and significant rules of procedure and to the development made in this branch of the law by the time of Narada, Brihaspati and Katyayana. For all

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(*a*) Brihaspati I, 2, 3 (S.B.E. Vol. XXXIII).

(*b*) Brihaspati I, 24, 30, 31 (S.B.E. Vol. XXXIII).

(*c*) Naradasmriti: Introduction, 35.

that it must be conceded that while the leading smritikars gave elaborate rules on matters of substantive law the rules of procedure which may be gathered from the extant works do not embrace all the heads of procedural law and are indeed wanting in fulness and even scanty on some topics. One reason for this paucity of rules seems to be that some of the topics were regarded as matters to be governed by practice of the court rather than by inflexible and mandatory rules of procedure. There are some texts of the smritikars which go to suggest that the court ought not to be bound and tied by too many rules of procedure and that every court is the master *of its own practice. Cursus curiae est lex curiae.* The provisions contained in these ancient treatises do not give any comprehensive code of procedure and there are a number of rules which must seem defective when judged by modern concepts. A critical summation of the true position has been given by Sir S. Varadachariar the eminent jurist (*d*): "Whenever, wherever and so far as circumstances permitted, attempts were all along being made . . . to administer justice broadly on the lines indicated in the law books. The defects and deficiencies, sometimes serious, must have been the result of the geographical features and the political history of the country."

Conflicting texts, how dealt with.

There were bound to be some variations and even conflicts between the texts of one smriti and another or even between some texts in the same smriti. The smritikars themselves were conscious of this and tried to deal with the problem in the first place by declaring: "That smriti (or text of law) which is opposed to the tenor of Manu is not approved" (*e*). In actual practice this maxim was not strictly followed and effect was at times given to texts of later smritikars on the ground that they were more in accordance with approved usage or by availing of some principle of exegesis. Another rule of preference stated by Narada was that: "in case of conflict between smritis decision should be based on reason" (*f*). Narada supplemented this rule of his by stating that: "Custom is powerful and overrides the sacred law" (*g*). As far as possible attempts were made to reconcile the texts by taking the view that the conflict was not real but only apparent (*h*). At times an apparent conflict was resolved by taking the view, not without some difficulty, that the less favoured text properly understood was of the nature of a statement of fact and not any rule (*i*). Where, however, the contradictions were patent and irreconcilable there was the option to prefer one of the contradictory matters (*j*). But the most salutary rule of them all was stated by Yajnavalkya who with his intrepidity and powerful sense of justice ordained that: "Where two Smritis disagree, that which follows equity guided by

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(*d*) Hindu Judicial System, p. 258.

(*e*) *Manvarthavipareeta ya sa smritirna prashasyate*—Brihaspati XXVII, 3 (S.B.E. Vol. XXXIII).

(*f*) *Dharmashastra virodhe tu yuktiyukto vidhih Smritah*—IV, 40.

(*g*) *Vyavahara hi balavan dharmastenavahiyate*—IV, 40.

(*h*) One of the leading aphorisms of Jaimini is: "Contradictions should not be too easily assumed". He asserts that apparent inconsistencies are at times not actually so; they merely consist in difference of application. *Prayoge hi virodhah syat*—II, i. 9.

(*i*) Apastamba II, 6. 14, 13.

(*j*) This was referred to as *Vikalparupatadhikaranam*—Jaimini X, viii.

the people of old should prevail" (*k*). *Nyaya* which in the context of this rule means natural equity and reason (*l*) was, therefore, to prevail in cases of conflicting rules of law (*m*).

**Mimansakas.**

But even apart from cases of conflicting texts, the fixed and authoritative formulae of which the Smriti texts were embodiments suffered from the same defects to which any *litera legis* is subject. The Mimansakas gave rules of exegesis which, though primarily intended as aids for the interpretation of rules contained in the Vedas and other Dharmashastras relating to ceremonial observances and sacrifices, were applied, though not with uniformity, in construction of texts also of Vyavahara or municipal law. Assistance was derived in the task of interpretation from the rules of Mimansa of which Jaimini was the greatest exponent. Aid was also sought from the Nirukta of Yaska who is the earliest of the known exegetes. The Mimansakas were not merely exegetes but also logicians (*n*).

**Mimansa of Jaimini.**

**Some basic rules of exegesis.**

When the language of a text was not only clear and unequivocal but admitted of only one meaning such language was regarded as best declaring the intention of the lawgiver and accepted as decisive (*o*). Where, however, the meaning was not self-evident the sense could be gathered by availing of the principle of necessary implication (*p*). Although the foremost rule and one repeatedly stressed by the Mimansakas embodied the cardinal principle of literal construction (*q*), words of sufficient flexibility and words of doubtful import could be construed in the sense, which if apparently less correct grammatically, was more in harmony with the intent of the lawgiver. That intention where possible was to be gathered by recourse to the principles of syntactical (*r*) or contextual (*s*) construction. The Mimansakas have laid down some clear, logical and distinctive rules which permit departure from the rule of literal construction and have also indicated the order in which those rules are to be applied. Those rules do not compare unfavourably with the rules stated in modern treatises on the subject of interpretation of statutes. Where not fettered by any mandatory rule, the judicial

**Departure from rules of literal construction.**

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(*k*) *Smrityorvirodhe nyayastu balavan vyavaharatah*—IV, 20.

(*l*) In case of early statutes English jurists and lawyers often appealed to the "reason of the law"; see Bacon's Abridgment of the law; title Statutes. This way of interpretation though not encouraged by rules of construction applicable to modern statutes is not, however, altogether unknown.

(*m*) See pp. 61, 62 *infra*.

(*n*) In *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290 the Privy Council observed: "The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders". An observation to the same effect was made in *Ram Singh* v. *Ugar Singh* (1870) 13 M.I.A. 373.

(*o*) This rule of literal construction was referred to as the Shruti principle: *Nirapekshah ravah shrutih.*

(*p*) Apadeva, author of a number of treatises on Mimansa, deals freely with this subject (*kalpya*) which is covered by the principle of interpretation called *Linga*. Inference could be employed in settling the sense either of a word or sentence: *Shabdsamarthyam lingam*. The meaning derived by necessary implication is by adopting the principle of *lakshanartha*.

(*q*) Where this primary rule governed a case no other rule of construction could be brought in aid: *Shruti linga, vakya prakaranasthana samakhyanam samavaye paradaurbalyamartha viprakarshat*—Jaimini III, iii. 14.

(*r*) Syntactical connection is referred to as the use of Vakya principle: *Samabhivyaharo vakyam.*

(*s*) Construction by emphasising interdependence between passages is called *prakarana—Ubhayakanksha prakaranam*. The Mimansakas also laid stress on the importance to be attached to sequence: *Sandigdheshu vakyasheshat*—Jaimini I, iv. 29.

interpreter was free to accept that meaning of the text which was supportable solely by the reason of the law. Then again resort was had to suppositions of law by inquiring into what was implied by the text and giving it a more rational interpretation. This was akin to what the later Roman Jurists called *fictio juris*. Study of Mimansa was regarded as an integral and essential part of the study of the Shastras. Of Jaimini's Mimansa Colebrooke observed: "The Logic of the Mimansa is the logic of the law—the rules of interpretation of Civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided, the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of the law, and this is, in truth, what has been attempted in the Mimansa" (*t*). Mention must here be made of the Mimansa treatise, Tantra-Vartika, the commentary of the versatile writer Kumarila Bhatta. This celebrated work of Kumarila is a commentary on certain important parts of the Mimansa-Bhashya of Shabara Swami. Shabara's work treats of the Purvamimansa sutras of Jaimini. The commentary of Kumarila is an encyclopaedic treatise and a veritable mine of information on Dharmashastra. Mahamahopadhyaya Sir Ganganath Jha's translation of Kumarila's work was published in 1924 in the Bibliotheca Indica.

Construction agreeable to justice and reason.

Tantra-Vartika of Kumarila.

In the history of Hindu law creative and critical periods succeed each other and it was the Post-Smriti period during which Hindu Law and jurisprudence reached a remarkable stage of progress and assimilation. If the productive era of the Dharmashastras was the golden age of Hindu Law, this was the period of critical inquiry, expansion and consolidation. The ancient aphorisms of the Sutrakars and the earlier Smritis were compiled when the spiritual motive dominated life. The Smritis though accepted as 'revelations remembered' were themselves partially based on usages and practices and did not profess to comprehend every aspect of Vyavahara. Questions of law were not decided by reference merely to the rules propounded by the early Smritikars. The salutary rule that in course of time had come to be accepted and emphasized by the Smritikars themselves was that cases were also to be decided agreeably to such usages and customs as were approved by the conscience of the virtuous and followed by the people. This from its very nature contributed to the growth of Hindu law by introducing innovations and modifications in what was in theory attributed to divine precepts otherwise unalterable owing to their emanation from the Deity. Usage when established outweighed the writted text of law. The Smriti law had a rational synthesis and went on gathering into itself modified and revised concepts of jural relations and things.

Post-Smriti period.

Era of remarkable progress.

An auxiliary to this process of development was the contribution of the Commentators who did not hesitate to interpret and

Commentaries.

(*t*) Miscellaneous Essays, p. 342.

mould the ancient texts so as to suit the needs of a progressive society. Without claiming any delegated authority or claiming paramount power, they of their own initiative helped in the process of development that was going on. Questions grew up round situations, round matters of frequent occurrences and also round the problems of interpretation and application that derive from every text of law. A comprehensive and homologous view of the contents of the Smritis required synthesizing of what was at times presented in an unsystematic form and the bringing out of the mutual co-ordination or subordination of single texts and detached passages. The aphorisms of the Sutrakars though not intrinsically obscure were often concise to excess and at times elliptical. Some of the rules of Smriti law expressed general principles without the necessary qualifications and exceptions and were therefore of the nature of propositions much too absolute. A number of rules again were of the nature of maxims of the law, and had the merits and defects common to such maxims. Being brief and pithy statements expressed in form of metrical redactions, they often constituted a species of legal shorthand requiring interpretation and exposition in the light of expert knowledge. Moreover, the fixed and authoritative formulae of which the Smriti texts were embodiments suffered from the same defects to which any *litera legis* is subject. Then again with so many recognised authors of the Dharmashastras differences and even some conflicts of opinion on points of law were naturally to be expected. Reference has already been made to some of the principles of exegesis relied upon by the smritikars themselves who realised the various difficulties in the way of evolving one system of law out of the numerous Smritis (*u*). Besides, the Smritis were not exhaustive. Points of law apparently not covered by the textual-law were naturally cropping up from time to time and many lacunae in the texts were clearly discernible. The commentaries being dissertations on law had in the nature of things to take notice of all this. Under the guise of critical interpretations of the Shastras, the commentators resorted to construction by implication and inferences, or supplied such omissions, or did both. It was in this and in their task of reconciling some of the inconsistencies and occasional conflicts found in the Smriti texts and in their treatment of vague and ambiguous texts that the commentators really excelled. The import of some of the terms employed by the Smritikars was complex and the intimate and indissoluble connection which existed between some of them demanded dissertations, long, intricate and coherent. When dealing with the eighteen titles of law which they felt bound to recognise the commentators did not consider them as watertight compartments. They looked upon them as matters of classification and not necessarily legal treatment. In the task of interpretation the rules of Mimansa were availed of by these commentators, but not invariably. What the commentators had recourse to were the principles

Arduous task of the commentators.

(*u*) See pp. 40-41 *supra*.

of exegesis to be found in the Smritis themselves and the *Mimansa*; rules of logic (*Tarka*); dialectic philosophy (*Nyaya*); rules of grammar (*Panini*) and approved methods of construction. The cardinal rule of literal construction (*v*) and many of the crystallised exceptions to this rule discussed by modern English authors, with which exceptions lawyers in India are so familiar, were borne in mind by these commentators and many doubtful points were solved by suggesting the key to the true intent and meaning of the lawgiver. Nonetheless difficulties did arise in the interpretation of texts not readily admitting of extended or restricted import and in getting over express texts the application of which had become obsolete. There can be no doubt that the commentators at times stretched points, took precepts out of their context and on occasions gave strained interpretations to rules. As far as possible, they tried to bring out the true import of the ancient texts but at times they made logic yield to convenience and clearness. Sometimes the reason given in support of an accepted construction would seem to be a sophism of sophisms but their ingenuity was at times taxed to the utmost.

Development of law by the Commentators and Nibandhakars.

This process of interpretation of law and through that process the declaration and exposition of law went on for a long time and naturally helped the rational development of law. There were established courts but there was no system under the Hindu law of reference to authoritative or persuasive judicial precedents. Instead a very large number of commentaries and Digests (Nibandhas) were from time to time written during this Post-Smriti period. The commentators did not at any time arrogate to themselves the position of law-makers. Many of the commentators with refined amenity of style disavowed all intention to make innovations. Their sole claim was that their works gave critical interpretations of the textual law of the Smritis and collated and declared the established textual and customary law (*w*). Nevertheless their thought was to fashion the law into as perfect an instrument of justice as they could devise albeit within certain absolute formulae of the smriti law and as far as possible by analogy to what was already settled and on lines parallel with usages and customs which were springing unconsciously from the habits and life of the people in their part of the country. Although in form merely commentaries on the ancient Smritis and complimentary to the same these treatises were independent works which embodied the law current at the time. Some of the commentaries were written under the patronage of kings or at their instance and must have assumed importance also on that score. In case of one or two works ascribed to kings, it would seem that the real author stood in the same position as Tribonian did to Justinian.

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(*v*) Where a proposition laying down a mandatory rule was stated in clear terms resort to extrinsic aid was not permissible. In such a case "considerations of reasons are of no avail": *Vachane hi hetvasamarthye* —Jaimini IV, i. 41. The popular saying is *yavat vachanam hi vachanikam.*

(*w*) For instance in treating of 'inheritance' Vijnaneshvara states: "In this section the texts are mostly narrations of well-recognised usages." Mitakshara II, 118, 119.

Systematic building up of the law.

In course of time the commentaries appear to have acted with ever increasing force to give an impulse to the systematic building up of the law. The commentators amplified narrow provisions of law, rounded off their angles and added a mass of relevant matter thereby materially contributing to the process of self-development of the law. The veneration in which they were held and the acknowledgment of their scholarship was indeed so remarkable that their opinions and conclusions became law by acceptance. The commentators, although they rested their opinions on the Smritis, were explaining, modifying, enlarging and even at times departing from the letter of the *lex-scripta* in order to keep the law in harmony with their environments and the prevailing notions of justice and to suit the felt necessities of the times. The law was basically and essentially traditional law and rooted in custom with the result that the process of development and assimilation continued and the law had to be gathered not merely from the ancient texts, nor solely from the commentaries but mainly from the latter and always having regard to rules of conduct and practices reflected in approved usage.

*Ex cathedra* character of the Commentaries and Digests.

So in course of time the law came to be ascertained and accepted in the main from the Commentaries and Digests of which the leading ones acquired almost *ex cathedra* character. Composed in different parts of India a number of these gained ascendancy in those parts of the country where the authors were accepted as of pre-eminent authority. Facts of geography were massive and in different parts of the country different commentaries came to be referred to as the chief guides on law. The result was that two principal schools of Hindu law the Mitakshara and the Dayabhaga sprang into existence and furthermore where the Mitakshara prevailed there came to be recognised a number of sub-schools of the parental authority.

Two principal schools of Hindu law.

An account of the origin and development of the schools of Hindu law was given by the Judicial Committee of the Privy Council in *Collector of Madura* v. *Moottoo Ramalinga* (*x*): "The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The Commentator put his own gloss on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Thus the Mitakshara which is universally accepted by all the schools except

Mitakshara.

that of Bengal as of the highest authority, and which in Bengal is received also as of highest authority, yielding only to the Dayabhaga in those points where they differ, was a commentary on Institutions of Yajnavalkya; and the Dayabhaga, which wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergencies between that and the other

(*x*) (1868) 12 M.I.A. 397. Also see *Jagmohan* v. *Official Liquidator* ('56) A.A. 145.

schools, equally admits and relies on the authority of Yajnavalkya. In like manner there are glosses and commentaries upon the Mitakshara, which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all." The Dayabhaga school prevails in Bengal; the Mitakshara school prevails in the rest of India. These schools born of diversity of doctrines mark a new stage in the evolution of Hindu law. One of the main differences between these two principal schools of Hindu law relates, as has been pointed out later on in some detail (*y*), to the law of inheritance. The meaning of the doctrine of sapinda relationship in the law of inheritance insisted upon by Vijnanesvara whereby community of blood (propinquity) is to be preferred to community in the offering of religious oblations is the governing factor whereby under the Mitakshara law the right to inherit arises. Under the Dayabhaga the right arises from spiritual efficacy, that is, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors. Another distinguishing feature relates to certain incidents of the joint family. According to the Mitakshara law, each son acquires at his birth an equal interest with his father, and on the death of the father the son takes the property, not as his heir, but by survivorship. The position of the son or grandson in the Mitakshara is somewhat similar to that of *sui hcredes* who under the Roman law are regarded as having a sort of dormant ownership in the estate of their father even during his lifetime. Their succession was not so much a succession as coming into the enjoyment of what in a sense had already partly belonged to them (*z*). According to the Dayabhaga school, the son does not acquire any interest by birth in ancestral property. His rights arise for the first time on the father's death. On the death of the father he takes such of the property as is left by the father, whether separate or ancestral, as heir and not by survivorship (*a*). Partition is another branch of law on which there is some radical difference between the two principal schools (*b*). Dayabhaga.

The Mitakshara is sub-divided into four minor schools:

Benares school;
Mithila school;
Maharashtra or Bombay school (Western India); and
Dravida or Madras school (Southern India).

Sub-divisions of the Mitakshara school.

Banares, Mithila, Maharashtra and Dravida are old names of the territories in which these schools gained mastery. The Benares school covers practically the whole of Northern India (*c*) with the exception of the Punjab where the Mitakshara law has on certain

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(*y*) Ch. IV *post*.
(*z*) Digest 28, 2, 11, Paulus.
(*a*) Ch. XVII *post*.
(*b*) See § 347 *post*.
(*c*) The Benares school prevails in Orissa: *Basanta Kumar* v. *Jogendra Nath* (1906) 33 Cal. 371, 374, 375. The Benares school also prevails in the Central Provinces: *Ramchandra* v. *Ramabai* ('30) A.N. 267, *Bhaskar* v. *Laxmibai* ('53) A.N. 326, *Udebhan* v. *Vikram* ('57) A. Madh. Pra. 175. Also see *Ramaji* v. *Manohar* ('61) A.B. 169.

points been considerably modified by custom. The Mithila school prevails in Tirhoot and certain districts in the northern part of Bihar. The Bombay school covers Western India including the whole of the old Presidency of Bombay as also the Berar (*d*). The Dravida or Madras school covers Southern India including the whole of the old Presidency of Madras. These schools differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of the Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of the Mitakshara. This mainly accounts for the differences between them.

Mitakshara of Vijnaneshwara.

Mitakshara—a very modest title meaning a brief compendium —is a running commentary on the Code of Yajnavalkya and a veritable digest of Smriti law. It was written in the latter part of the eleventh century by Vijnaneshwara an ascetic also mentioned as bearing the name Vijnana Yogin. In the Mitakshara which is more of a digest than a mere commentary on a particular smriti, we find the quintessence of the smriti law and its precepts and injunctions. The chief merit of the work consists in its comprehensive treatment of almost all important topics of the law and the synthesizing of various smriti texts. It is of supreme authority throughout India except in Bengal where the Dayabhaga of Jimutavahana is given paramount importance. In Bengal the Mitakshara is more revered than followed but its authority is not questioned on points on which there is no conflict between it and the works prevalent there. The Mitakshara is given general predominance in all the four minor schools which are no more than sub-divisions of the Mitakshara school but, as will be pointed out later on, in Gujarat, the island of Bombay and North Konkan, the Mayukha a more modern treatise is allowed to compete with it and even regarded as an overruling authority on certain points; and in the Mithila there are some deflexions from the parental authority. Vijnaneshwara analyses and discusses the texts of Yajnavalkya sometimes at considerable length. As the Privy Council has observed, he "explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law" (*e*).

Institutional treatise.

Mitakshara has for more than nine centuries occupied a place of ascendancy and authority unique and unrivalled in the annals of legal literature. Vijnaneshwara was one of the greatest of the juristheologians who contributed to the making of Hindu Law. The subjects he dealt with were reasonably well classified and he had no call to do what the canon lawyers were always doing. He did not take upon himself the task of endlessly arranging and rearranging particular instances in an endeavour to deduce principles. He rather emulated the example of Confucius, who had a thread

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(*d*) *Bajirao* v. *Atmaram* ('30) A.N. 265. 42 I.A. 208, 214, 220; (1915) 37 All. 604,
(*e*) *Buddha Singh* v. *Laltu Singh* (1915) 611.

along which his experiences slid. Even though his treatment of certain matters is exhaustive and sometimes elaborate, he is mostly concise and precise and true to the brevity designated in the title of the work. But on some points which are indeed few his expressions are so brief that they do not afford adequate guidance and it may be said of them that they suffer by "obscurity from too much precision" as Dumont phrased it in complaining of some of Bentham's expressions. He is imbued with the *generalia* of law and there is no *ipse dixitism* in his treatment of any point. Nor is there any antiquarian trifling or wild philosophy about his discussions. In his Mitakshara he produced a juridical work which is an institutional treatise. There can be little doubt that his treatise had from a very early time a large degree of practical influence on many branches of Hindu Law. The very wide range of its authority was only due to its intrinsic worth. A number of commentaries were written on the Mitakshara itself of which mention may be made of the Subodhini (*f*) of Visvesvara Bhatta, and the controversial treatise of Balambhatta (*g*). Nandapandita, an esteemed writer of the Benares school and the author of the Vaijayanti (*h*) and a noted work on the law of adoption the Dattaka Mimamsa, had written a commentary also on the Mitakshara. Mention was made of this work by the Privy Council in the undermentioned case (*i*) but the work has not been published nor has it been found in its integral form.

Mitakshara is the paramount authority of all the sub-schools.

It is of consequence to notice over again that the Mitakshara holds sovereign sway in the whole of India except Bengal. The sectioning of the Mitakshara school into the four minor schools nominated Benares, Mithila, Bombay and Madras schools, is no doubt of some importance and consequence but it is apt to create confusion and even lead to error if it is not fully appreciated that essentially there are only the two schools of Hindu law, the Mitakshara and the Dayabhaga. These minor schools are not born of any diversity of doctrines such as exists in case of the Mitakshara and the Dayabhaga. There is no disagreement on any fundamental or constitutive principle and the differences that are to be found are mainly the result of variant interpretations given by different commentators to some texts of the smritis and particularly to certain texts in the Mitakshara and at times the result of conflict of opinion between different High Courts. It is also of importance to notice that, from some exceptions to be pointed out later, the commentaries and digests, to be immediately referred to as the leading authorities of these minor schools, were only intended to supplement the Mitakshara and not to replace or abrogate the same. Speaking broadly, therefore, the first thing is to inquire what the Mitakshara has laid down on the question under inquiry when it is not concluded by judicial decision and then to turn to

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(*f*) See p. 51 *infra*.
(*g*) See p. 52 *infra*.
(*h*) See p. 49 *infra*.
(*i*) *Buddha Singh* v. *Lallu Singh* (1915) 37 All. 604, 618 (P.C.).

the other authorities. Error is almost sure to arise if this order of priority be changed. The first thing to be considered is what the Mitakshara states When reference is made to texts from any of the recognised authorities, it is always unsafe to examine a single paragraph or a single verse. It is necessary to see for what purpose the reference is to be made and with that view to turn to the verses immediately preceding the same and to study the whole chapter and in some cases several chapters of the same treatise.

Viramitrodaya of Mitramishra.

The Viramitrodaya of Mitramishra (*j*) composed in the earlier part of the seventeenth century is a commentary on Yajnavalkya smriti and accepted as an authority in many parts of India where the Mitakshara school prevails and ranks as especial authority in the Benares school (*k*). In *Girdhari Lall's* case the Judicial Committee of the Privy Council observed: "Adhering to the principles which this Board lately laid down in the case of *Collector of Madura* v. *Moottoo Ramalinga* (*l*), their Lordships have no doubt that the Viramitrodaya . . . is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school" (*m*). Where, however, the Mitakshara is clear on a point, it must not be overlooked that the Mitakshara is the guiding authority of the Benares School and indeed of every other sub-school (*n*). The Vyavahara part of the treatise is sub-divided into four parts. The first treats of judicature and procedural law. The second treats mainly of the law of evidence. The third division relates to the eighteen topics of litigation and the last gives some rules of criminal law. Mitramishra expresses profound respect for Yajnavalkya of whom he always speaks of as the lord of the sages (Yogeeshwara).

Last of the outstanding commentaries.

Mitramishra is a voluminous writer and a master of analysis though on certain points which are indeed few his analysis is half-illuminating and half-obscuring. He was determined to use hard and empirical terms in his disputations with the writers of the Dayabhaga school and in his criticism of the reasoning of those with whom he was at loggerhead. A controversialist of no mean order he does give the impression that he sometimes deliberately chose to indulge in barren logomachy. This pugnacity disregarded, there can be no doubt that in his very notable commentary there is reliable discussion of the law on every useful subject and thorough exposition of every point taken up by him. The work is documented with references to most of the earlier writers. Of the utility of the work there seems no end because for each dipping

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(*j*) An English translation of the law of succession from Viramitrodaya called 'partition of heritage' was published by Gopalchandra Sarkar Shastri in 1879. Other translations of parts of the treatise have also been published.

(*k*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 438; *Jagannath Prasad* v. *Ranjit Singh* (1898) 25 Cal. 354, 367-368.

(*l*) (1868) 12 M.I.A. 448, 466. Its value and importance has been repeatedly recognised by the Privy Council. *Girjabai* v. *Sadashiv* (1916) 43 I.A. 151, 159.

(*m*) *Jagannath Prasad* v. *Ranjit Singh supra.*

(*n*) In *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 788, 789, the Privy Council observed that the Viramitrodaya may be referred to in Bengal in cases where the Dayabhaga is silent. In practice, in Bengal, this work is rarely relied upon: See pp. 56-58 *infra* for the authorities of the Dayabhaga School.

one finds some useful discussion on the point under inquiry. Mitramishra does full justice to his themes and his work saves much research because the enormous task of research is performed by Mitramishra himself. The Viramitrodaya has been cited in innumerable decisions of Courts in India wherever the Mitakshara prevails. The Privy Council has observed: "It supplements many gaps and omissions in the earlier commentaries and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions" (*o*). This authoritative work of the Mitakshara school is a classic because of its direct approach to some of the most involved and difficult questions. Mitramishra is the last of the outstanding commentators who give reliable and authoritative guidance on Hindu law.

A classical treatise.

The Apararka — Yajnavalkya — Dharmashastra — Nibandha although it purports to be a commentary on Yajnavalkya Smriti is more of the nature of a digest than a commentary (*p*). In this digest we find extracts from a number of Smritikars whose works are not available to us in their integral form. Apararka, a Silhara king, flourished about a century later than Vijnaneshwara and references to his massive treatise are to be found in the works of many later writers and in some decisions of Courts (*q*). Apararka's work is received as of great authority in Kashmir. Its authority is also acknowledged by the expositors of the Benares School. Apararka is rather sprawling though not untidy. The usefulness and importance of his work cannot, however, be minimised and may be gauged from the circumstance that Vishweshwara Bhatta, the author of the Madanaparijata and of the Subodhini which is the leading commentary on the Mitakshara, has used Apararka's work.

Apararka.

The Vaijayanti, written by Nandapandita, an esteemed writer of the Benares School, is as already mentioned a commentary on the Vishnusutra. Nandapandita is the author of the Dattaka Mimamsa which is a standard treatise and a noted work on the law of adoption (*r*). The Vaijayanti has been cited with approval in numerous decisions of Courts in India and also by the Privy Council (*s*). It is also known as Kesava Vaijayanti. Dr. Jolly has given many passages from the same in his publication of the Dharmasutra of Vishnu (*t*).

Vaijayanti.

The Benares school as already mentioned prevails in the whole of North India with the exception of the Punjab and the Viramitrodaya, to which reference has already been made above (*u*), ranks there as especial authority. Of the other authorities to which great weight is attached there reference must be made to the

Benares school.

Viramitrodaya.

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(*o*) *Vedachela* v. *Subramania* (1921) 48 I.A. 349, 362.

(*p*) For a translation of a part of the work entitled 'partition of heritage' see Ghosh Vol. II.

(*q*) *Buddha Singh* v. *Laltu Singh* (1912) 34 All. 663, 673; (1915) 37 All. 604, 617, 618 (P.C.): *Chinnasami Pillai* v. *Kunju Pillai* (1912) 35 Mad. 147, 159.

(*r*) See § 13 *post.*

(*s*) *Buddha Singh* v. *Laltu Singh* (1915) 37 All. 604, 608 (P.C.). But see *Puttu Lal* v. *Parbati Kunwar* (1915) 42 I.A. 155; *Pitra Kueri* v. *Ujagir Raj* ('38) A.A. 101.

(*t*) This commentary was composed by Nandapandita in the first quarter of the seventeenth century at the instance of his patron King Kesavanayaka.

(*u*) See pp. 48-49 *supra.*

Nirnayasindhu of Kamalakara.

Nirnayasindhu and the Vivadatandava of Kamalakara. Kamalakara is a versatile and an eminent writer of the seventeenth century two of whose numerous works have acquired great authority. His Nirnayasindhu which is the better known of his works though not a work on civil law is accepted as of authoritative guidance in a number of decisions of various High Courts on questions involving ceremonies and on matters affecting devolution of property and heirship (*v*). His Vivadatandava is a treatise on the law of inheritance. In most emphatic words he deprecated the assertion of heritable rights of women other than those expressly enumerated by certain earlier lawgivers (*w*). Kamalakara, comparatively, a modern author, is of the same time as Nilkantha Bhatta (who is said to be his cousin), one of the great Hindu jurisprudentes (*x*) and Mitramishra, the author of the Viramitrodaya. Both his works Nirnayasindhu and Vivadatandava are entitled to weight wherever the Mitakshara prevail; but they are accepted as of particularly great authority in the Benares school when not in conflict with any higher authority (*y*). The Benares School is sometimes called the most orthodox of the different schools of Hindu law (*z*).

Vivadatandava.

Mithila school.

The Mithila School has at times followed almost implicitly the Vivada Chintamani and the Vivada Ratnakara (*a*). Though the Vivada Chintamani (*b*), the Vivada Ratnakara and the Madana Parijata are the favoured Mithila authorities it is of importance to notice that the law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara (*c*). Neither incidental dicta in any of those works nor any solitary interpretation nor statements in them founded on any ambiguous texts from the smritis can control the plain meaning of any rules laid down in the Mitakshara (*d*). Of these Mithila authorities the Vivada Chintamani is given the first place (*e*) being a work of unquestioned merit written by Vachaspatimisra a celebrated nibandhakar of the fifteenth century. Vachaspatimisra is also the author of Vyavahara Chintamani another work of allowed excel-

Vivadachintamani of Vachaspatimisra.

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(*v*) *Khushalchand* v. *Bai Mani* (1887) 11 Bom. 247, 254 (marriage ceremonies): *Viswasundara Row* v. *Somasundara Rao* (1920) 43 Mad. 876, 882 (Upanayana ceremony); *Dwarka Nath* v. *Sarat Chandra* (1912) 39 Cal. 319, 331-333 (succession to *Stridhan*); *Dattatraya* v. *Gangabai* (1922) 46 Bom. 541, 556, 557 (Right to perform Shradhha).

(*w*) *Ananda Bibee* v. *Nownit Lal* (1883) 9 Cal. 316, 324.

(*x*) See pp. 52-54 *infra*.

(*y*) *Dwarka Nath* v. *Sarat Chandra* (1912) 39 Cal. 319, 335, 336. "The governing authority of the Benares School is the Mitakshara". *Ram Singh* v. *Ugur Singh* (1870) 13 M.I.A. 373, 390. Of the commentaries on the Mitakshara the Vaijayanti of Nanda Pandita is greatly respected in the Benares school; see p. 49 *supra*.

(*z*) *Ram Singh* v. *Ugur Singh* (1870) 13 M.I.A. 373, 390.

(*a*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487, 507, 508; *Birajun Koer* v. *Luchmi Narayan* (1884) 10 Cal. 392, 399; *Balwant Singh* v. *Rani Kishori* (1898) 20 All. 267, 290.

(*b*) The Vivadachintamani has been translated by Setlur in his Collection of Hindu Law Books. Mahamahopadhyaya Sir Ganganath Jha, a distinguished jurist of recent times, has among various works to his credit translated this treatise. In the translation by Tagore there are inaccuracies as noticed in several decided cases: *Rajrani* v. *Gomati* (1928) 7 Pat. 820; *Sabitri* v. *Savi* (1933) 12 Pat. 359, 413; also see *ibid.* at pp. 428, 429; (33) A.P. 306, 342.

(*c*) *Bhairab* v. *Birendra*, I.L.R. (1949) 28 Pat. 123, 127. *Sourendra Mohan* v. *Hari Prasad* (1926) 5 Pat. 135, 155 (P.C.); *Kamla Prasad* v. *Murli* (1934) 13 Pat. 550.

(*d*) *Ram Khelawan* v. *Lakshmi*, I.L.R. (1949) 28 Pat. 1008; *Bhairab* v. *Birendra*, *supra*; *Bacha Jha* v. *Jagmohan Jha* (1885) 12 Cal. 348; *Kamla Prasad* v. *Murli*, *supra*.

(*e*) *Mt. Thakoor Deyhee* v. *Baluk Ram* (1886) 11 M.I.A. 139, 174, 175. Also see f.n. (*a*) above.

lence. These two works of his are not commentaries on any code but digests and are most probably parts of one and the same treatise. Weight is also attached in Mithila to Vivadachandra by Lakshmi Devi, the Smritisara by Shrikaracharya, the Smritisara by Harinathopadhyaya and the Dwoita-parishishta by Keshava Mishra (*f*). The Kalpataru by Lakshmidhara is a work which is freely cited by the exponents of the Mithila School.

Vyavahara Chintamani.

The Vivada Ratnakara mentioned above is a digest which has been referred to in numerous decisions. Its author was Chandeshwara, a minister of Harasinha, who was a Mithila king (*g*). Vachaspatimisra has stated that he had considered the Ratnakara and it would seem that this work was written in the first quarter of the fourteenth century. Chandeshwara has given the year in which he had performed Tula Purusha in which he distributed his own weight of gold amongst Brahmins.

Vivada Ratnakara.

The Madana Parijata to which reference is made above is a work on civil and religious duties, by Vishveshwara Bhatta. It contains a chapter on inheritance and is treated as an authority in the Mithila School (*h*). It is a digest which quotes a number of works and was written at the latest a little before the fourteenth century. It was composed at the instance of Madanapala, a king of the Jath race, who ruled Kashtha on the banks of the Jamuna. This work has been referred to by a number of later commentators and in numerous decisions. It is written in language comparatively easy to understand. The tenuity of its style is one of its important features. Vishveshwara Bhatta is also the author of the Subodhini (*i*) which is "the most celebrated commentary on the Mitakshara" (*j*). It is not a running and exhaustive commentary but gives a very useful exposition of the difficult and obscure texts in the Mitakshara in a remarkably facile manner. The Subodhini has been referred to in a number of decisions of various High Courts.

Madana Parijata of Vishveshwara Bhatta.

Subodhini of Vishveshwara Bhatta.

The Maharashtra or Bombay School, also known as the School of Western India, claims in respect of certain matters to be the most liberal of the different schools of Hindu law. In Western India, sometimes mentioned as the Bombay Presidency, the pre-eminence of the Mitakshara is generally admitted. The relative position of the Mitakshara and the Vyavahara Mayukha which are proximate authorities as well as of the other works accepted as authorities in the old Bombay Presidency and in other parts of Western India is discussed in several cases decided by the Bombay

Maharashtra or Bombay School.

The proximate authorities.

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(*f*) *Kamani Devi* v. *Sir Kameshwar Singh* (1946) 25 Pat. 58, 63.

(*g*) This work has been translated by Mr. Gopalchandra Sarkar Shastri and Mr. Justice Digambar Chatterjee. Of the other translations reference is often made to the one given by Ghosh in his Hindu Law, Vol. II.

(*h*) This work has been translated by Ghosh (Vol. II) and Setlur. The earliest translation was made by S. Sitarama Sastri and appeared in the Madras Law Journal. It was published in book form in 1899. A translation by the same author of Vivada Ratnakara originally published in the Madras Law Journal appeared in book form in 1898.

(*i*) The complete text and English translation of the Vyavaharadhyaya from this work have been published by Mr. Gharpure in his Hindu Law Texts Series (Vols. III and IV).

(*j*) *Lallubhai* v. *Mankuvarbai* (1876) 2 Bom. 388, 416 (F.B.).

High Court. Such works as the Samskara Kaustubha (*k*) and the Subodhini (*l*) are consulted and reference is made to the Viramitrodaya, Nirnayasindhu and other works of the Mitakshara School (*m*). Reference has also been made by that Court to the Balambhatti (*n*) and to the interpretations given there to certain expressions in the Mitakshara. In the last mentioned work it is stated that it was written by a lady named Lakshmidevi and at one time considerable importance was attached to the opinions of this author by the High Court of Bombay till it was felt that some of those opinions were rather of the nature of what in case of judicial decisions would amount to no more than mere obiters. On certain points the author has expressed very liberal views and given interpretations in furtherance of the rights of women and done so with cute reasoning and in an impressive style. Those interpretations though welcome in themselves do not derive support from any authoritative texts or opinions of other commentators and must be regarded as beautiful but ineffective flutter of wings. Valuable as is the commentary of Balamabhatti (*o*), now generally regarded to have been written by the husband or son of Lakshmidevi, it is not treated in later decisions in Bombay as an authority to be accepted without question (*p*).

Vyavahara Mayukha and the Bombay School.

While the parental authority of the Mitakshara is never questioned, some of the rules there stated have not been accepted and preference has been given to those put forward in the Vyavahara Mayukha in certain parts of Western India. The Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. But in Gujarat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara (*q*). The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize them with each other wherever and so far as that is reasonably possible (*r*). In Poona, Ahmednagar and Khandesh, the Mayukha is considered to be of equal authority with the Mitakshara, but not capable of overruling it as in Gujerat, the Island of Bombay and the North Konkan (*s*).

**Vyavahara Mayukha of Nilakantha Bhatta.**

The Vyavahara Mayukha of Nilakantha Bhatta, written in the beginning of the seventeenth century is, as indicated above, an authority that strikes a dominating note in some parts of Western India. From the special and almost paramount authority which

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(*k*) *Bhagirathibai* v. *Kahnujirao* (1887) 11 Bom. 285, 293 (F.B.): *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 436. An edition of this work was published in 1914 in the Gaikwad Sanskrit Series.

(*l*) See p. 51 *supra*.

(*m*) For instance see *Gojabai* v. *Shahajirao* (1893) 17 Bom. 114. Also see f.n. (*v*) at p. 50 *supra*.

(*n*) The text of Balamabhatti dealing with Achara, Vyavahara and Prayaschitta was published in separate volumes by Mr. Gharpure.

(*o*) *Buddha Singh* v. *Laltu Singh* (1915) 37 All. 604, 613 (P.C.). And see *Pitra Kueri* v. *Ujagir Rai* ('58) A. All. 101, 103, for some of the cases where its authority was not accepted.

(*p*) *Bhagwan* v. *Warubai* (1908) 32 Bom. 300; *Dattatraya* v. *Gangabai* (1922) 46 Bom. 541, 558, "cannot be accepted without due caution and examination". Reference may also be made to *Pitra Kueri* v. *Ujagir Rai* ('58) A. All. 101.

(*q*) See f.n. under § 12(2).

(*r*) See f.n. under § 12(2).

(*s*) See f.n. under § 12(2).

the Vyavahara Mayukha gained in Gujerat and in the island and city of Bombay, it must not be supposed that the Vyavahara Mayukha presents a development of the Hindu law connected in any peculiar way with the religious or social system of Gujerat. Before the Maratha conquest of Gujerat it had long been under Mahommedan rule. The customary law had almost dwindled away into mere caste usages and the brahminical influence had almost perished. The Vyavahara Mayukha was one of the latest products of the Bombay school, and had gained the eminent position which it has retained in the Deccan.The Brahmins, following the Maratha chiefs into the newly conquered country, naturally took their law books with them. And of these, the Vyavahara Mayukha was the most comprehensive and characteristic. In Gujerat it had virtually no rival; and, as a Hindu polity was revived there, it took a place analogous to that of the Roman law in mediæval Europe (*t*), with the Maharashtrian Brahmins as its expositors. Hence arose the somewhat strange consequence that the doctrines of the Mayukha gained a more undivided sway over Gujerat than amongst the Marathas themselves, who had men of wide learning and copious sources of information at hand (*u*). Predominance was given by the High Court of Bombay and particularly by the older British Courts established in Bombay to the Mayukha partly perhaps because they found it more frequently quoted to them than the Mitakshara and partly because the Mayukha was very much praised and followed in Gujerat and partly because the Mayukha was the more modern treatise and embodied to a considerable extent such variations in usage as had occurred during the long period which intervened between its composition and that of the Mitakshara (*v*). Both in Gujerat and in the Maharashtra, the doctrines of the Vyavahara Mayukha and the Mitakshara are largely tempered by customs amongst the backward castes as may be seen from the collections of Steele and Borradaile to which reference is made in a number of decisions.

Nilakantha Bhatta: One of the great juris-theologians.

In form the Vyavahara Mayukha is a digest and follows the usual pattern of discussion of the eighteen titles of law. This treatise on Vyavahara is really one of the twelve parts of his encyclopædic work entitled Bhagvanta Bhaskara each part called a Mayukha (ray of the sun). The dissertations wholly justify the claim made by the author that he was firmly grounded in the Smritis and had no equal in the mastery of the Purva Mimamsa of Jaimini (*Jaiminiye advitiyah*). He is more than a scholiast or glossator and is accepted as the founder of a liberal school of law. In his discussions we see the work of one of the greatest of the Hindu Jurisprudentes. His technique is valuable because he gives precision to words. In examining points where the law derives from usage or usage draws inspiration from law, he effectually

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(*t*) Sav. Gesenichte des R.R., Ch. XXVI.

(*u*) *Bhagirthibai* v. *Kahnujirav* (1887) 11 Bom. 285, 294, 295 (F.B.). Also see *Ambabai* v. *Keshav* (1941) 43 Bom. L.R. 114, 117-119.

(*v*) *Lallubhai* v. *Mankuvarbai* (1876) 2 Bom. 388, 418 (F.B.).

brings out the important point that the law is the more exact in the choice of words whether it be the source or the recipient of the ideas involved.

Founder of the liberal School of Western India.

Nilakantha Bhatta was a Maharashtrian Brahmin born at Benares. In general he follows the Mitakshara but there are a number of matters on which he differs from Vijnaneshwara. In matters of succession and stridhan, the Bombay School is more liberal in giving recognition to the rights of women and for this credit must in a large measure go to this great legist whose work is notable for his originality and openminded views. Nilakantha Bhatta does not merely present traditional solutions in the traditional way but seems to suggest that he evaluates them in the light of what must have been the then current thought and current needs of the society. A translation of Vyavahara Mayukha was published by Mr. Mandlik in 1880. Thereafter Mr. Gharpure and M. Kane have also published their translations (*w*). An interesting account of the life of Nilakantha Bhatta, his works and his family which produced some very learned authors, is given by M. Kane in the introduction to his publication of Vyavahara Mayukha.

Dravida or Madras school.

The Dravida or Madras school, also known as the school of Southern India, leans heavily on the Smriti Chandrika which is intended to supplement and not replace or abrogate the Mitakshara.

Smriti Chandrika of Devanna Bhatta.

The Smriti Chandrika of Devanna Bhatta (*x*) who flourished in the close of the twelfth century has all along had commanding influence in the South. It is an exposition on the law of inheritance and was considered by Colebrooke to be a work of uncommon excellence, equal, if not superior, to Parashara Madhaveeya which also is a leading authority in the South (*y*). Little, if anything, is known of Devanna Bhatta but there is adequate data that the work was compiled sometime in the beginning of the great Vijayanagar Empire. Devanna Bhatta cites copiously from Katyayana and Brihaspati which shows the great eminence and authoritative status which had been achieved by the authors of those leading smritis. But for the Smriti Chandrika, some texts of Brihaspati and a number of texts of Katyayana would have probably been lost to us. The work also refers to a commentator spoken of as Sangrahakara to whom was attributed the authorship of an abridged edition of Manu's Institutes. The Smriti Chandrika is not a commentary but a Nibandha (Digest) and a work of especial authority of the Dravida or Madras school, in which it has originated. But it is to be noted that it is there accepted in point of authority as next to the Mitakshara (*z*). Therefore, in the

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(*w*) M. Kane's translation has often been relied on by Courts in recent cases. It is very useful both from the scholastic and the practical legal point of view as the meaning of some abstruse texts has been brought out after referring to technical Mimamsa rules.

(*x*) The first English translation of the law of succession and inheritance from this treatise was published by T. Krishnaswamy Ayyar in 1867. Other translations of the same are to be found in the publications of Ghose. Vol. II, and Setlur. The work has been published in the Hindu Law Texts Series of Mr. Gharpure.

(*y*) See p. 28 *supra*.

(*z*) Reference may be made to *Kamalammal* v. *Venkatalakshmi* ('65) A.S.C. 1349, 1356 where the importance of this work was emphasised. *Sundaram Pillai* v. *Ramasamia Pillai* (1920) 43 Mad. 32, 34; *Raju* v. *Ammani* (1906) 29 Mad. 358.

absence of any evidence of usage, indicating a consciousness of the people governed by that school that any opinion expressed in the Smriti Chandrika is living law, the Court would not be justified in departing from any doctrine of the Mitakshara (*a*) and prefer any text of the Smriti Chandrika. In *Buddha Singh* v. *Laltu Singh* the Judicial Committee of the Privy Council observed that the author of the Smriti Chandrika "differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether any enunciation in the Smriti Chandrika can be safely applied, except perhaps by way of analogy, to explain a dubious or interminate phrase or term in the Mitakshara" (*b*).

A very valuable source of law.

It is true that on some points Devanna Bhatta differs from the Mitakshara and there is occasionally about him the mere *ipse dixit* of the law-giver. Most probably those interpretations and opinions were tinged by established usages or views which found general favour in the South and this accounted for the very high authority there wielded by this work. Though not held in equal estimation by the other schools, it must be noted that the Smriti Chandrika is a treatise most freely quoted as a high authority in the works of almost all writers who flourished after the twelfth century and is approached by all the High Courts as a valuable source of Hindu law. There are in the Smriti Chandrika very full and detailed discussions on a number of questions often running to several pages. Devanna Bhatta seems to be of the view that mere exposition of a word or phrase would often be barren and unsatisfactory and on that account takes particular care to see that his treatment of the important texts of the Smritikars is exceptionally complete. But his notations are selective and his propositions are stated in a straightforward manner with a logical sequence. His style is impeccable.

Parashara Madhaviya.

Among the other works which are regarded as authoritative in the South are the Parashara Madhaviya, to which reference has already been made (*c*), the Sarasvati Vilasa, the Nirnayasindhu and the Subodhini (*d*).

Sarasvati Vilasa.

The Sarasvati Vilasa (*e*) ranks high in this school. It has been referred to in a number of decisions of the Privy Council. Undoubtedly, as pointed out by the Supreme Court, the foremost is the Mitakshara. That is followed by the Smriti Chandrika and next by Sarasvati Vilasa. Where there is no text of the Mitakshara which directly contradicts the law as expounded in the Sarasvati Vilasa it cannot be discarded on the ground of any alleged defects in its reasoning (*e*1). Prataprudadeva, a king of a principality near modern Cuttack who is the reputed author of this work, flourished some centuries after Devanna Bhatta, the author of the Smriti Chandrika, to which

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(*a*) *Simmani Ammal* v. *Muttammal* (1880) 3 Mad. 265, 269.

(*b*) (1915) 37 All. 604, 619 (P.C.).

(*c*) See p. 28 *supra*. Also see *Chinnasami Pillai* v. *Kunju Pillai* (1912) 35 Mad. 153, 156.

(*d*) See pp. 50 and 51, *supra*.

(*e*) A translation of this work was published by the Rev. Mr. Thomas Foulkes. Other translations of it are to be found in the publications of Ghosh, Vol. II, and Setlur.

(*e*1) *Kamalammal* v. *Venkatalakshmi* ('65) A.S.C. 1349, 1356, 1357.

latter work frequent references are made in his work. The Sarasvati Vilasa presents a picture of the actual working of the law and not merely a series of abstract statements of old rules. It has been referred to in decisions of various Courts (*f*). But it is not regarded as a work of any particular authority in certain districts of Travancore-Cochin (*g*). Of commentaries which rank high in the Madras school mention must also be made of the Vyavaharanirnaya of Varadaraja and Smritimuktaphala which have been referred to in a number of decisions (*h*). It has been repeatedly pointed out in decisions of the Madras High Court that none of these and other authorities respected by the Madras School can outweigh the Mitakshara.

Vyavahara-nirnaya.

Bengal or Dayabhaga School.

The Bengal or Dayabhaga School, as it is generally denominated, prevails in the Bengali speaking States of Bengal and Assam and the Dayabhaga, the celebrated treatise of Jimutavahana, is most respected and is of ascendent authority in those States. The Dayabhaga is a valuable dissertation on the law of inheritance and partition and is believed to be a part of a larger work known as Dharmaratna. Two other works of Jimutavahana entitled Kalaviveka and Vyavaharmatrika were also part of this larger work. Whether the larger work was wholly written or intended to be written has remained a matter of uncertainty. The Dayabhaga is not a commentary on any particular Code but purports to be a digest of all the Codes. Jimutavahana, the founder of the Bengal School, flourished in or about the beginning of the twelfth century. His doctrines on the law of inheritance and the joint family system controverted some basic rules stated in the Mitakshara of Vijnaneshwara (*i*). It is difficult to say as to when the protestant and advanced views of Jimutavahana were accepted as of binding authority in Bengal, but it seems that this treatise soon commanded recognition and acceptance as the fountain-head for a number of commentators on the same, the earliest of whom probably was Srinath Acharya Chudamani (*j*). Not much is known about Jimutavahana but there is reliable material which goes to show that this eminent juris-consult was a Judge and a minister of a king of Bengal. His massive character must have run along bold lines and appears to have found its full and direct expression in his work.

Jimutavahana, author of Dayabhaga.

Progressive juris-consult: Builder of a great school.

Jimutavahana, although he does not break away from or gloss over any authoritative texts of the leading Smritikars, as will be seen from a comparison of the points of difference in the law of inheritance between the Mitakshara and the Dayabhaga, does break in upon the Mitakshara system which favours a particular mode of devolution of joint family property in case of death of a coparcener.

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(*f*) *Muthappundayan* v. *Ammani Ammal* (1898) 21 Mad. 58, 60.

(*g*) *Neelamma* v. *Perumal* ('53) A. Tra-Co. 518, 521 (F.B.). Also see *Krishna Kumar* v. *Sheo Prasad* ('47) A.N. 205, 207.

(*h*) *Simmani Ammal* v. *Muttammal* (1880) 3 Mad. 265, 267, 269. Also see *Buddha Singh* v. *Lattu Singh* (1915) 37 All. 604, 618 (P.C.). The Smritimuktaphala of Vaidyanatha Dikshitar has been published by Mr. Gharpure. The Vyavaharakanda, however, remains to be published.

(*i*) See p. 46.

(*j*) See p. 57.

He introduces innovations in a number of incidents of the joint family and the rights of the members of such family. He purports to found himself on certain precepts of Manu, the meaning of which according to him had not been properly comprehended by some previous commentators. He is not averse to and in fact is successful in the creation of adroit devices and the use of fictions based on legal subtilities to relieve the pressure of traditional law. This he does by expressing his disagreement with other commentators. Although he does not expressly mention the name of the commentator with whom he really joins issue and is in particular disagreement, it is obvious that he is controverting some of the doctrines of Vijnaneshwara. He does not accept any set of propositions laid down by the other commentators on questions of inheritance as crystallized law and deals with his subject as an objective science. His appeal is more to reason and stern logic than to precepts or precedents and his approach to some of the controversial questions raised by him is forthright and direct. He plunges in medias res and is at the heart of the subject. Much can be learnt from this builder of a great edifice whose radical turn of mind made him hunt back constantly to dig up a variety of standpoints and examine their roots. The criticism made by Mitramisra and others that Jimutavahana relies at times merely on postulations does not appear to do justice to this progressive juris-consult some of whose interpretations were in all probability tinged by established usages and must naturally have found favour with the Hindus of Bengal.

Dayatatva of Raghunandana.

Of other authorities of the Bengal School, formerly at times mentioned as the Gauriya school, the most notable is the Dayatatva written by Raghunandana Siromani of Nadia. It is a treatise on the law of inheritance and is generally accepted as giving the most reliable exposition of the doctrines of the Dayabhaga and has become almost a textbook on law (*k*). The authority of Raghunandana is acknowledged and respected universally in the Bengal school as only next to that of Jimutavahana and statements from his work, some of which have become *locus classicus,* are cited and relied upon in numerous decisions of the Calcutta High Court (*l*).

Srikrishna Tarkalankar and other authors of Bengal School.

Srinath Acharya Chudamani and Srikrishna Tarkalankar are other exponents of the Dayabhaga law. The latter is the author of Dayakrama Sangraha which is an excellent compendium of the law of inheritance. His elucidations have been of great assistance and guidance to the Court in a number of cases. Achyuta and Maheshwara followed Srinath. All of them are expounders of stature of dignity and wide prestige. The Vivada Bhangarnava of Jagannatha Tarkapanchanana, a work commonly known as Colebrooke's Digest, is one of the authorities consulted in Bengal. With the exception of the three leading writers of the Bengal school, namely Jimutavahana, Raghunandana and Srikrishna Tarkalankar, the authority of Jagannatha is, so far as that school is concerned,

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(*k*) The Dayatatva was translated by Golapchandra Sarkar Sastri.

(*l*) For instance see, *Hiralal* v. *Tripura Charan* (1913) 40 Cal. 650, 668, 669 (F.B.).

higher than that of any other writer (*m*). Mention may also be made of the Dipakalika of Shulapani (*n*) which is one of the older authorities accepted in Bengal. It is a commentary on the Yajnavalkya Smriti. It has the merit of brevity and is remarkable for its neatness of style. Where the authorities of the Bengal School are silent or where there is no conflict between them and the leading authorities of the Mitakshara School, reference may be made to the latter in cases in Bengal (*o*).

Special works on adoption.

Reference must be made in passing to two special works on adoption—the Dattaka Mimamsa and the Dattaka Chandrika. Generally speaking they are equally respected throughout India, but where they differ, the Dattaka Mimamsa is preferred in Mithila and Benares, and the Dattaka Chandrika in Bengal. Both works have had a high place in the estimation of the Courts in all parts of India, and having had the advantage of being translated into English at a comparatively early period, their authority was increased during the British rule. The law of adoption built up in decisions of the Privy Council has been in the main founded on these two treatises which furnished almost exclusively the basis for the same (*p*).

Practical importance of the commentaries.

So the *lex scripta* of the Smritis, though in theory it continued to remain the infallible guide and one of the effective sources of law, gave way on most points to the authority of the commentators whose interpretations were received as authentic by the particular school. This evolution of Hindu law was at times apt to be overlooked by the Courts owing to the fact that the Smritis were the axis of the law and the desire to turn immediately to the same was quite natural. Nearly a century ago the Judicial Committee of the Privy Council observed (*q*) that the early versions of the Laws of Manu were very ancient and it might be doing great mischief to construe the words of the original texts literally, unaided by the gloss that had been put upon them by writers and commentators of authority. A number of the precepts of Manu have been undoubtedly altered and modified by modern law and usage. The duty, therefore, of the Court is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which it has to deal, and has there been sanctioned by usage (*r*). The tenacity with which people in different parts of the country clung to their age-long traditions and family and local usages are often reflected in the works of the commentators. Though the commentators professed to interpret the

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(*m*) *Kery Kolitany* v. *Moneeram* (1874) 13 Beng. L.R. 1, 49-51.

(*n*) A translation of the portion on partition is to be found in the publication of Ghose, Vol. II.

(*o*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 778, 789 (P.C.): *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 435 (P.C.).

(*p*) The leading decisions on the subject were referred to by the Privy Council in *Arumilli Perrazu* v. *Subbarayudu* (1921) 44 Mad. 656, 665-668. Also see § 13 *post*.

(*q*) *Pedda Ramappa* v. *Bengari Seshamma* (1880) 8 I.A. 1; *Ramalaxmi* v. *Sivanantho* (1872) 14 M.I.A. 570.

(*r*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397; *Atmaram* v. *Bajirao* (1985) 62 I.A. 139.

law laid down in the smritis, their conclusions were in a large measure permeated by the customs and usages which they found in vogue around them. In the case of *The Collector of Madura* v. *Moottoo Ramalinga* referred to immediately above, the Privy Council ruled that it is the duty of the Courts to recognise the rules of law enunciated in the commentaries, even if they appear to proceed on a wrong interpretation of the smritis, "the reason being that under the Hindu system of law, clear proof of usage will outweigh the written text of the law." Indeed, the Mitakshara, the Dayabhaga and the other works of especial authority subordinate in so many places the language of the Smriti texts to custom and approved usage and evolve rules which draw inspiration from custom.

Commentators were virtually law-makers.

The leading commentators and nibandhakars although they purported to confine their task within the structure of the Smriti law accomplished the work of keeping the law abreast of the felt necessities and demands of the time through a long series of centuries during the Post-Smriti Period commencing from about the beginning of the seventh century when Asahaya wrote his Naradabhashya and ending with the seventeenth century when Viramitrodaya, the last of the leading commentaries, was written by Mitramishra. They originated and accomplished their task without permitting themselves to be fettered with orthodox prejudices and yet with disciplined sagacity. They combined intimate knowledge and mastery of the law and their awareness of its conservatism with *gravitas* and a liberal readiness to move with the times. Even when they were expounding a particular smriti, they constantly kept before their mind a map of the Smriti law as a whole. They have been adverted to in some decisions as mere glossators, or compilers of congeries of customs. It must have been seen from the foregoing observations that the leading commentators and nibandhakars were more than glossators or compilers of customs. At times they have been referred to not inappropriately as scholiasts obviously in analogy of the commentators of the Greek and Latin classics and the European philosophers of the middle age whose great aim was to reduce the doctrine of the Christian Church to a scientific system. During a long series of centuries when legislation in the modern sense was not originated and judicial precedents as now understood had no established authority, these juris-theologians were virtually law-makers who systematized the personal law of the Hindus and accomplished legal innovations and in doing so combined all that legal pholosophy could yield and substantially enriched Hindu Law and jurisprudence.

Custom a source and constituent part of law.

Pursuing the order in which the indices of law are stated by the Hindu jurisprudents, reference must next be made to approved usage or custom. Ancient custom is generally regarded as a just foundation of many laws in every system of jurisprudence and for reasons grounded on principle and justice. Cicero speaking of the generation of custom observes in a classical passage: *"Justitiae initium est a natura perfectum. Diende quaedam in consuetudinem*

*ex utilitatis ratione venerunt. Postea res, et a natura profectas, et a consuetudine probatas, legum metus et religio sanxit.*" "Justice has emanated from nature. Therefore, certain matters have passed into custom by reason of their utility. Finally, the fear of law, even religion, gives sanction to those rules which have both emanated from nature and have been approved by custom." In Hindu law immemorial custom has *proprio vigore* the efficacy of law. It is not merely an adjunct of ordinary law but as has already been pointed out a constituent part of it.

Its importance stressed by the Smritikars.

During the earliest stages of the development of Hindu Law, custom was acknowledged and accepted as being the embodiment of principles and rules prescribed by sacred tradition. During the Sutra period also the influence of custom upon law bore the same characteristic. Gautama, the most ancient of the Sutrakars whose aphorisms on law are extant, states at the very outset of his work: "The Veda is the source of the sacred law, and the tradition and practice of those who know the Veda" (*s*). Gautama states in another aphorism relating to administration of justice by the king: "The customs of countries, castes and families, which are not opposed to the sacred records have also authority" (*t*). Manu, as has already been pointed out, regards approved usage as direct evidence of law (*u*). He stresses the importance of custom. The expressions generally used by the Smritikars for 'custom' are *achara, sadachara* and *shishtachara*. Broadly interpreted they mean practices of good men, a concept which necessarily involves the element of reasonableness. In the context of civil law *sadachara*, which is the most commonly used of these three expressions, requires that there must be no element of moral turpitude or anything opposed to public policy about the custom. The Mahabharata in one place uses the expression *'Lokasangraha'* meaning usages of the people and in another place states that usage is superior to all the shastras taken together. Without retracing covered ground (*v*), the importance and efficacy attached to custom by the Hindu juris-theologians may be summarised by reference to the oft-quoted verse of Narada: "Custom is powerful and overrides the sacred law" (*w*). There are in the Smritis numerous texts relating to the origin and binding nature of custom and the commentators and nibandhkars have critically discussed, considered and applied those texts (*x*). Of those the texts of Manu and Narada cited above and a quotative verse of Brihaspati exhorting recognition of local, tribal and family usages (*y*) are particularly notable.

*Sadachara.*

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(*s*) I, 1, 2 (S.B.E. Vol. II). Also see Apastamba I, 1, 1-2—*Athatah samayacharikan dharman vyakhyasyamah: Dharmagnasamyah pramanam vedashcha.*

(*t*) XI, 20 (S.B.E. Vol. II). Also see pp. 15-18 *supra.*

(*u*) II, 12.

(*v*) See pp. 16 and 39. Also see f.n. (*c*) on p. 2 *supra.*

(*w*) I, 40. Asahaya states that this verse accepts the rule that custom is superior to written law. The Romans took the view that an existing statute might even be replaced by adverse usage 'ea vers (i.e. jura) quaæ ipsa sibi quæque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata'.

(*x*) Reference has already been made to some of them. Asahaya cites: *Deshe deshe ya acharah paramparyakramagatah: Sa shastrarthabalannaiva langhaniyah kadachana.*

(*y*) *Desha jati kulanam cha ye dharmah prak pravartitah: Tathaiva te palaneeyah prajah prakshubhyatenyatha:* II, 28 (S.B.E XXIII).

Custom can outweigh written text of the law.

In a long series of cases decided by the Privy Council and Courts in India, the rule has been accepted that custom can override any text of smriti law. In *Collector of Madura* v. *Moottoo Ramalinga*, the Judicial Committee of the Privy Council observed: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law" (*z*). It has been repeatedly stated that a custom may be in derogation of smriti law and where proved to exist may supersede that law (*a*). The tenacity of family customs even under the strain of migration has been repeatedly recognised in decisions of the Courts (*b*). It may, however, be observed that though local and family custom, if proved to exist, will supersede the general law, the general law will in other respect govern the relations of the parties outside that custom (*c*). The essential attributes of a custom are that it must be ancient; reasonable; must have continued or been observed without interruption; and must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. It must be uniform and obligatory. It must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of custom. In a catena of cases the Judicial Committee of the Privy Council has observed that it is of the essence of special usages modifying ordinary law that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends (*d*). Custom as a source of law is considered in some detail in Chapter II *post*.

Essential attributes of custom.

*Nyaya or Yukti*: An auxiliary indice of Dharma.

A subsidiary or auxiliary indice of dharma was *nyaya* or *yukti*, expressions the juridical connotation of which included principles of equity. The smriti texts, howsoever widely interpreted and usages of people though fully recognised, could not obviously provide for every conceivable question of law. Analogies drawn from established rules and fictions of law were therefore resorted to in order to cover such cases. One of the rules laid down by Jaimini in his Mimamsa was *atidesha* whereby any principle laid down with reference to one case was applied to other analogous cases (*e*). It is well understood that the spirit of equity underlies many legal fictions (*f*) and rules propounded by analogy. It was recognised by the Smritikars that the traditional law from its very nature could not be exhaustive and principles of justice had to be invoked

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(*z*) (1868) 12 M.I.A. 397, 436.

(*a*) *Neelkisto Deb* v. *Beerchunder* (1869) 12 M.I.A. 523, 542.

(*b*) *Parbati* v. *Jagdis* (1902) 29 I.A. 82.

(*c*) *Kali Pershad* v. *Anund Roy* (1887) 15 I.A. 18. Also see *Rao Kishore Singh* v. *Gahenabai* (1920) 22 Bom. L.R. 507 (P.C.).

(*d*) *Raja Rup Singh* v. *Rani Baisini* (1884) 11 I.A. 149, 162.

(*e*) Books VII and VIII. *Atidesha* is a relation in which one thing contains the indication of another thing and deriving its force from that other becomes (by derivation) an incident of it: *Yasya lingamarthasanyogad abhidhanavat* VIII, i. 2. Remote analogy, however, was not permissible.

(*f*) *In fictione juris semper æquitas existit.*

in cases not expressly provided for by the *litera legis* or conventional law. Yajnavalkya enjoined that nyaya, meaning natural equity and reason, should prevail in case of conflicting rules of law (*g*). Brihaspati gave a rule of fundamental importance when he recommended yukti in the well-known *versus memorialis* that decision must not be made solely by having recourse to the letter of the written codes; since if no decisions were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice (*h*). Narada also, although he does not in this context use the expression nyaya, favours an appeal to yukti (*i*). And even apart from any special or technical significance of these expressions, it does appear that the unified legal system aimed at by the smritikars did envisage a department or aspect of law which would permit, within limits, interpretation of the sacred texts by resorting to something akin to what the modern lawyer at times does when he appeals to the "equity of the statute" (*j*). The expression *nyaya* and *yukti* are certainly broad enough to allow the two sorts of equity described by Cowell: "for the one doth abridge and take from the letter of the law, the other doth enlarge and add thereto". The smritikars dealt with the perennial conflict between law and justice by emphasizing the importance of right reason, good sense and equable justice by which alone any law can justify its existence.

Natural equity.

Principles of Justice, equity and good conscience.

Several Charters directed Courts in India to proceed when the law was silent in accordance with justice, equity and good conscience, an expression which was generally interpreted to mean rules of English law if found applicable in Indian society and circumstances (*k*). These principles were invoked only in cases for which no specific rules existed (*l*). Accordingly it was laid down by the Judicial Committee of the Privy Council in the case of a will that because the case was new the court would not take the view that it was not provided for at all Where new combinations of circumstances arose it was incumbent on the Court to apply rules of law which could be derived from general principles. Nor would the Court abandon all analogy to such principles and similar cases but would keep them steadily in view not merely for the determination of the particular cases but for the interests of law as a science (*m*). Applying this rule of jurisprudence the Privy Council held in another case that a murderer was disqualified from succeeding to the property of the murdered person in case of intestacy. This rule of English law founded on public policy was applied to the case of

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(*g*) See p. 39 *supra*.

(*h*) *Kevalam shastramashritya na kartanyo hi nirnayah: yuktiheene vichare tu dharmahanih prajayate.*

(*i*) I. 40. See f.n. (*f*) on p. 39, *supra*.

(*j*) They recognised that the rigour of the law often required to be moderated and that there was at times possibility of litigants successfully evading operation of rules of law by recourse to subtleties and technicalities. A text of Yajnavalkya enjoined the king to do justice according to the pith and substance of the rule of law and disregard technical flaws and deceptive subtleties: *Chhalam nirasya bhootena vyavaharannayennrupah;* II, 19.

(*k*) *Waghela Rajsanji* v. *Sheikh Masludin* (1887) 14 I.A. 89.

(*l*) *Ram Coomar* v. *Chunder Canto* (1876) 4 I.A. 23, 50-51.

(*m*) *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872) Sup. I.A. 47. Also see *Subramania Ayyar* v. *Rathnavelu Chetty* (1918) 41 Mad. 44, 74 (F.B.).

a Hindu on grounds of justice, equity and good conscience (*n*). But care was taken to see that no refined distinctions essentially characteristic of English law and no technical rules of equity were introduced into Hindu law (*o*). Though there are no texts in the smritis expressly recognising the right of an adopted son to inherit to his adoptive mother's relations, this right has been enforced on general principles of equity and good conscience and analogy deduced from texts applicable to similar cases (*p*). In a recent case the Supreme Court observed that it is now well known that in the absence of any clear Shastric text the Courts have authority to decide cases on principles of justice, equity and good conscience unless it is shown that the decision would be repugnant to or inconsistent with any doctrine or theory of Hindu Law (*q*).

Appeal to the genius of Hindu Law.

Where there is absence of any express rule of law and any authority affording any real guidance and no rule of custom, appeal to the spirit of the law is not unknown. Some modern decisions of the highest tribunal in England go to show that, while judges do not legislate at large, they do subscribe to the view that only in the absence of authority, and when the spirit of the law suggests the affirmation of previously unknown or undertermined duties, the Courts do commit themselves to novelty, though of course, very cautiously. Instances do occur from time to time, though they are not frequent, where the Courts in examining any new situation or a new jural relationship have regard to the genius of the Hindu Law (*r*) and the consciousness of the community at large and also found the conclusions reached by them on the grounds that they were more in accordance with the reason of the thing and general principles.

Judicial decisions as a source of law.

Since the reduction of India under British rule another element was added to the effective sources of Hindu Law. The courts had to ascertain and administer the personal law of the Hindus in matters relating to succession, inheritance, marriage, adoption and religious usages and institutions except in so far as such law was altered by legislative enactment. The decisions of Courts, founded on interpretation of the texts of the Smritis and principally on the views expressed by the commentators accepted as leading authorities in the different Schools, although they immediately affected only the parties, necessarily operated as binding on the entire community. Judicial precedents became necessary and useful for in them the Courts found reasons to guide them and the authority of those who made them had to be regarded. Unfortunately, however, the importance of custom was at times not fully appreciated and decisions given on some points had the effect of disturbing

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(*n*) *Kenchava* v. *Girimalappa* (1924) 51 I.A. 368. S. 25 of the Hindu Succession Act, 1956, now inflicts this disqualification on the murderer.

(*o*) *Juttendromohun Tagore* v. *Ganendromohun Tagore supra.*

(*p*) *Subramania Ayyar* v. *Rathnavelu Chetty supra.*

(*q*) *Gurunath* v. *Kamalabai* (1951) 1 S.C.R. 1135, 1147, 1148. Also see *Peramanayakam* v. *Sivaraman*, ('52) A.M. 419, 472, 473 (F.B.). Reference may be made to *Kamalakshy* v. *Narayani* ('68) A.Ker. 123.

(*r*) For instance see *Tiruvengadam* v. *Butchayya* (1929) 52 Mad. 373, 379.

what had been accepted by the community as established law. The *cursus curiae* was bound to be strong in these matters and there was little chance of retracing the steps already taken because obviously the preferable course was to follow the doctrine of *stare decisis* and to uphold a decision already given rather than overturn it after it had stood unreversed and acquired increased strength by lapse of time. This, as will be presently pointed out, tended to impart a measure of rigidity to the law. With numerous Superior Courts administering law in different parts of the country there grew up a mass of case-law and most of the important points of Hindu law are now to be found in the law reports and to this extent it may be said that the decisions on Hindu law, though not in theory yet in effect, have in part superseded the commentaries and limited and supplemented the rules of Hindu law. Modern jurisprudence endorses the importance of authoritative precedents and accepts them as legal sources of law being entitled to unquestioning obedience. The pronouncements of the Privy Council and now of the Supreme Court are final and in practice recourse to them is of the utmost importance and necessity: The decisions of the Privy Council and the Supreme Court are binding on all the other Courts of India including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the courts subordinate to it.

Hindu law not static but empiric and progressive and a living system.

It must have been seen from the foregoing observations that Hindu law was not static or staid but was empiric and progressive. Sir Henry Maine, author of Ancient Law, and some of his contemporaries propounded the speculative theory that the Manusmriti and other Smriti Codes did not at any time constitute a set of rules of positive law actually administered in India. In their opinion, expressed with smug uncharitableness, the Smriti law, in great part, was merely the ideal picture of that which in the view of the Brahmins, ought to be the law. It was suggested by an eminent English author that Hindu law was "a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit". All this naturally disturbed many Indian jurists and scholars who felt compelled to refute the charge. It is no more necessary to discuss that theory since it has now been securely interred and its perturbed spirit has ceased to wax the law. Some writers on Hindu law made observations of a like nature with lofty disdain or condescension and some captious critics could see in the Dharmashastras only primitive rules of rude simplicity. Dr. Sen has observed that the critic who pretended to see nothing in the Hindu law but a stagnant mass of archaic rules knew not what he said and only showed that he himself had a stagnant mind. This eminent jurist has, however, justly pointed out that for this attitude of those writers we ourselves are partly responsible. While foreign jurists, in spite of their many disadvantages have, out of a spirit of research, directed their attention to Hindu law, no matter with

what success, we ourselves have simply looked on (*s*). It must also be acknowledged that translations of many Dharmashastras by eminent orientalists of Europe in the Sacred Books of the East Series and in other publications and the monographs written by them are the result of untiring research and evince critical power of a high degree. Mostly based on leading commentaries, those translations of some of the Smritis have been of great help to the Courts and generations of lawyers and students of Hindu law.

The slow and steady process of development of Hindu law was the result of innovations often imperceptible as happens when old and obsolete rules become gradually displaced by growing usages and customs. In a large measure impetus was given to that progress by the standard works of those leading commentators and nibandhakars who did not permit themselves to be fettered by orthodox prejudices and showed liberal readiness to move with the times. But as the Hindu Law Committee very appropriately observed, we have no longer Smritikars and commentators of the old type; we have the Legislature and the Courts of Law. The Courts of Law, however, do not exercise the same freedom of interpretation in moulding the law as did the ancient commentators even when the interpretation was not fairly deducible from the earliest authorities. This practically meant that Hindu law, excepting in so far as the Legislature intervened, had to remain arrested in its growth at the point at which it was left by Vijnaneshvara, Jimutavahana and other recognised commentators, the latest of whom flourished in the 18th century (*t*). For more than two thousand years after the Code of Manu was compiled, Hindu law pursued the even tenor of its way without any real break in its continuity and was altered, improved and refined from time to time. But the spontaneous growth of Hindu law was retarded if not wholly stopped with the reduction of India under British rule. The difficulties of English Judges, who did not know the language of the Dharmashastras, when called upon to administer a system of law which required understanding and appreciation of argumentative works, religious traditions, ancient usage and more modern habits of the Hindus with which they were unfamiliar, were indeed great. No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. The ancient works and commentaries dealt with and discussed texts which were mandatory as well as those which were directory and did not always draw a clear line of demarcation between matters religious and secular (*u*). Texts which did not contain positive law were at times not distinguished from rules intended for positive laws and in a number of cases the Privy Council sounded a note of caution while correcting such errors. In difficult cases some of those judges were not unnaturally inclined to rely on their own concepts of what the law should be and on *praesumptiones hominis* and at times reached

Its growth arrested.

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(*s*) Sen's Hindu Jurisprudence, p. 110.
(*t*) Report of the Hindu Law Committee, 1941, paras 15-16.
(*u*) See pp. 1, 8, 9, *supra*.

conclusions at variance with the spirit and substance of Hindu law. In some cases, doctrines of English law of doubtful applicability were pitchforked into Sanskrit texts and Roman law was laid under contribution. The Privy Council, not being unmindful of all this, observed in a very early case (*v*): "At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindoos, with which we cannot be familiar."

Decisions of the Privy Council.

With their mastery of jurisprudential concepts and their unmatched forensic ability to expound and elucidate even the most complicated matters of unfamiliar laws affecting the personal status of parties, their Lordships of the Privy Council evolved principles and laid down rules on varied and complex subjects in their own unique style and generations of lawyers and judges in this country have acknowledged their indebtedness to that august Tribunal for the lead and guidance given by it. The principle was established that the duty of a judge, who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities (Smritis), as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law (*w*).

Difficulty of establishing custom.

But 'clear proof of usage' of necessity required establishment of the usage by showing that it was ancient, certain and reasonable and where the attempt was to support any usage in derogation of the general rules of Hindu law it had to be construed strictly. The lawyer familiar with rules of procedure and evidence knows the practical difficulties in the way of a party who undertakes the heavy burden of adducing satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent, been submitted to by a class or a district or local area. The course of practice upon which the custom is said to rest must not be left in doubt but be proved with certainty. Moreover custom in matters of personal law readily applies closure and does not permit of extension by analogy nor of any deductivity by *a priori* methods. Custom should occur substantially under conditions 'substantially similar and instances must indicate the probable general habit of persons under similar circumstances. The principles are indubitably sound but the difficulties of proving modifica-

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(*v*) 4 M.I.A. 1, 97, 98.

(*w*) *Collector of Madura* v. *Mottoo Ramalinga* (1868) 12 M.I.A. 397, 435, 436. In Chapter X *post* Sir Dinshah Mulla while discussing Stridhana according to the Smritis, the Commentaries and Judicial Decisions has pointed out how the Judicial Committee of the Privy Council, notwithstanding repeated warnings given by it that the Courts of India should take the law not from the Smritis but from the commentaries, brushed aside a text in the Mitakshara which maintained the doctrine that property inherited by a woman became her Stridhan (§ 112).

tions and variations in the old rules of law introduced by custom were at times almost insurmountable and the task often beyond the means of an average litigant. The effect of some of the pronouncements of the highest tribunal was to treat certain commentaries as having laid down the last word on every rule collocated and dealt with in them centuries ago and the task of the courts as no more than application of those self-same rules to a fast changing society. Referring to the arrest of progress suffered by Hindu law, Mr. Mayne wrote that "no voices were heard unless they came from the tombs." Some ancient texts and injunctions favoured by the commentators which had not been accepted as part of current law and virtually abandoned in practice were in some cases received as binding law and given inflexible interpretation. All this tended in a large measure to unprecedented rigidly and to the creation of judge-made law which from the inherent limitations on its scope could not be expected to respond adequately to all changing needs and circumstances. The only remedy was comprehensive legislation in the form of a uniform code.

Codification.

Codification is a well-known subject. Its chief apostle was Bentham and its greatest antagonist was Savigny. It has been said that they were both giants to each of whom half his prayers were granted, whilst the other half was scattered to the winds. According to Savigny, "law should be gradually developed by the silent internal forces of national consciousness with the least possible interference by the legislature." Modern jurisprudence recognises the advantages of the transformation of well-developed and long established traditional and customary law into statutory form. It accepts innovations on the substance of existing law and even extirpation and substitution of any part of that law to ensure that it accords with the actual circumstances in which the people of a country are placed. Idealists and totalitarians had most of them to agree that there existed a large number of anomalies and inequitable rules in the complicated structure of Hindu law which could be dealt with only by legislation. It could no longer be denied that the fast moving conditions and the social, economic and political transformation in the country had rendered imperative substantial and radical changes in that law. It has to be admitted that far-reaching and fundamental changes had become inevitable for they alone could furnish fair and equable solutions to some of the most controversial questions relating to the law of marriage and succession.

Some relevant considerations.

The question of codification of Hindu law has been debated for nearly a century both by law reformers who like Bentham were staunch advocates of the theory of the utility of a Code of laws and by others who like Savigny exaggerated the defects of a Code and declined to accept its practical utility. Bentham wrote that the great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten and that its style should be characterised by force and harmony. The code of his

dreams, one that would not require schools for its explanation or casuists to unravel its subtleties and be a complete self-sufficing enactment, was indubitably an ideal to be pursued but he pushed his theory too far when in his aim at finality he minimised all practical difficulties in the way of such legislation. Codification has all along been opposed by those who deprecated legislation in any shape or form in Hindu law on religious grounds and by some others on the ground that it would be impossible to give legislative form to the spacious and complicated structure that was Hindu law. Much of the opposition was grounded in sentiment and not in reason. Some objection belonged to the class of uninformed and orthodox element though it must be said that there was considerable sentiment born of reverence for an institution which had its roots in hoary antiquity. It was not realised by some dry traditionalists that the venerated authors of the Dharmashastras had themselves been progressive and tried to keep the law in harmony with their environments and in general responded to changing ideas, changing customs and the march of time.

Recent enactments.

The Hindu Law Committee appointed in 1941 to examine Hindu law recommended that it should be codified in gradual stages beginning with the law of intestate succession and marriage. The Committee ceased to function after making considerable progress and was revived in 1944. The Committee presided over by Sir Benegal Narsing Rau—known as the Rau Committee—made its report and presented a draft code. One of the objects of the Committee was to evolve a uniform code of Hindu law which would apply to all Hindus by blending the most progressive elements in the various schools of law which prevailed in different parts of the country. The draft of the Code presented by the Committee was to be regarded as an integral whole so that no part of it would be judged as if it stood by itself. The Hindu Law Bill remained on the anvil for a long time and ultimately those in charge of it decided to split it into certain parts and to move the Parliament after placing each part separately before it. The advantages of this were probably practical but one disadvantage was that it meant legislation by instalments. Such codification, however carefully done, cannot derive the full benefit of a pre-conceived plan of the whole system to be wrought upon. Instalments of a law intended to be uniform and to operate as an organic whole have come into operation at intervals during 1955 and 1956 and this must raise some problems and create some anomalous situations and this apart from the fact that the enactments which have so far found place on the statute-book leave an undetermined residue. The Hindu Marriage Act was enacted in May 1955, the Hindu Succession Act in June 1956, the Hindu Minority and Guardianship Act in August 1956 and the Hindu Adoptions as Maintenance Act in December 1956.

Fundamental Changes.

The changes brought about by the two principal enactments the Hindu Marriage Act, 1955, and the Hindu Succession Act, 1956, are pointed out in the Introductory Notes to the commentaries to those Acts. It will suffice here to state that the alternative conditions which had arisen in matters social, economic and political made it imperative that polygamy should not be permitted and rules of succession should be equitable. The outstanding feature of the new Hindu Marriage Act is that monogamy is now enforced as a rule of law and bigamy is rendered punishable as a crime. The conditions and requirements of a ceremonial Hindu marriage are considerably simplified and any two Hindus, which expression includes not merely Hindus by religion but Buddhists, Jains and Sikhs as well, can solemnize the ceremonial marriage recognised by the Act. Relief by way of judicial separation, declaration of nullity of marriage and divorce are permissible under the Act. There is considerable force in the remark belonging to times long past that rules of succession to property being in their nature arbitrary, are in all systems of law mostly conventional and that even deeply rooted traditions may have to change with the march of time. The new Hindu Succession Act may seem to break violently with the past but it has to be conceded that it is characteristic of the age which is one of great ideals and fast changing theories. One outstanding feature of this Act is that it lays down a uniform system of inheritance for the whole country and lays down some simple rules relating to succession to the property of a Hindu male and female. The property of a male Hindu dying intestate after the commencement of the Act devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction. Another notable feature of the new Act is that any property possessed by a female Hindu is now held by her as her absolute property and she has full power to deal with it and can even dispose of it by will as she likes. The restraints and limitations on her power have ceased to exist even in respect of existing property, so that any property possessed by a female Hindu whether acquired by her before or after the commencement of the Act, is now held by her as full owner and not as limited owner.

Right of woman to be in *equali jura*.

The objects achieved by the new legislation are substantial unification of Hindu law by blending much that was progressive in the various schools of law which prevailed in different parts of the country and removal of many anomalies and incongruous injunctions. One aim of this legislation was to act, it is submitted rightly, on the principle that where the reason of the rule had ceased to exist there was little justification for insistence upon its preservance. *Cessante ratione legis cessa ipsa lex.* Renascent India of the post-independence era appreciated the value of a fresh

and broadened outlook in matters affecting the rights social, economic and political of the citizen regardless of sex. Adult suffrage and political parity were fore-runners to the recognition of all that was implicit in the constitutional directives and fundamental guarantees of equality of status and equality before the law enounced in the Constitution. The underscoring of the rights of women to be in *equali jura* finds concrete shape in the new legislation.

# PRINCIPLES OF HINDU LAW

## CHAPTER I

## OPERATION OF THE HINDU LAW

**1. Personal Law.**—(1) Wherever the laws of India admit the operation of personal law, the right and obligations of a Hindu are determined by Hindu law, that is, his traditional law subject to the exception that any part of that law may be modified or abrogated by statute.

(2) The Hindus are divided into four castes (*a*), namely—

(1) the Brahmans, or priestly caste;
(2) the Kshatriyas, or warrior caste;
(3) the Vaisyas, or agricultural caste; and
(4) the Sudras.

The members of the first three castes are called twice-born or regenerate. The second birth or regeneration consists in the study of the Vedas or sacred literature and in the performance of *samskaras* or sacraments. All these are denied to Sudras except the *samskara* of marriage (*b*).

The above classification was of considerable importance prior to the recent enactments. The classification, however, continues to be relevant in certain matters to be decided in accordance with the earlier law. In cases of adoption the adopted son had to belong to the same caste as the adoptive father. In cases of marriage, according to one view, the parties to the marriage had both to belong to the same caste.

In the undermentioned case (*b*1) the Supreme Court explained who are Hindus and stated the broad features of Hindu religion.

*Kayasthas.*—It has been held by the High Court of Calcutta that Kayasthas as a general rule are Sudras (*c*). On the other hand, it has been held by the High Courts of Allahabad (*d*) and Patna (*e*), that they are not Sudras, but belong to one of the three regenerate classes, probably Kshatriyas.

*Marathas.*—There are three classes of Marathas in the Bombay State, namely (1) the five families, (2) the ninety-six families, and (3) the rest. Of these, the first two classes are Kshatriyas, and the last Sudras (*f*).

*Vaidyas.*—The Vaidyas of Bengal are Sudras (*g*). The Tanjore branch of the Marathas descended from Shivaji belongs to the Sudra and not to the Kshatriya caste (*h*). The Madura Ramayana Chavadi Thousand Yadavas residing chiefly in Madura and adjoining villages are Sudras (*i*).

*Sadgopes.*—The Sadgopes of Bengal are not *Vaisyas* but Sudras (*j*).

*Komatis.*—The Komatis of Madhya Pradesh are a Telugu caste of Vaisyas (*k*).

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(*a*) *Chuoturya* v. *Sahub* (1857) 7 M.I.A. 18, 4 W.R. 132.

(*b*) See Banerjee on Marriage and Stridhana, 5th ed., pp. 31, 37.

(*b*1) *Yagnapurushdasji* v. *Muldas* ('66) A.S.C. 1119.

(*c*) *Raj Coomar Lall* v. *Bissessur Dyal* (1884) 10 Cal. 688; *Asita Mohon* v. *Nerode Mohan* (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292, on appeal (1920) 47 I.A. 140, 145, 24 C.W.N. 794, 798, ('20) A.P.C. 129; *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 81 I.C. 709 ('24) A.C. 616; *Raj Nandini* v. *Aswini Kumar* (1941) 1 Cal. 457, ('41) A.C. 20.

(*d*) *Tulshi Ram* v. *Behari Lal* (1890) 12 All 328, 334.

(*e*) *Ishwari Prashad* v. *Rai Hari Prasad* (1927) 6 Pat. 506, 106 I.C. 620 ('27) A.P. 145.

(*f*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I.C. 497, ('28) A.B. 295.

(*g*) (1941) 1 Cal. 457 noted under n. (*c*) *supra.*

(*h*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*i*) *Mokka Kone* v. *Ammakutti Ammal* (1928) 51 Mad. 1 (F.B.), ('28) A.M. 299.

(*j*) *Durga Das Pan* v. *Santosh Kumar Pan* (1945) 1 Cal. 17.

(*k*) *Nagi* v. *Rajkunwar* ('56) A.N. 138,

*Christian: Reconversion to Hinduism: Caste.*—In *S. Rajagopal* v. *C. M. Armugam* (*k*1) the Supreme Court pointed out that the tenets of Christianity militate against persons professing it from being divided or discriminated on the basis of caste and that a Adi Dravida Hindu who gets converted ceases to belong to the Adi Dravida caste. The Court referred to a number of decisions where it was held that on reconversion to Hinduism, a person can become a member of the same caste in which he was born and to which he belonged before his conversion to another religion. The main basis of those decisions (*k*2) is that, if the members of the caste accept the reconversion of the person as a member, it should be held that he does become a member of that caste, even though he may have lost membership of the caste on conversion to another religion. This question was left open by the Supreme Court. On merits of the case arising out of clection disputes it was held that the appellant had failed to establish that he became a member of the Adi Dravida Hindu caste (Scheduled Caste) after he started professing the Hindu religion.

**2. Application of Hindu Law.**—The power of the Courts of India to apply the Hindu law to Hindus is derived from and regulated by certain statutes of the British Parliament and by imperial and provincial legislation passed during the period of British rule, which unless altered or repealed are to continue in force under the express provisions of Art. 372 of the Indian Constitution.

**3. Extent of application of Hindu Law.**—(1) The Hindu law as administered by the Courts of India is applied to Hindus in some matters only.

(2) Throughout India, questions regarding succession, inheritance, marriage, and religious usages and institutions, are decided according to Hindu law, except in so far as such law has been altered by legislative enactment.

(3) Besides the matters above referred to, there are certain additional matters in which the Hindu law is applied to Hindus, in some cases by virtue of express legislation, and in others on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also, the Hindu law is to be applied subject to such alterations as have been made by legislative enactment.

**4. Acts modifying and abrogating rules of Hindu Law.**—Fundamental and radical changes have been made recently by the following Acts:—

(1) Hindu Marriage Act, 25 of 1955;

(2) Hindu Succession Act, 30 of 1956;

(3) Hindu Minority and Guardianship Act, 32 of 1956; and

(4) Hindu Adoptions and Maintenance Act, 78 of 1956.

The Hindu law had, prior to 1955, been modified and supplemented in certain respects by the following Acts:—

(i) *The Caste Disabilities Removal Act*, 1850.—According to the Hindu law and usage, if a Hindu renounces his religion, or is excluded from the communion of that religion, or is deprived of caste, such renunciation, exclusion or deprivation entails a forfeiture of his rights and property, and deprives him of his right of inheritance. The effect of the above-mentioned Act was that these consequences ceased to be enforced as law in the Courts of British India (*l*). The Act is also known as the Freedom of Religion Act.

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(*k*1) ('69) A.S.C. 101.

(*k*2) These cases are collected at pp. 108, 109 of the above decision in ('69) A.S.C. 101.

(*l*) *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477. See also *Chidambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179.

(ii) *The Hindu Widows' Remarriage Act,* 1856.—This Act legalizes the remarriage of Hindu widows in certain cases.

(iii) *The Indian Succession Act,* 1925, *ss.* 57, 214, *and Schedule III to the Act.*—These sections are dealt with in the chapter on Wills.

(iv) *The Native Converts' Marriage Dissolution Act,* 1866.—This Act enables a Hindu convert to Christianity to obtain a dissolution of marriage under certain circumstances.

(v) The Special Marriage Act XLIII of 1954.

(vi) *The Transfer of Property Act IV of* 1882.—This Act supersedes the whole of the Hindu law as to transfer of property.

(vii) *The Indian Majority Act,* 1875.—This Act, which fixes the age of majority on completion of the eighteenth year, applies to Hindus, except in matters of marriage, divorce and adoption.

(viii) *The Guardians and Wards Act,* 1890.—This Act applies to Hindus in cases where a guardian has to be, or has been, appointed by the Court.

(ix) *The Hindu Inheritance (Removal of Disabilities) Act,* 1928.—This Act limits the disabilities which excluded a Hindu from inheritance and from a share on partition.

(x) *The Hindu Law of Inheritance (Amendment) Act,* 1929.—This Act admits the son's daughter, the daughter's daughter, the sister, and the sister's son, as heirs, next after the father's father and before the father's brother. This Act is now repealed by s. I of the Hindu Succession Act, 1956.

(xi) The Child Marriage Restraint Act XIX of 1929.

(xii) *The Hindu Gains of Learning Act,* 1930.—This Act makes all acquisitions by means of learning the separate property of the acquirer.

(xiii) *The Hindu Women's Rights to Property Act XVIII of* 1937.—This Act, which came into force on the 14th April 1937, gives new rights of inheritance to widows, and strikes at the root of a Mitakshara coparcenary. This Act is now repealed by s. 31 of the Hindu Succession Act 30 of 1956.

(xiv) *The Hindu Married Women's Right to separate Residence and Maintenance Act,* 1946.—This Act is now repealed by s. 29 of the Hindu Adoptions and Maintenance Act, LXXVIII of 1956.

**5. Enactments referred to in § 2.**—For a statement in a tabular form of the enactments referred to in § 2 above, the Courts to which they apply, and the extent to which the Hindu law is to be administered by those Courts, reference may be made to § 5 of the earlier editions of this work.

**6. Persons governed by Hindu Law.**—The four New Enactments of 1955 and 1956 stated in § 4 above expressly mention the persons to whom they are applicable. §§ 6 and 7 are based on decisions of Courts, relating to old uncodified Hindu law, determining persons governed by Hindu law and stating persons to whom Hindu law has been held not to be applicable. The Hindu law applies—

(i) not only to Hindus by birth, but also to Hindus by religion, i.e. converts to Hinduism (*o*);

In a very recent decision the Supreme Court (*o*1) pointed out that a person may be a Hindu by birth or by conversion. A mere theorctical allegiance to the Hindu faith

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(*o*) *Abraham* v. *Abraham* (1863) 9 M.I.A. 195, 243; *Jowala* v. *Dharum* (1866) 10 M.I.A. 511, 537; *Dagree* v. *Pacotti* (1875) 19 Bom. 783, 788; *In re Joseph Vadiar of Nazareth* (1872) 7 Mad. H.C. 121; *Morarji* v. *Administrator-General* (1929) 52 Mad. 160, 111 I.C. 364 ('28) A.M. 1279; *Sahdeo Narain* v. *Kusum Kumari* (1922) 50 I.A. 58, 2 Pat. 230, 71 I.C. 769 ('23) A.P.C. 21; *Palaniappa Chettiar* v. *Alagan Chetti* (1921) 48 I.A. 539, 44 Mad. 740, 64 I.C. 439, ('22) A.P.C. 228; *Ganesh Mahto* v. *Shib Charan Mahata* (1932) 11 Patna 139, 133 I.C. 165. ('31) A.P. 305 following (1928) 51 Mad. 1 (F.B.), 108 I.C. 760, ('28) A.M. 299; *Sunder Devi* v. *Jhaboo Lal* ('57) A.A. 215 (inheritance to property of a Muslim woman converted to Hinduism).

(*o*1) *Perumal* v. *Ponnuswami* ('71) A.S.C. 2352. In *Bhaiya Sher Bahadur* v. *Ganga Baksh* (1913) 36 All. 101, 115-116, 41 I.A. 1, 14, the Privy Council had left this question open.

by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a *bona fide* intention to be converted to the Hindu faith accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification is necessary to effectuate conversion.

In a case decided by the Privy Council, Lord Shaw, in delivering the judgment of the Board, said in effect that the expression "Hindu" in the Indian Succession Act included a convert to Hinduism (*q*).

See § 7(4).

(ii) to illegitimate children where both parents are Hindus (*r*);

(iii) to illegitimate children where the father is a Christian and the mother a Hindu, and the children are brought up as Hindus. But the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case apply to such children (*s*);

(iv) to Jains (*t*), Buddhists in India, Sikhs (*u*), and Nambudri Brahmins (*v*) except so far as such law is varied by custom and to Lingayats who are considered Sudras (*w*);

(v) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance (*x*). Or even without a formal ritual of reconversion when he was recognised as a Hindu by his community (*y*);

(vi) to sons of Hindu dancing girls of the Naik caste converted to Mahomedanism, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus (*z*);

(vii) to Brahmos (*a*); to Arya Samajists (*b*); and to Santhals of Chota Nagpur (*c*); and also to Santhals of Manbhum (*d*) except so far as it is not varied by custom; and

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(*q*) *Kamawati* v. *Digbijai* (1921) 43 All. 525, 533, 48 I.A. 381, 385, 64 I.C. 559, ('22) A. PC. 14.

(*r*) See *Ram Kumari, in the matter of* (1891) 18 Cal. 264; *Dattatraya Tatya* v. *Matha Bala* (1934) 58 Bom. 119, 149 I.C. 821, ('34) A.B. 36.

(*s*) *Myna Boyee* v. *Oataram* (1861) 8 M.I.A. 400.

(*t*) *Sheo Singh* v. *Dakho* (1878) 1 All. 688, 5 I.A. 87 (adoption); *Chotay Lall* v. *Chunnoo Lall* (1878) 4 Cal. 744, 6 I.A. 15 (*inheritance*): *Sheokuarbai* v. *Jeoraj* (1920) 25 C.W.N. 273, 275, 61 I.C. 481 [P.C.]; *Rup Chand* v. *Jambu Parshad* (1910) 37 I.A. 93, 6 I.C. 272 (adoption): *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H.C. 241, p. 247 (adoption): *Thackersey* v. *Hurbhum* (1884) 8 Bom. 432, p. 453 (Jain temple): *Parshotam* v. *Venichand* (1921) 45 Bom. 754, 757, 61 I.C. 492, ('21) A.B. 147 (adoption); *Gateppa* v. *Eramma* (1927) 50 Mad. 228, 99 I.C. 503, ('27) A.M. 228 [adoption]: *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I.C. 628 ('30) A.B. 517 [alienation by Jain widow]: *Jaiwanti* v. *Anandi Devi* (1938) 59 All. 196, 173 I.C. 356, ('38) A.A. 62; *Suganchand* v. *Mangibai* (1942) Bom. 467, 44 Bom. L.R. 358, 20 I.C. 759, ('42) A.B. 185.

(*u*) *Rani Bhagwan Koer* v. *Bose* (1903) 31 Cal. 11, 30 I.A. 249; *Inder Singh* v. *Sadhu Singh* (1944) 1 Cal. 233. See *Bahadursingh* v. *Dalipsingh* ('50) A.M.B. 1.

(*v*) *Vishnu* v. *Akkamma* (1911) 34 Mad. 496, 6 I.C. 583; *Narayan Iyer* v. *Moorthi Kenden* (1938) Mad. 897, ('38) A.M. 643; *Narayanan Namboori* v. *K. Ravi Varma* ('56) A. Trav.-Co. 74 (Nambudri Malayalam Brahmins in Travancore-Cochin).

(*w*) *Tirkangauda* v. *Shivappa* (1943) Bom. 706, 45 Bom. L.R. 992, ('44) A.B. 40. Also see § 627 *post*.

(*x*) *Kusum* v. *Satya* (1903) 30 Cal. 999.

(*y*) *Durga Parasada Rao* v. *Sudarsanaswami* ('40) A.M. 513. Also see *Rajagopal* v. *Armugam* ('69) A.S.C. 101.

(*z*) *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420.

(*a*) *In the goods of Jnanendra Nath Roy*, (1922) 49 Cal. 1069.

(*b*) *Mst. Suraj* v. *Attar* (1922) 1 Pat. 706, 713-714, 67 I.C. 550, ('22) A.P. 378; *Iswar Radhakanta* v. *Khetra* ('49) A.C. 253; *Shyamsunder* v. *Shankar Deo* ('60) A. Mys. 27.

(*c*) *Chunka* v. *Bhabani* (1945) 24 Pat. 727. Also see *Langa* v. *Jiba* cited in the f.n. below.

(*d*) *Budhu* v. *Dukhan* ('56) A.P. 123; *Langa* v. *Jiba* ('71) A. Pat. 185 (Aboriginal Santhals of village Kutchai are Hindus).

(viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872 (*e*). Also see § 7 (4) *infra*.

Many persons of aboriginal tribes and origins have been absorbed in the Hindu faith and have come under the sway of Hindu law. Naiks in Madhya Pradesh who were originally of Gond origin are governed by Hindu law (*f*). Rajgonds are not Hindus but the presumption is that they are governed by Hindu law unless the contrary is shown (*g*). That presumption was applied by the Nagpur High Court in the undermentioned case (*h*).

As to Kurmi Mahtons of Chota Nagpur see *Mohari Mahto* v. *Mokaram Mahto* ('63) A.A.P. 466 and decisions cited there.

A person who is born a Hindu and has not renounced the Hindu religion, does not cease to be a Hindu merely because he departs from the standard of orthodoxy in matters of diet and ceremonial observances (*i*). The acceptance of the "Granth Sahib" by the Udassis (a Schismatic sect of Sikhs who remained within the fold of Hinduism) is in no way inconsistent with their continuing as Hindus (*j*). A Hindu does not by becoming a Jati Vaishnava (a sect in Bengal not recognising the caste system) cease to be a Hindu (*k*).

In the undermentioned case (*k*1) the Supreme Court explained who are Hindus and stated the broad features of Hindu religion (Swaminarayan Sect).

**7. Persons to whom Hindu Law does not apply.**—The Hindu law does not apply—

(1) to the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians (*l*), or to illegitimate children of a Hindu father by a Mahomedan mother (*m*);

These are not Hindus either by birth or by religion.

In § 6, cls. (ii) and (iii), the mother is a Hindu, but not so here.

(2) to the Hindu converts to Christianity. Succession to the estate of a Hindu convert to Christianity who dies a Christian and intestate is governed by the Indian Succession Act, 1865, now the Indian Succession Act, 1925. A person ceasing to be a Hindu in religion cannot since the passing of the Act of 1865 elect to continue to be bound by the Hindu law in the matter of succession (*n*);

*Native Christians.*—In cases before the Indian Succession Act, 1865, it was held by the Judicial Committee of the Privy Council that a Hindu convert to Christianity may, if he thinks fit, continue to be bound by Hindu law, although he has renounced the Hindu religion (*o*), but these decisions are no longer good law. See the Indian Succession Act, 1925, s. 58.

It is not settled whether the Hindu *rule of survivorship* is applicable to the families of Native Christians who *continue to be joint* even after conversion. According to the

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(*e*) *Vidyagavri* v. *Narandas* ('28) A.B. 74; *Punyabrata Das* v. *Monmohan Ray* ('34) A.P. 427; *Thukru Bai* v. *Attavar* (1935) 58 Mad. 1004, ('35) A.M. 653.

(*f*) *Nagi* v. *Rajkunwar* ('56) A.N. 138. Also see *Rafail Uraon* v. *Baiha Uraon* ('57) A.P. 70.

(*g*) *Dashrath Prasad* v. *Lallosingh* ('51) A.N. 343, (1951) Nag. 873.

(*h*) *Raja Chattar Singh* v. *Diwan Roshan Singh* (1946) Nag. 159, ('46) A.N. 277.

(*i*) *Rani Bhagwan Koer* v. *Bose* (1903) 31 Cal. 11, 30 I.A. 249; *Ma Yait* v. *Maung Chit* (1921) 49 Cal. 310, 321, 48 I.A. 553, 562, 66 I.C. 609, ('22) A. PC. 197; *Ishwari Prashad* v. *Rai Hari Prashad* (1927) 6 Pat. 506, 106 I.C. 620, ('27) A.P. 145 (Kayasthas of Bihar).

(*f*) *Mahant Basant* v. *Hem Singh* (1926) 7 Lah. 275, 94 I.C. 695 ('26) A.L. 100.

(*k*) *Nalinaksha* v. *Rajanikanta* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

(*k*1) *Yagnapurushdasji* v. *Muldas* ('66) A.S.C. 1119.

(*l*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 (maintenance).

(*m*) *Charanjit Singh* v. *Amir Ali Khan* (1921) 2 Lah. 243, 248, 64 I.C. 892, ('21) A.L. 121.

(*n*) *Kamawati* v. *Digbijai Singh* (1921) 43 All. 525, 48 I.A. 381, 64 I.C. 559, ('22) A. PC. 14; *Dagree* v. *Pacotti* (1895) 19 Bom. 783.

(*o*) *Abraham* v. *Abraham* (1963) 9 M.I.A. 195, 241; *Sri Gajapathi* v. *Gajapathi* (1870) 14 W.R. (P.C.) 33.

Madras High Court, it is not applicable to such families (*q*), according to the Bombay High Court, it is (*r*). Two Hindu brothers *A* and *B* constituting a joint Hindu family, become converts to Christianity and continue to be joint after their conversion. *B* dies leaving a widow. According to the Madras High Court, *B*'s one-half share in the property should go to his heirs under the Indian Succession Act, 1925. According to the Bombay High Court, *B*'s one-half share should go to *A* by *survivorship*. The decision of the latter Court proceeds on the ground that the Indian Succession Act, 1925, deals with inheritance and does not affect rights of coparcenership as between those to whom it applies.

*Custom: Tamil Vanniya Christians.*—The Tamil Vanniya Christians of Chittur Taluk are by custom governed by the rules of Hindu law in matters of inheritance and succession. The Mitakshara School of Hindu law applies to them in these matters and a son of a member of this community gets by birth an interest in ancestral property, owned by the father. In a recent decision (*r*1) the Supreme Court held that the doctrine of pious obligation applies to this community and the son is bound to discharge his father's debts not tainted by illegality or immorality. The doctrine it was observed is not opposed to any principle of Christianity.

(3) to converts from the Hindu to the Mahomedan faith.

The succession to the estate of a convert from the Hindu to the Mahomedan faith is governed by the Mahomedan, and not by the Hindu law. Khojas and Cutchi Memons, who are converts from Hinduism to Mahomedanism, and who, in accordance with their customs have hitherto been governed by the Hindu law of inheritance and succession will hereafter be governed by the Muslim personal law except where the questions relate to agricultural lands [*vide* Act XXVI of 1937 and Mulla's Mahomedan Law, 15th Edition, p. 20].

(4) The Hindu law of succession does not apply to the property of any person professing the Hindu, Sikh, or Jain, religion who married under the Special Marriage Act III of 1872 or the property of the issue of such marriage. These are governed by secs. 32 to 48 of the Indian Succession Act. Also see s. 21 of the Special Marriage Act, 1954 and s. 5(1) of the Hindu Succession Act, 1956.

(*q*) *Tellis* v. *Saldanha* (1887) 10 Mad. 69. See also *Jogi Reddi* v. *Chinnabbi Reddi* (1929) 56 I.A. 6, 9-11, 52 Mad. 83, 87-90, 114 I.C. 5, ('29) A. PC. 13.

(*r*) *Francis Ghosal* v. *Gabri Ghosal* (1907) 31 Bom. 25. See *Kulada* v. *Haripada* (1913) 40 Cal. 407, 417-418, 17 I.C. 257.

(*r*1) *Anthonyswamy* v. *Chinaswamy* ('70) A.S.C. 223.

# CHAPTER II

# SOURCES OF HINDU LAW

*Texts.*—1. "The Veda, the Smriti, the approved usage, and what is agreeable to one's soul [or good conscience] the wise have declared to be the quadruple direct evidence of Dharma [law]."—*Manu,* ii, 12.

2. "The Sruti, the Smriti, the approved usage, what is agreeable to one's soul [or good conscience] and desire sprung from due deliberation, are ordained the foundation of *Dharma* [law]."—*Yajnavalkya,* i. 7.

3. "Whatever customs, practices and family usages prevail in a country shall be preserved intact, when it comes under subjection by (conquest)."—*Yajnavalkya,* i. 343.

4. "If any usage required by utility is established in a locality [which is contrary to the written text of law] it should be practised therein only, but not in any other district. Whatever customary law is prevalent in a district, in a city, in a town or in a village, or among the learned, the said law [though contrary to the Smritis] must not be disturbed." *Devala,* cited in the *Parashara Madhaviya.*

**8. Sources of Hindu Law.**—The three main sources of Hindu *dharma* or law are (1) the Sruti, (2) the Smriti, and (3) Custom.

A practical division of the sources of Hindu law would be (1) Original texts of the Dharmashastras: (2) Commentaries and Digests and (3) Custom. Hindu law at the present day is the result of many ingredients. To these main sources must be added for all practical purposes the auxiliary indice, justice, equity and good conscience: Judicial decisions: and legislative enactments modifying or abrogating previously existing law. The sources of Hindu law have been considered in the Introduction added to this work.

(1) "Sruti" means, literally, that which was *heard.* The Srutis are believed to contain the very words of the deity, and they include the four Vedas, but they contain very little of law.

(2) "Smriti" means, literally, that which was *remembered.* It is the recollection handed down by the Rishis, or sages of antiquity, of the precepts of God. The Smritis constitute the principal source of law. The term *Dharmashastra,* literally, *teacher of law,* comprehends both Srutis and Smritis, but it is often used to designate the Smritis alone.

The three principal Smritis are—

(i) The Code or Institutes of Manu, compiled in about 200 B.C.(*s*).

(ii) The Code or Institutes of Yajnavalkya, compiled in about A.D. 100 (*t*). Mitakshara is the leading commentary upon this Code (*u*).

(iii) The Code or Institutes of Narada, compiled in about A.D. 200 (*v*).

(3) Custom. In Hindu law custom has *proprio vigore* the efficacy of law. It is not merely an adjunct of ordinary law but a constituent part of it (*w*).

**9. Commentaries as a source of law.**—The law of the Smritis was empiric and progressive and in course of time several Commentaries and Digests (Nibandhas) were written on it (*x*). The authority of the several commentators varied in different districts, and thus arose the schools of law which are operative in different parts of India.

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(*s*) See p. 20, *supra.*
(*t*) See pp. 22-23, *supra.*
(*u*) see p. 46, *supra.*
(*v*) See p. 24, *supra.*
(*w*) See Introduction pp. 60-61, *supra.*
(*x*) See Introduction p. 43, *supra.*

Though the commentators professed to interpret the law laid down in the Smritis, in fact, they recited the customs and usages which they found in vogue around them (*a*) and on this ground their interpretations have been accepted as authoritative. It is therefore the duty of Indian Courts to recognize the rules of law enunciated in the commentaries, even if they appear to proceed on a wrong interpretation of the Smritis, the reason being that under the Hindu system of law, "clear proof of usage will outweigh the written text of the law (b)."

**10. Judicial decisions as a source of law.**—Judicial decisions on Hindu law are sometimes spoken of as a source of law (*c*). Almost all the important points of Hindu law are now to be found in the law reports, and to this extent it may be said that the decisions on Hindu law have superseded the commentaries. The decisions of the Privy Council and the Supreme Court are binding on all the Courts of India including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the Courts subordinate thereto (*d*).

The Hindu law was at first administered by the English Judges with the assistance of Hindu *Pundits*. The institution of *Pundits*, as official referees of the Courts was abolished in the year 1868.

**11. Mitakshara and Dayabhaga school.**—(*1*) "The remoter sources of the Hindu law [that is, Smritis] are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose" (*e*).

(2) Properly speaking, there are only two schools of law, namely, the Mitakshara school and the Dayabhaga school. The Dayabhaga school prevails in Bengal; the Mitakshara school prevails in other parts of India.

(3) The Mitakshara is a running commentary on the Code of Yajnavalkya. It was written by Vijnaneswara in the latter part of the eleventh century (*f*). The Dayabhaga is not a commentary on any particular Code, but purports to be a digest of all the Codes. It was written by Jimutavahana who flourished in about the beginning of the twelfth century (*g*). Attention has been drawn in the Introduction to the other works which are accepted as authoritative in Bengal (*h*).

(4) The Mitakshara is of supreme authority throughout India except in Bengal. The Dayabhaga is of supreme authority in Bengal. But even in Bengal the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the Dayabhaga and the other works prevalent there (*i*). The Dayabhaga may also be

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(*a*) *Keshao Rao* v. *Sadasheorao* (1938) Nag. 469, ('38) A.N. 163.
(*b*) See p. 59, *supra*.
(*c*) See pp. 63, 64, *supra*.
(*d*) *Korban Ally* v. *Sharoda* (1884) 10 Cal. 82; *Balaji* v. *Sakharam* (1893) 17 Bom. 555. Also see *Amritlal* v. *Jayantilal* ('60) A.S.C. 964; *Dudh Nath* v. *Sat Narain* ('66) A.A. 315 (F.B.).
(*e*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 435. See p. 47, *supra*.
(*f*) See p. 46, *supra*.
(*g*) See p. 56, *supra*.
(*h*) See pp. 57-58, *supra*.
(*i*) *Bhagwandeen* v. *Myna Bace* (1867) 11 M.I.A. 487, 507-508; *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 435; *Akshay* v. *Hari Das* (1908) 35 Cal. 721.

referred to in a Mitakshara case on points on which the latter treatise is silent (*j*).

(5) It is said that the Mitakshara school is the orthodox school, and the Dayabhaga school is the reformed school, of Hindu law. The Dayabhaga school is also called the Bengal school of Hindu law.

(6) The Bengal school differs from the Mitakshara school in two main particulars, namely, the law of inheritance and the joint family system.

**12. Sub-divisions of Mitakshara school.**—(1) The Mitakshara school is sub-divided into four minor schools; these differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of the Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of the Mitakshara. This accounts for the differences between those schools (*k*).

The sub-schools and the principal works which supplement the Mitakshara in each sub-school are mentioned below:—

| | | |
|---|---|---|
| Benares school | .. | Viramitrodaya (*l*).<br>Nirnayasindhu (*m*). |
| Mithila school | .. | Vivada Chintamani (*n*).<br>Vivada Ratnakara (*o*).<br>Madanaparijata (*p*). |
| Maharashtra or Bombay school [Western India] | | Vyavahara Mayukha (*q*).<br>Viramitrodaya.<br>Nirnayasindhu. |
| Dravida or Madras school [Southern India] | .. | Smriti Chandrika (*r*).<br>Parashara Madhaviya (*s*).<br>Saraswati Vilasa (*t*).<br>Vyavahara Nirnaya (*u*). |

(2) As regards authorities in Western India the Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. In Gujerat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara (*v*).

The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize them with each other

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(*f*) *Rai Bishenchand* v. *Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164, 179; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585, 203 I.C. 244, ('43) A.O. 27.

(*k*) (1867) 11 M.I.A. 487, 507-508, *supra*.

(*l*) See p. 48, *supra*.

(*m*) See p. 50, *supra*.

(*n*) See p. 50, *supra*.

(*o*) See p. 51, *supra*.

(*p*) See p. 51, *supra*.

(*q*) See p. 52, *supra*.

(*r*) See p. 54, *supra*.

(*s*) See p. 55, *supra*.

(*t*) See p. 55, *supra*.

(*u*) See p. 56, *supra*.

(*v*) *Krishnaji* v. *Pandurang* (1875) 12 Bom. H.C. 65; *Lallubhai* v. *Mankuvarbai* (1878) 2 Bom. 388, 418; *Sakharam* v. *Sitabai* (1879) 3 Bom. 353, 365; *Balkrishna* v. *Lakshman* (1890) 14 Bom. 605; *Jankibai* v. *Sundra* (1890) 14 Bom. 612 [Mahad is not within the Northern Konkan]; *Narhar* v. *Bhau* (1916) 40 Bom. 621, 36 I.C. 539, ('16) A.B. 206.

wherever and so far as that is reasonably possible (*w*). In Poona, Ahmednagar, and Khandesh the Mayukha is considered to be of equal authority with the Mitakshara, but not capable of overruling it as in Gujerat, the Island of Bombay and the North Konkan (*x*).

**13. Works on adoption.**—The two special works on adoption are the Dattaka Mimansa and the Dattaka Chandrika. Generally speaking they are equally respected throughout India, but where they differ the Dattaka Mimansa is preferred in Mithila and Benares, and the Dattaka Chandrika in Bengal (*y*).

As to these two works their Lordships of the Privy Council said in *Balusu* v. *Balusu* (*z*): "Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for this effect, which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

In *Abhiraj Kuer* v. *Debendra Singh* (*z*1) the Supreme Court examined the text of Nandapandita in Dattaka Mimansa "*Viruddha sambandho putro varjaneeyah*" and held that it was merely recommendatory. Reference may be made to § 480(3).

As to the Dattaka Chandrika it may be said that in Bengal there is a tradition that it is a literary forgery by Raghumani Vidayabhushana who was the Pundit of Colebrooke, the celebrated English translator of numerous Sanskrit works on Hindu law. It is said that it was written to help a claim set up by an adopted son to a Raj in Bengal.

**13A. Personal law: Rule of presumption.**—A Hindu family residing in a particular state of India is presumed to be governed by the law of the place in which it resides (*a*). The mere transfer, however, of a district to another presidency or state for administrative purposes is not sufficient to affect the personal law of the residents in that district, unless and until it is shown in the case of any resident there that he had intended to change and has in fact changed his personal law (*b*).

The rule that a Hindu family residing in a particular state is *prima facie* governed by the law of that place is not founded on any doctrine affecting *lex loci*. The rule rests on personal law and status. In general it may be

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(*w*) Per Telang, J., in *Gojabai* v. *Shrimant Shahjirao* (1893) 17 Bom. 114, 118, approved in *Bai Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I.A. 176; *Bhagwan* v. *Warubai* (1908) 32 Bom. 300, 312; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585, 203 I.C. 244, ('43) A.O. 27.

(*x*) *Bhagirthibai* v. *Kahnujirao* (1887) 11 Bom. 285, 294 [F.B.]; *Bhaskar* v. *Laxmibai* ('53) A.N. 326 (Kunbis from Maharashtra); *Kanaiyalal* v. *Dhanji* ('52) A. Kutch 18 (Kutch was regarded as part of Bombay); *Kammathi* v. *Padmavathi* ('52) A. Trav.-Co. 501 (Gowda Saraswatha Brahmins of Travancore).

(*y*) *Balusu* v. *Balusu* (1899) 22 Mad. 398. 411-412, 26 I.A. 113, 131, 132; *Radha Mohan* v. *Hardai Bibi* (1898) 21 All. 460, 465-466; *Bhagwan Singh* v. *Bhagwan Singh* (1898) 21 All. 412, 419, 26 I.A. 153, 161; *Puttu Lal* v. *Parbati Kunwar* (1915) 37 All, 359, 367, 42 I.A. 155, 161, 29 I.C. 617, ('15) A. PC. 15; *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 437; *Laxman* v. *Bayabai* (1953) Nag. 656, ('55) A.N. 241; *Anandi Lal* v. *Onkar* ('60) A. Raj. 251, 10 Raj. 160; *Bodo* v. *Dondo* ('52) A. Orissa 307 (Oriyas from Madras area).

(*z*) (1899) 22 Mad. 398, 411-412, 26 I.A. 113, 131-132.

(*z*1) ('62) A. S.C. 351. Also see *Vallabhalalji* v. *Mahalaxmi Bahuji* ('62) A. S.C. 356, 64 Bom. L.R. 433.

(*a*) *Ram Das* v. *Chandra* (1893) 20 Cal. 409; *Chandrakanto* v. *Ram Mohini* ('56) A.C. 577.

(*b*) *Somasekhara* v. *Mahadeva* ('36) A.P.C. 18, 38 Bom. L.R. 317, 159 I.C. 1079. In appeal from (1930) 53 Mad. 297, ('30) A.M. 496; *Chennamma* v. *Srinivas* ('71) A. Mys. 28.

said that in matters of status there is no *lex loci* in India and every person is governed by the law of his personal status (*c*).

**14. Migration and school of law.**—(1) Where a Hindu family migrates from one state to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family relations prevailing in the state from which it came. But this presumption may be rebutted by showing that the family has adopted the law and usages of the province to which it has migrated (*d*).

(2) It is the law existing at the time of migration which continues to govern the migrated members until it is renounced. It is the law in force in the state at the time of their leaving it which continues to govern persons who have migrated to another state. Thus they are affected by decisions of the Courts of their state of origin which declare the correct law of the state up to the time of their leaving it, but not by customs incorporated in its law after they have left it (*e*).

*Illustrations*

(1) A Hindu family migrates from the North-Western Provinces where the Mitakshara law prevails to Bengal where the Dayabhaga law prevails. The presumption is that it continues to be governed by the Mitakshara law, and this presumption may be supported by previous instances of succession in the family according to the Mitakshara law after its migration and by evidence relating to ceremonies performed in the family at marriages, births and *sradhas*, showing that the family continued to be governed by the Mitakshara law after its migration: *Parbati* v. *Jagadis* (1902) 29 Cal. 433, 452, 29 I.A. 82. If the migration is proved, and it is also proved that the family followed the customs of the Mitakshara school, it is not necessary to prove also that the family immigrated to Bengal after the establishment of the Dayabhaga system of law (*f*).

(2) A joint Hindu family, consisting of two brothers *A* and *B*, migrates from the N.W.P. to Bengal. *A* dies leaving a widow *C*. The presumption being that this family continues to be governed by the Mitakshara law, the joint property will, on *A*'s death, pass to his surviving brother *B*; *C* will be entitled to maintenance only. But if the family had renounced the Mitakshara law, and adopted the Dayabhaga law, *A*'s share would pass to his widow *C*: *Parbati* v. *Jagadis* (1902) 29 Cal. 433, 29 I.A. 82.

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(*c*) *Nataraja Pillai* v. *Subbaraya Chettiar*, 77 I.A. 33, (1950) Mad. 862, ('50) P.C. 34, (1950) 52 Bom. L.R. 474; *Vasant Atmaram* v. *Dattoba* (1955) 57 Bom. L.R. 1026, I.L.R. (1955) Bom. 1021 (1956) A.B. 49; *Udebhan* v. *Vikram* ('57) A. Madh. Pra. 175; *Chandrakanto* v. *Ram Mohini*, *supra*; *Duggamma* v. *Ganeshayya* ('65) A. Mys. 97.

(*d*) *Srimati Parbati* v. *Jagadis* (1902) 29 Cal. 433, 29 I.A. 82; *Soorendranath* v. *Heeramonee* (1869) 12 M.I.A. 81; *Arjun Singh* v. *Virendra* ('71) A.A. 29; *Govind* v. *Radha* (1909) 31 All. 477, 3 I.C. 563; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I.C. 459; *Sarada Prasanna* v. *Umakanta* (1923) 50 Cal. 370, 77 I.C. 450, ('23) A.C. 485; *Jagadamba* v. *Satyanarayana* (1961) Mad. 841, (1961) 2 Mad. L.J. 297. See also *Mailathi* v. *Subbaraya* (1901) 24 Mad. 650 (migration by a Hindu widow from French India to British India); *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I.C. 257; *Sukhbir Singh* v. *Mangeisar Rao* (1927) 49 All. 302, 100 I.C. 778 ('27) A.A. 252; *Babu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I.C. 379, ('29) A.B. 57; *Basant Kumar Basu* v. *Ramshanker Ray* (1932) 59 Cal. 859, 138 I.C. 882; *Bijay Lal* v. *Bhubaneswar* ('63) A. Cal. 18; *Suganchand* v. *Mangibai* (1942) Bom. 467, 201 I.C. 759, ('42) A.B. 185; *Kachrulal* v. *Nandlal* I.L.R. (1955) Nag. 618; *Naya* v. *Motilal* ('59) A. Bom. 282; (1959) Bom. 727; 60 Bom. L.R. 1154; *Udebhan* v. *Vikram* ('57) A. Madh. Pra. 175 (Maharashtrian Telis in Madhya Pradesh, held governed by Mayukha); *Anjubai* v. *Hemchandrarao* ('60) A. Madh. Pra. 382 (Marathas settled in Chattisgath in M.P. held governed by Bombay School). *Sitabai* v. *Tuljabai* ('63) A.M.P. 322 (Leva Patidar Kulmees from Gujerat); *Gigi* v. *Panna* ('56) A. Assam 100 (custom regarding matters of adoption among Marwalis); *Laxman* v. *Gangabai* ('55) A. Madh. Bha. 138 (Maharashtrian Brahmins resident in Malwa); *Brindaban* v. *Chandubala*, I.L.R. (1951) 2 Cal. 225; *Nathulal* v. *Rangoba*, I.L.R. (1952) Nag. 597; *Pralhad* v. *Damodhar* ('38) A.B. 79 (Agarwals in Berar). *Hirabai* v. *Bhagirathibai* ('69) A.M.P. 241 (Maharashtrian Mahars living in Nagpur and Berar).

(*e*) *Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 48 Cal. 30, 57 I.C. 545, ('21) A.PC. 59; *Saraswati* v. *Debendra* ('56) A.P. 340 (migration before development of law in the State of origin); *Rukhmabai* v. *Ramratan* (1951) Nag. 367, ('51) A.N. 350; *Pakula Majhi* v. *Subhdra* ('69) A. Orissa 3.

(*f*) *Ramesh Chandra* v. *Mohammed* (1923) 50 Cal. 898, 79 I.C. 309, ('24) A.C. 383.

A Maharashtrian family residing in Chhatisgarh, in Central Provinces, is presumed to have come as immigrant and if it retains its individuality as Maharashtrian, is governed by the Bombay interpretation of the Mitakshara: *Keshao Rao* v. *Sadasheorao* (1938) Nag. 469, ('38) A.N. 163. Similarly, a Rajput family which had migrated to Berar, and were proved to have retained its old manners and customs were held to be governed by the Benares and not the Bombay School of Hindu law (*g*).

In *Abdurahim* v. *Halimabai* (*h*), their Lordships of the Privy Council said: "Where a Hindu family migrates from one part of India to another *prima facie* they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate [from India] to another country [East Africa], and, being themselves Mahomedans [*e.g.*, Memons], settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. ... The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India." "Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicile of importance" (*i*).

*Clause* (2).—"The law must be the family law as it was when they left. A judgment declaratory of law as having always been would bind: but it would be a different thing if subsequent customs became incorporated in the law" (*j*).

*Raghuvamshis of Nandurbar.*—These migrated from Oudh and settled in Khandesh and they are governed by the Benares school of Hindu law (*k*).

*Hindus of North Canara.*—They are governed by the Bombay and not the Madras School of Hindu law (*l*). Komtis of Chanda District are governed by the Mitakshara and not the Madras school of law (*m*).

*Yelmis* of Berar are governed by the Madras school of law (*n*).

**15. Custom as a source of law.**—Custom is one of the three sources of Hindu law. When there is a conflict between a custom and a text of the Smritis, the custom overrides the text: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law" (*o*).

Reference may be made to the Introduction pp. 59-61 *supra.*

**16. Three kinds of customs.**—The Hindu customs recognized by the Courts of British India are—(1) local, (2) class, and (3) family customs.

**17. Essentials of a valid custom.**—(1) A custom is a rule which in a particular family or a particular class or community or in a particular district, has from long usage obtained the force of law. It must be *ancient, certain,* and *reasonable,* and being in derogation of the general rules of law, must be construed strictly (*p*). It is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evi-

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(*g*) *Lalsingh* v. *Vithal Singh* (1950) Nag. 62 ('50) A.N. 62. See f.n. (*d*) above.

(*h*) (1916) 43 I.A. 35, 41, 18 Bom. L.R. 635, 32 I.C. 413, ('15) A.PC. 86. See also *Ma Yait* v. *Maung Chit Maung* (1921) 49 Cal. 310, 48 I.A. 553, 564, 66 I.C. 609, ('22) A.PC. 197.

(*i*) *Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 219, 48 Cal. 30, 39, 57 I.C. 545, ('21) A.PC. 59; *Tula Ram* v. *Shyam* (1927) 49 All. 848, 86 I.C. 729, ('25) A.A. 648. See f.n. (*e*) above.

(*j*) (1920) 47 I.A. 213, 222, 48 Cal. 30, 43, 57 I.C. 545, ('21) A.PC. 59, *supra.*

(*k*) *Babu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I.C. 379, ('29) A.B. 57.

(*l*) *Venkanna Narasinha* v. *Laxmi* ('51) A.B. 57; *Manjapa* v. *Lakshmi* (1890) 15 Bom. 234; *Mahableshwar* v. *Durgabai* (1896) 22 Bom. 199; *Shantaram* v. *Krishna* (1947) Bom. 798, *Contra Dattatraya* v. *Laxman* (1941) 44 Bom. L.R. 527; *Shantaram* v. *Mahabaleswar* (1947) 49 Bom. L.R. 764.

(*m*) *Ramlu* v. *Vithal* (1947) Nag. 267.

(*n*) *Mahadeo* v. *Vyankammabai* (1947) Nag. 781.

(*o*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 436; *Vannia Kone* v. *Vennichi Ammal* (1928) 51 Mad. 1, 108 I.C. 760, ('28) A.M. 299.

(*p*) *Hurpurshad* v. *Sheo Dyal* (1876) 3 I.A. 259, 285.

dence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends (*q*). It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature (*r*). It must not be in derogation of the fundamental rights of a citizen to hold and dispose of property by absolutely prohibiting alienation of property even after actual division (*r*1). Where the evidence shows that the custom alleged was not followed in numerous instances, the custom could not be held to be proved (*s*). A custom derives its force from the fact that it has, from long usage, obtained the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality (*t*).

(2) It is incumbent on a party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by *a priori* methods. Custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another (*u*). It is well established law that custom cannot be enlarged by parity of reasoning since it is the usage that makes the law and not the reason of the thing (*v*).

(3) Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the Court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between *other* parties fuller evidence with regard to the alleged custom should be forthcoming (*w*). A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case (*x*). Where, however, a custom is repeatedly brought to the notice of the Courts, the Courts, may hold that the custom was

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(*q*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M.I.A. 570, 585-586; *Siromani* v. *Hemkumar* ('68) A.S.C. 1299; *Pushpavathi* v. *Visweswar* ('54) A.S.C. 118. See as to evidence of custom, *Gopalayyan* v. *Raghupatiayyan* (1873) 7 Mad. H.C. 250; *Mirabivi* v. *Vellayanna* (1885) 8 Mad. 464; *Harnabah* v. *Mandil* (1900) 27 Cal. 379; *Rup Chand* v. *Jambu Parsad* (1910) 32 All. 247, 252, 37 I.A. 93, 6 I.C. 272; *Abdul Hussein Khan* v. *Bibi Sona Dero* (1918) 45 Cal. 450, 45 I.A. 10, 43 I.C. 306, ('17) A.PC. 181; *Ram Narain* v. *Har Narinjan Kaur* (1923) 4 Lah. 297, 76 I.C. 535, ('24) A.L. 116; *Vannia Kone* v. *Vannichi Ammal* (1928) 51 Mad. 1, 108 I.C. 760, ('28) A.M. 299; *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I.C. 628, ('30) A.B. 517; *Gulam Chand* v. *Manni Lal* (1941) 16 Luck. 302, 192 I.C. 643, ('41) A.O. 230; *Tulasiram* v. *Ramprasanna* ('56) A. Orissa 41; *Subramanian* v. *Kumarappa* ('55) A.M. 144, (1955) 1 M.L.J. 355. *Narayani Amma* v. *Sankara Pillai* ('61) A. Kerala 149 (F.B.), (1960) Ker. 1366.

(*r*) *Vannia Kone* v. *Vannichi Ammal, supra*; *Balusami* v. *Balakrishna* ('57) A.M. 97.

(*r*1) *Sheikriyammada Koya* v. *Administrator* ('67) A. Ker. 259 (custom prohibiting alienation even after actual division among tavazhis of a tarwad).

(*s*) *Ishwarbai* v. *Bhagwandas* ('50) A.S. 26.

(*t*) *Gokal Chand* v. *Parvin Kumari*, A.I.R. (1952) S.C. 231, 234, (1952) S.C.R. 825; *Subhani* v. *Nawab* (1941) 68 I.A. 1, (1941) Lah. 154, 193 I.C. 436, ('41) A.PC. 21, 32.

(*u*) *Saraswathi* v. *Jagadambal* (1953) S.C.R. 939, *Thankamma* v. *Narayana Pillai* ('58) A. Kerala 35 (F.B.); (1958) Ker. 108.

(*v*) *Venkata Challamma* v. *Cheekati*, A.I.R. (1953) Mad. 571; *Deivanai* v. *Chidambaram Chettiar*, A.I.R. (1954) Mad. 657; *Narasayya* v. *Ramachandrayya* ('56) A. Andhra 209; *Thankamma* v. *Narayana* ('58) A. Kerala 35 (F.B.).

(*w*) *Chiman Lal* v. *Hari Chand* (1913) 40 I.A. 156, 160, 40 Cal. 879, 890, 19 I.C. 669; *Rup Chand* v. *Jambu Parshad* (1910) 37 I.A. 93, 104, 32 All. 247, 252, 6 I.C. 272; *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 760, 761, 61 I.C. 492, ('21) A.B. 147; *Kasiviswanatham* v. *Somasundaram* (1946) 51 C.W.N. 374 (P.C.).

(*x*) *Mst. Kesarbai* v. *Indarsingh* (1945) Nag. 1, 71 I.A. 190.

introduced into the law without the necessity of proof in each individual case (*y*).

*Family Custom.*—In respect of family custom, the same principles are applicable, though, of course, in the case of a family custom instances in support of the custom may not be as many or as frequent as in case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs the consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the Court to be sufficient that a specific family custom pleaded in a particular case can be held to be proved (*z*). Custom binding inheritance in a particular family has long been recognised in India (*z*1).

**18. Discontinuance of custom.**—A family usage, like a local custom, must be certain, invariable and continuous *but it may be discontinued* so as to let in the ordinary law. Well established discontinuance of a *family* usage, whether it has arisen from accidental causes, or has been intentionally brought about by the concurrent will of the family, has the effect of destroying the custom; it is different however, in the case of a *local* custom which is the *lex loci* binding on all persons within the local limits in which it prevails (*a*).

**19. Burden of proof of custom.**—Where members of a family admittedly governed by the Hindu law set up a custom derogatory to that law, the burden lies upon them to prove the custom (*b*). In the case of a tribe or family which were not originally Hindus, and have only adopted Hindu usages in part, if it is alleged by any member that a particular Hindu usage has been adopted by the tribe or family, the burden lies upon him to prove the usage (*c*).

The *Kurmi Mahtons* of Chota Nagpur, though aboriginals in origin, have accepted the Hindu religion and Hindu social usages. The presumption in law will, therefore, be that they are governed by the Hindu Law of Succession and the party who alleges a special custom tc the contrary has to prove the same (*d*).

**20. Invalid custom.**—No custom is valid if it is opposed to morality or public policy or to any express enactment of the Legislature (*e*).

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(*y*) *Munnalal* v. *Rajkumar* ('62) A.S.C. 1493, 1498; *Rama Rao* v. *Rajah of Pittapur* (1918) 45 I.A. 18, 41 Mad. 778, 47 I.C. 354, ('18) A.PC. 81; *Hemendra Nath Roy* v. *Jnanendra* ('35) A.C. 702, 62 Cal. L.J. 49; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I.C. 1047, (36) A.A. 641; *Suganchand* v. *Mangibai* (1942) Bom. 467, 201 I.C. 759, ('42) A.B. 185.

(*z*) *Pushpavathi Vijayaram* v. *P. Visweswar* ('64) A.S.C. 118, 125, 126.

(*z*1) *Abdul Hussein Khan* v. *Bibi Sona Dero* (1917) 45 Cal. 450, 460, 45 I.A. 10, 14, 43 I.C. 306, ('17) A.P.C. 181.

(*a*) *Rajkishen* v. *Ramjoy* (1876) 1 Cal. 186, 196 [P.C.]; *Sarabjit* v. *Indarjit* (1905) 27 All. 203; *Vannia Kone* v. *Vannichi Ammal*, *supra*.

(*b*) *Bhagwan Singh* v. *Bhugwan Singh* (1890) 21 All. 412, 423; *Chandrika Bakhsh* v. *Muna Kuar* (1902) 24 All. 273, 29 I.A. 70; *Rup Chand* v. *Jambu Parshad* (1910) 37 I.A. 93, 32 All. 247, 6 I.C. 272; *Sahdeo Narain Deo* v. *Kusum Kumari* (1923) 50 I.A. 59, 62-64, 2 Pat. 230, 71 I.C. 769, ('23) A.PC. 21; *Shamlal* v. *Jiyabal* (1943) Nag. 678, ('44) A.N. 62; *Indramani Devi* v. *Raghunath Bhanja* ('61) A. Orissa 9.

(*c*) *Fanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 476, 12 I.A. 72, 88; *Muhammad Ibrahim* v. *Shaikh Ibrahim* (1922) 49 I.A. 119, 45 Mad. 308, 67 I.C. 115, ('22) A.PC. 59. *Ramrudharsingh* v. *Dileshwar Singh* ('65) A.P. 117 (F.B.).

(*d*) *Ganesh Mahto* v. *Shib Charan Mahata* (1932) 11 Pat. 139, 133 I.C. 165, ('31) A.P. 305.

(*e*) *Balusami* v. *Balakrishna* ('57) A.M. 97. See f.n. (*r*) above.

2.24.

## CHAPTER III

# GENERAL PRINCIPLES OF INHERITANCE

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

*Note.*—The Hindu Succession Act, 1956, which came into force on 17th June 1956, has now codified the law of intestate succession among Hindus. It has brought about fundamental and radical changes in the law of succession as will be seen from the Introductory Note to the commentary on that Act. Overriding application has been given to that Act and in effect it repeals all previous law relating to intestate succession whether textual, customary or statutory. That Act, however, subject to a few exceptions, is not retroactive in its operation and *succession to the property of a male or female Hindu who died intestate before 17th June 1956 is governed by the previous law discussed in Chapters III to XI.*

**21. Law of inheritance.**—The joint and undivided family is the normal condition of Hindu Society. An undivided Hindu family is ordinarily joint, not only in estate, but in food and worship.

The joint family system comes first in historical order. The law of inheritance is of later growth and, in general, applies only to property held in absolute severalty by the last owner, as distinguished from property held by a Mitakshara joint family. But, after the Hindu Women's Rights to Property Act XVIII of 1937 came into operation, the interest which a Hindu, governed by any school of law other than the Dayabhaga or by customary law, had in joint family property, devolved upon his death on his widow. And after the coming into force of the Hindu Succession Act, 1956, the position is governed by s. 6 of that Act.

**22. Two systems of inheritance.**—There are two systems of inheritance amongst the Hindus in India namely, the Mitakshara system and the Dayabhaga system. The Dayabhaga system prevails in Bengal; the Mitakshara system in other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under the Dayabhaga school (§ 79), there is no such definite guiding principle under the Mitakshara school. Sometimes, consanguinity has been regarded as the guiding principle and at other times, religious efficacy (§ 36 *et seq*).

**23. Inheritance to males and females.**—(1) Succession to stridhana, that is, property held absolutely by a *female*, is governed by rules different from those which govern inheritance to the property of a *male*.

(2) Inheritance to males according to the Mitakshara school is dealt with in Chapter IV and that according to the Dayabhaga school is dealt with in Chapter VII. Succession to stridhana is dealt with in Chapter X.

**24. Modes of devolution of property.**—(1) The Mitakshara recognizes two modes of devolution of property, namely, survivorship and succession.

The rule of survivorship applies to joint family property; the rules of succession apply to property held in absolute severalty by the last owner.

(2) The Dayabhaga recognizes only one mode of devolution, namely, succession. It does not recognize the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an *undivided* interest in the joint property, a member of a Dayabhaga joint family holds his share in *quasi-severalty*, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mitakshara law.

*Illustrations*

(1) *A* and *B*, two Hindu brothers, governed by the Mitakshara school of Hindu law, are members of a joint and undivided family. *A* dies leaving his brother *B* and a daughter. *A*'s share in the joint family property will pass to his brother, the *surviving coparcener*, and not to his daughter. But if *A* and *B* were separate, *A*'s property would on his death pass to his daughter as his *heir*.

(2) *A* and *B*, two Hindu brothers, governed by the Dayabhaga school, are members of a joint and undivided family. *A* dies leaving his brother *B* and a widow. *A*'s share in the joint family property will pass to his widow as his heir, exactly as if *A* and *B* were separate.

**25. Female heirs.**—According to the Bengal, Benares and Mithila schools, there are only five females who can succeed as heirs to a male, namely, (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother. To this list three more were added by the Hindu Law of Inheritance (Amendment) Act, 1929, namely, the son's daughter, daughter's daughter, and sister. The Madras school recognizes a large number of female heirs including the three mentioned in the Act of 1929, and the Bombay school a still larger number. Under Act XVIII of 1937, the widow of a predeceased son and the widow of a predeceased son of a predeceased son are among the heirs to a Hindu's separate property in all the schools.

**26. Limited estate of females.**—(1) Males succeeding as heirs, whether to a male or to a female, take absolutely.

(2) Females succeeding as heirs, whether to a male or to a female, take a limited estate in the property inherited by them, except in certain cases in the Bombay State.

If a separated Hindu under the Mitakshara, or any Hindu under the Dayabhaga, dies leaving a widow and a brother, the widow succeeds to the property as his heir. But the widow, being a female, does not take the property absolutely. She is entitled only to the income of the property. She cannot make a gift of the property nor can she sell it unless there is a legal necessity either for the gift or for the sale. On her death, the property will pass not to her heirs, but to the next heir of her husband, that, is his brother.

(3) Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

**27. 'Last full owner' and 'fresh stock of descent.'**—The last 'full' owner of property is one who held the property *absolutely* at the time of his death.

Except in the case of stridhana and in certain cases in the Bombay Presidency, the last full owner is always a *male*.

It is only a 'full' owner that can become a fresh stock of descent. Since a female cannot (except as aforesaid) be a full owner of property, she cannot become a fresh stock of descent.

*Illustrations*

*A* dies leaving a widow, a mother, a brother *B*, and a paternal uncle *C*. On *A*'s death, the widow succeeds to his property as his heir. She takes only a limited estate in the property. She is not the full owner of the property, and she cannot, therefore, become a fresh stock of descent. On her death, the property will revert to the next heir of the last full owner (*A*), that is, the mother. The mother, again, does not take absolutely. She too, therefore, cannot become a fresh stock of descent, and on her death the property will go not to her heirs, but to the next heir of the last owner (*A*), that is to *B*, *A*'s brother. But, *B*, being a male, takes the property absolutely. He becomes full owner of the property and he can, therefore, become a fresh stock of descent. On his death, the property will pass to his own heirs. Thus if he leaves a widow, the property will pass to her, and not to *C*. But since she takes a limited estate only, the property will, on her death, revert to the next heir of *B*, the last full owner. If that heir is *C*, the property will pass to him. *C*, being a male, will take the property absolutely and on his death it will again pass to his heirs.

A woman's stridhana descends to *her* own heirs. See Chapter X below.

**28. Inheritance never in abeyance.**—(1) On the death of a Hindu, the person who is then his nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot under any circumstance remain in abeyance (*f*) in expectation of the birth of a preferable heir, where such heir was not conceived at the time of the owner's death (*g*).

(2) Where the estate of a Hindu has vested in a person who is his nearest heir at the time of his death, it cannot be divested except either by the *birth* of a preferable heir such as a son or a daughter (*h*), who was conceived at the time of his death, or by *adoption* in certain cases of a son to the deceased (*i*).

**29. Doctrine of representation.**—A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, all succeed simultaneously as one heir to the separate and self-acquired property of their paternal ancestor. The reason is that the grandson *represents* the rights of his father to a share and the great-grandson *represents* the rights both of his father and grandfather. This is the only case to which the doctrine of *representation* applies; it does not apply to any other case (*j*), *e.g.*, the case

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(*f*) *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, ('36) A.L. 124, 162 I.C. 718; *Srinivasa Rao & Ors.* v. *Annadhanam Seshacharlu & Ors.* (1942) Mad. 42, 198 I.C. 169, ('42) A.M. 106, (1941) 2 M.L.J. 406.

(*g*) The statement of the law in § 28 was cited with approval by the Supreme Court in *Shrinivas* v. *Narayan* (1955) S.C.R. 1, 16, 57 Bom. L.R. 678, ('54) A.S.C. 379.

(*h*) *Bayaya* v. *Parvateya* (1933) 35 Bom. L.R. 118, 144 I.C. 442, ('33) A.B. 126.

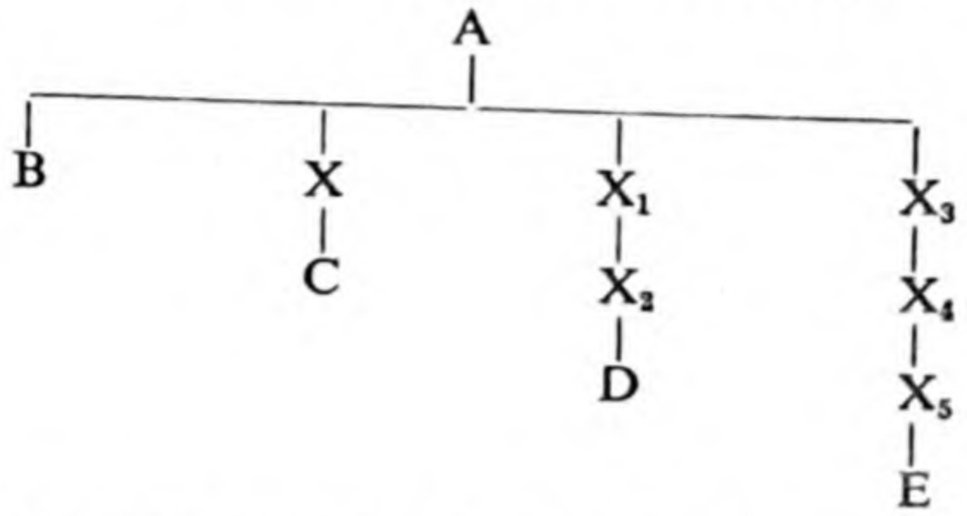
(*i*) *Nilcomul* v. *Jotendro* (1881) 7 Cal. 178, 188; *Kalidas* v. *Krishan* (1869) 2 Beng. L.R. F.B. 103; *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 397; *Bamundoss* v. *Tarinee* (1858) 7 M.I.A. 169, 184, 206; *Narasimha* v. *Veerabhadra* (1894) 17 Mad. 287; *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 467; *Hira* v. *Buta* (1919) 1 Lah. L.J. 36, 56 I.C. 256 ('20) A.L. 160; *Sooramma* v. *Venkataratnam* (1951) 2 M.L.J. 664, ('52) A.M. 166 (A stillborn son is not regarded as a posthumous son).

(*j*) See *Marudayi* v. *Doraiswami* (1907) 30 Mad. 348; *Soshil Chand* v. *Mangat Ram*, I.L.R. (1954) Punj. 449.

of daughter (*k*). Sons, grandsons, and great-grandsons inheriting together as aforesaid succeed to the estate of the deceased as coparceners [§ 31, ill. (a)]. On a partition among them they take *per stirpes* and not *per capita*.

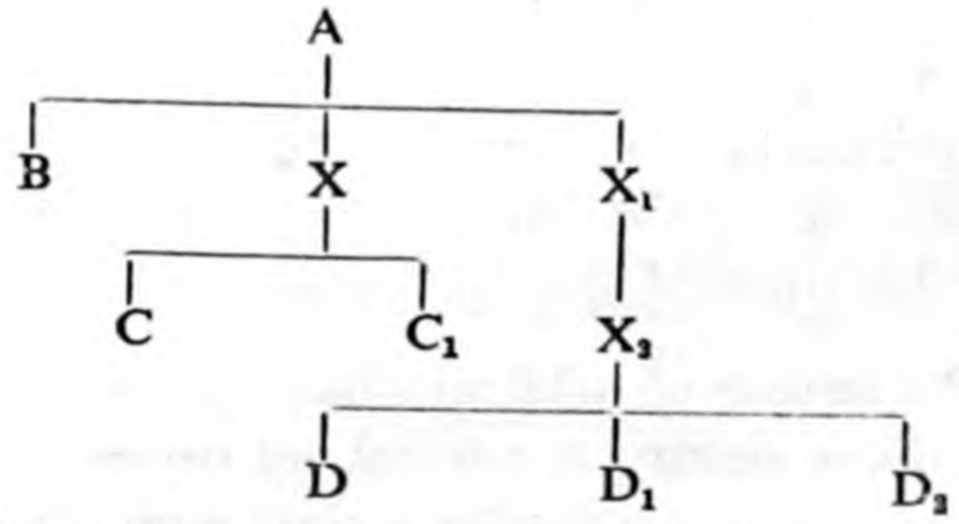
*Illustrations*

(a) *A*, a male Hindu, dies leaving a son *B*, a grandson *C*, a great grandson *D*, and a great-great-grandson *E*, as shown in the following diagram:—




On *A*'s death, his estate will pass to *B*, *C* and *D* as coparceners. If they continue joint, and if any one of them dies without leaving male issue, his share will pass to the survivors (§ 229). If they want to divide the estate, it will be divided into three equal parts, *B*, *C* and *D*, each taking one part. *B* alone is not entitled to inherit the whole property. *C* will take the share of his father *X*, and *D*, the share of his grandfather $X_1$, *E* is not entitled to any share at all, for he is more than four degrees removed from *A*, and the right of representation does not extend beyond four degrees.

(b) *A*, a male Hindu, dies leaving a son, *B*, two grandsons *C* and $C_1$, and three great-grandsons *D*, $D_1$ and $D_2$ as shown in the following diagram:—




*A*'s property will be divided, if the heirs choose to divide it, into three equal parts of which *B* will take one, *C* and $C_1$ will together take one, and *D*, $D_1$ and $D_2$ will together take one. This is a division of the estate *per stirpes*. To divide it *per capita* would be to divide it into 6 parts, and give one part to each of the 6 heirs.

*Note.*—If *B* had a son $B_1$, *B* would take the one-third for himself and $B_1$, and it would become ancestral property in the hands of *B*, to which $B_1$'s right would attach by birth.

(c) *A*, a separated male Hindu, dies leaving a brother *B*, and a nephew *C*, being the son of a predeceased brother *D*. On *A*'s death *C* claims half the estate alleging that had his father *D* been alive he would have taken one-half and that he (*C*) is entitled to that half as representing his father. *C*'s claim must be rejected, for the right of representation is confined to the lineal male descendants of the deceased owner as stated in the section, and *C* is not such a descendant. *B* therefore is entitled to the whole estate as the nearest heir of *A*.

**30. Spes successionis.**—The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer

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(*k*) *Mussammat Lorandi* v. *Mst. Nihal Devi* (1925) 6 Lah. 124, 95 I.C. 701, ('25) A.L. 403: *Soshil Chand* v. *Mangat* (1954) Punj. 449, ('54) A. Punj. 26 (widow). The doctrine does not apply to stridhan succession, *Krishnaswami* v. *S. S. Chettiar* ('55) A.M. 702, (1955) 2 M.L.J. 541. Nor does it extend to the case of a predeceased legitimate son of a Sudra, *Govindarajulu* v. *Balu Ammal* ('52) A.M. 1, (1951) 2 M.L.J. 209.

of it (*l*). For the same reason, any agreement entered into by him in respect of the inheritance cannot bind persons who actually inherit when the succession opens (*m*).

*Illustration*

*A* has a brother *B* and an uncle *C*. *B* has a wife *D*. It is true that if *A* died, *B* would succeed as his nearest heir if he was then alive, but in the lifetime of *A*, *B* does not take any interest in *A*'s property. All that he is entitled to is a bare chance of succession. If he predeceases *A*, the heir on *A*'s death will be *C*, and not his widow *D* [see ill. (c) to § 29.] *B* does not take any interest in *A*'s property in *A*'s lifetime and he cannot transmit to his heir *D* an interest which had not accrued to himself. For the same reason, a sale or a mortgage by *B* of the *spes successionis* is a nullity. And, further, if he makes any contract with respect to the inheritance in *A*'s lifetime, and predeceases *A*, and *C* succeeds as *A*'s heir, the agreement is not binding on *C*.

**31. Co-heirs.**—(*1*) According to the Mitakshara school two or more persons inheriting jointly take as tenants-in-common (*n*) except the following four classes of heirs who take as joint tenants with rights of survivorship:

(a) Two or more sons, grandsons, and great-grandsons, who are living as members of a joint family (*o*), succeeding as heirs to the separate or self-acquired property of their paternal ancestor (*p*). [Also see § 222 and Notes thereunder.]

(b) Two or more grandsons by a daughter, who are living as members of a jointly family, succeeding as heirs to their maternal grandfather (*q*). The Madras High Court has held that in property inherited by two or more daughter's sons from their maternal grandmother there can be no right of survivorship and the daughter's sons take as tenants in common (*r*). The decision in *Venkayyamma* v. *Venkataramanayyamma* (*q*) has been held to be no longer a binding authority on nature and incidents of property inherited by daughter's sons from their maternal grandfather. [Also see § 223(2) and Notes thereunder.]

(c) Two or more widows succeeding as heirs to their husband (*s*).

(d) Two or more daughters succeeding as heirs to their father (*t*), except in the Bombay State where they take an absolute estate in severalty (*u*).

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(*l*) See Transfer of Property Act, 1882, s. 6.

(*m*) *Brojo* v. *Gouree* (1870) 15 W.R. 70. See *Bahadur Singh* v. *Mohar Singh* (1902) 24 All. 94, 29 I.A. 1.

(*n*) *Karuppai* v. *Sankaranarayanam* (1904) 27 Mad. 300; *Ram Bharosey* v. *Ram Bahadur* (1948) 23 Luck. 58.

(*o*) The statement of the law on the point has been altered by adding the words "who are living as members of a joint family."

(*p*) *Raja Jogendra* v. *Nityanand* (1890) 18 Cal. 151, 17 I.A. 128; *Madivalappa Irappa* v. *Subbappa Shankreppa* (1937) Bom. 906. 39 Bom. L.R. 895, ('37) A.B. 438, 172 I.C. 184; *Shyam Behari Singh* v. *Rameshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208 ('42) A.P. 213; *Gangadhar* v. *Ibrahim* (1927) 25 Bom. L.R. 197 and by the Madras High Court in *Marudayi* v. *Doraisamy* (1907) 30 Mad. 348. In *Hari Kishan* v. *Rajeshwar* (1952) Punj. 134, ('52) A. Punj. 165, the Punjab High Court expressed the view that the rule applies only if the sons, grandsons and great-grandsons had not separated from the deceased. In a very recent case, *Ragho Sambhaji* v. *Shantabai* (1957) 59 Bom. L.R. 999, the Bombay High Court has followed the Punjab decision. Reference may be made to *Ranganatha* v. *Kumaraswami* ('59) A. Mad. 253; (1959) Mad. 298. Also see *Girdharilal* v. *Fatehchand* ('55) A.MB. 148 and § 222 and Notes thereunder.

(*q*) *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156; *Muhammad Husain Khan* v. *Babu Kishva Nandan Sahai* (1937) 64 I.A. 250, (1937) All. 655, 39 Bom. L.R. 979, 169 I.C. 9, ('37) A.PC. 233; *Seri Ram* v. *Chandramma* ('52) Hyd. 45.

(*r*) *Godavari Lakshminarasamma* v. *Godavari Rama Brahman* (1950) 63 M.L.W. 258, ('50) A.M. 680.

(*s*) *Bhugwandeen* v. *Myna Baee* (1860) 11 M.I.A. 487.

(*t*) *Chotay Lall* v. *Chunnoo Lall* (1879) 4 Cal. 744, 6 I.A. 15; *Aumirtolall* v. *Rajoneekant* (1875) 2 I.A. 113, 126, 15 Beng. L.R. 10, 24; *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156; *Chhattar Singh* v. *Hukum Kunwar* (1936) 58 All. 391.

(*u*) *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445.

(2) According to the Dayabhaga school two or more persons inheriting jointly take as tenants-in-common, except only (1) widows, and (2) daughters who take as joint tenants with rights of survivorship.

*Illustrations*

(a) A Hindu, who is possessed of separate property, dies leaving two sons, *A* and *B*. *A* then dies leaving a daughter *C*.

According to the Bengal school, *A* and *B* inherit as tenants-in-common, and, therefore, on *A*'s death, his share in the property goes to his *heir C* by *succession*.

According to the Mitakshara school, *A* and *B* inherit as joint owners who are living as members of a joint family. Therefore if *A* dies without having partitioned the property, his undivided interest in the property will pass to his brother *B* by *survivorship* to the exclusion of his daughter *C*. But if the property was partitioned between *A* and *B*, the share which came to *A* on partition would go to his heir *C* by *succession*. Assuming that *A* and *B* did not divide the property, and that *A* died leaving a *son, grandson,* or *great-grandson,* the undivided interest of *A* would pass to his son, grandson or great-grandson by *survivorship,* in preference to his undivided brother *B*. The reason is that the right of survivorship of *male issue* always prevails over that of a collateral with whom the deceased was joint.

(b) A Hindu dies leaving two widows *A* and *B*. According to both the schools, the widows succeed as joint tenants. On *A*'s death, therefore, her interest in the property will pass to *B* by *survivorship* [§ 43, n. 4].

(c) A Hindu dies leaving two daughters *A* and *B*. According to both the schools they succeed as joint tenants. On *A*'s death, therefore, her undivided interest in the property will pass to *B* by *survivorship*. It is different, however, in the Bombay State. In that State *A* and *B* take an absolute estate in severalty, and not as joint tenants. Therefore, on *A*'s death, her one-half share will pass to her own heirs by *succession*. Thus if *A* dies leaving a daughter, her share will go to her daughter, and not to her sister *B* [§ 43 no. 5].

(d) A Hindu dies leaving two brothers. The brothers take as tenants-in-common and on the death of either of them, his one-half share will pass to his heirs by *succession*. The same rule applies to uncles, nephews, *etc.*

**32. Successions per stirpes and per capita.**—Except in the two cases hereinafter mentioned persons of the same relationship to the deceased take *per capita,* that is, the estate of the deceased is divided into as many shares as the number of heirs, each heir taking one share.

*Exception I.*—On a partition among them, the sons, grandsons and great-grandsons of a deceased male Hindu take *per stirpes* [§ 29].

*Exception II.*—Sons' sons, daughters' sons, and daughters' daughters, succeeding to stridhan take *per stirpes* (*v*) [§ 160].

Brother's sons, uncle's sons, etc., take *per capita*. Thus if a Hindu dies leaving 2 sons by one brother and 3 sons by another brother, the property will be divided into 5 equal parts, each heir taking one-fifth. This is division of the estate *per capita*. To divide it *per stirpes* would be to divide it into 2 equal parts, giving one part to the 2 sons of one brother, and the other part to the 3 sons of the other brother. The reason why they take *per capita* is that the brothers' sons do *not* inherit as *representing their father* but *in their own right* as the nephews of the deceased (see § 29). Similarly, if a Hindu dies leaving one son by a paternal uncle and two sons by another paternal uncle, the estate will be divided into three parts, each son taking one-third (*w*).

Exception I and Exception II both rest on special texts. For an illustration of Exception I, see § 29, ill. (b). For an illustration of Exception II, see the illustration to § 160.

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(*v*) *Vide* authorities cited under § 160.

(*w*) *Narsappa* v. *Bharmappa* (1921) 45 Bom. 296, 59 I.C. 251, ('21) A.B. 408.

CHAPTER IV

# ORDER OF INHERITANCE TO MALES ACCORDING TO THE MITAKSHARA LAW

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**33. Mitakshara law of inheritance.**—The rules of inheritance laid down in the Mitakshara are followed by the Bombay, Madras, Benares and Mithila schools, all the schools being sub-divisions of the Mitakshara school. But the rules of inheritance in force in the several States represented by these schools are not entirely the same. They differ in certain respects, namely,

(1) The order of inheritance as laid down in the Mitakshara is not strictly followed in the island of Bombay, Gujarat and the North Konkan. The reason is, that in those places preference is given to the Vyavahara Mayukha of Nilkantha Bhatta in the few points on which it differs from the Mitakshara.

(2) As regards females, there are many who are recognized as heirs in the Bombay and Madras schools but are not recognized as such in the Benares and Mithila schools [§§ 61-70].

**34. Devolution of property according to the Mitakshara law.**—In determining the mode in which the property of a Hindu *male* governed by the Mitakshara law devolves on his death, the following propositions are to be noted:—

(1) Where the deceased was, at the time of his death, a member of a joint and undivided family, technically called coparcenary, his undivided interest in the coparcenary property devolves on his coparceners *by survivorship* (But see Act XVIII of 1937 and § 35.)

(2) (i) Even if the deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by *succession* according to the order given in § 43, and not to his coparceners (*x*).

(ii) If the deceased was at the time of his death the sole surviving member of a coparcenary, the whole of his property, including the coparcenary property, will pass to his heirs by *succession* according to the order given in § 43 (*y*).

(iii) If the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by *succession* according to the order given in § 43 (*z*).

(3) If the deceased was re-united at the time of his death, his property will pass to his heirs by *succession* according to the rule laid down in § 60 below.

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(*x*) *Katama Natchiar* v. *The Rajah of Shivagunga* (1863) 9 M.I.A. 539; *Sivagnana Tevar* v. *Periasami* (1878) 1 Mad. 312, 5 I.A. 61.

(*y*) *Naqalutchmee* v. *Gopoo Nadaraja* (1856) 6 M.I.A. 309.

(*z*) *Doorga Persad* v. *Doorga Konwari* (1878) 4 Cal. 190, 202, 5 I.A. 149, 160.

*Illustration*

*A. B.* and his brother constitute a coparcenary. *A. B.* dies leaving a daughter. He leaves self-acquired property. He also leaves property inherited by him from his maternal uncle, which, according to law, is his separate property. The undivided interest of *A. B.* in the coparcenary property will pass to his brother as surviving coparcener, but his self-acquired and separate property will pass to his daughter as his heir.

**35. Act XVIII of 1937.—The Hindu Women's Rights to Property Act (XVIII of 1937 amended by XI of 1938)** introduced important changes in the law of succession. This short enactment which came into force on 14th April 1937 is as under:

WHEREAS it is expedient to amend the Hindu Law to give better right to women in respect of property:—

It is hereby enacted as follows:—

Short title and extent.

1. This Act may be called The Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of India (*a*) except Part B States (*b*).

Application.

2. Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

Devolution of property.

3. (1) When a Hindu governed by the Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow (*c*), or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son (*c*1) shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

Savings.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

Meaning of the expression "die intestate."

5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

The Act was repealed by s. 31 of the Hindu Succession Act, 1956. Rights acquired and liabilities incurred under the Act are, however, not affected.

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(*a*) Unless expressly adopted the Act cannot be applied to territories which were outside British India when the Act was passed. *Bhanbai* v. *Devji* ('50) A. Kutch 43.

(*b*) Hindus who had migrated from Part B States (formerly outside British India) and settled in Part A States (in former British India) were governed by the provisions of the Act even if they had retained their personal law. *Rukhmabai* v. *Ramratan* (1951) Nag. 367, ('51) A.N. 350; *Pannalal* v. *Sitabai* (1954) Nag. 30, ('53) A.N. 70; *Ratan Kumari* v. *Sunder Lal* ('59) A. Cal. 787.

(*c*) The expression 'widow' in the Act, though used in the singular includes all the widows left by the deceased if there are more than one, *Bhiwra* v. *Renuka* (1949) Nag. 400; *Umayal Achi* v. *Lakshmi Achi* ('45) A.F.C. 25, (1945) F.C.R. I, (1945) I M.L.J. 108.

(*c*1) *Asarfa Kuer* v. *Bhuneshwar Rai* ('59) A. Pat. 210, 37 Pat. 206.

This is by reason of s. 6 of the General Clauses Act X of 1897 (*d*). In this context it is essential to note the provisions contained in s. 14 of the Act of 1956 which lay down a rule having some retroactive operation.

The Act came into force from 14th April 1937. As some difficulties were felt in the interpretation of the Act it was amended on 8th April 1938 by Act 11 of 1938. The amending Act was made retroactive and operated from the date of the main enactment. The main enactment, as in terms stated in s. 4, is not retrospective in operation and does not apply to the property of any Hindu who died intestate before the commencement of the Act (*e*). Nor does it apply to the widow of any coparcener who died before the Act came into force (*f*).

The validity of the Act was questioned in some cases and it was held by the Federal Court that the Act did not operate to regulate succession to agricultural lands in the Governor's Provinces, or to a mortgagee's interest or a lessee's interest in such lands (*g*) but was not *ultra vires* as to other lands (*h*). The validity of the Act was again upheld by the Federal Court in another case (*i*). After the decision of the Federal Court relating to agricultural lands, some of the provinces extended the operation of the Central Act to succession to agricultural lands by passing suitable legislation (*j*).

The measure was intended to redress disabilities and "to give better rights to women." It was ameliorative in character and enacted to carry out important social reform (*k*). It introduced far-reaching changes in the law of succession and was obviously intended to give better rights to women by recognising their claim to fair and equitable treatment in certain matters of succession but unfortunately the rules of devolution set out in the Act are so penned that there have arisen anomalies and a number of conundrums and an attempt to resolve one difficulty has often caused misconception and equally great if not greater difficulties in other cases (*l*). The Act, in its consequence, touched many branches of Hindu law such as joint family and partition, adoption, maintenance and disqualification from inheritance and illustrates how piecemeal legislation can result in contradictions and unexpected situations. It has raised problems which do not admit of logically consistent answers (*m*) and the difficulties found in interpreting the enactment have been pointed out in numerous decisions (*n*). The Act was not a codifying enactment nor even in general amendment of the law of inheritance. Its proper construction requires that it must be fitted into the context of the law existing at the time it was enacted (*o*) and read in the light of its ameliorative character and expressed intention to give better rights to women (*p*). In *Umayal Achi* v.

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(*d*) See Sections 4(*b*), 14 and 31 of the Hindu Succession Act, 1956, and Notes thereunder.

(*e*) *Umayal Achi* v. *Lakshmi Achi* ('45) A.F.C. 25, (1945) F.C.R. 1, (1945) 1 M.L.J. 108. *Lakhan Lal* v. *Richu Mian* ('60) A. Pat. 181; *Jasoda Kuer* v. *Phul Kuer* ('58) A. Cal. 600; *Mohari* v. *Chukli* ('60) A. Raj. 82; *Ratan Kumari* v. *Sunder Lal*, ('59) A. Cal. 787.

(*f*) *Moni Dei* v. *Hadibandhu* ('55) A. Orissa 73 (F.B.).

(*g*) *Kotayya* v. *Annapurnamma* (1945) Mad. 777, *Ramaswami* v. *Murugayyan* (1945) Mad. 781, ('45) A.M. 191.

(*h*) *In re the Hindu Women's Rights to Property Act of 1937 and the Hindu Women's Rights to Property Amendment Act of 1938 and In re a special reference under sec. 213 of the Government of India Act, 1935* (1941) F.C.R. 72; *Anant Lal* v. *Ram Adhar*, 17 Luck. 720, 198 I.C. 443, ('42) A.O. 216.

(*i*) *Umayal Achi* v. *Lakshmi Achi* (1945) F.C.R. 1, ('45) A.F.C. 25.

(*j*) See f.n. (*o*) on p. 98.

(*k*) *Dagdu* v. *Namdeo* (1954) Bom. 1069, 56 Bom. L.R. 513, ('55) A.B. 152.

(*l*) *Shivappa* v. *Yellawa* (1953) Bom. 958, 55 Bom. L.R. 658, ('54) A.B. 47; *Shyamu* v. *Vishwanath* (1955) 57 Bom. L.R. 807 (co-widows prejudicially affected); *Jana Gadi* v. *Parvati Santosh* (1958) 60 Bom. L.R. 553.

(*m*) *Shivappa* v. *Yellawa* (1953) Bom. 958, 55 Bom. L.R. 658, ('54) A.B. 47.

(*n*) See f.n. (*l*) above. Also see *Pannalal* v. *Sitabai* (1954) Nag. 30, ('53) A.N. 70 (position of a Jain widow); *Parappa* v. *Nagamma* (different modes of devolution); *Rathinasabapathy* v. *Saraswathi* ('54) A.M. 307, (1953) M.L.J. 459.

(*o*) *Ramaiya* v. *Mottayya* ('51) A.M. 954; *Chinniah Chettiar* v. *Sivagami Achi* ('45) A.M. 21; *Parappa* v. *Nagamma* ('54) A.M. 576 (F.B.). The effect of the Act was not to confer larger rights on the widow than those enjoyed by her deceased husband as a coparcener.

(*p*) *Dagdu* v. *Namdeo* (1954) Bom. 1069, **56** Bom. L.R. 513, ('55) A.B. 152.

*Lakshmi Achi* (q) the Federal Court observed: "Its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement."

The main features of the Act are:

(1) In the case of separate property,

(a) the widow along with the sons is entitled to the same share as the son,

(b) A pre-deceased son's widow inherits in like manner as the son, if there is no son surviving of such predeceased son; and in like manner as a son's son if there is surviving a son or son's son of such pre-deceased son.

(c) The same provision applies *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son.

(2) In the case of a Mitakshara joint family the widow takes the place of her husband.

*General effect of the Act.*—The Act confers new rights on widows in modification of previous law as laid down by the texts and interpreted by judicial decisions. The general effect of the Act is to put the three female heirs mentioned in sub-section (1) of section 3 on the same level as the male issue of the last owner along with the male issue or in default of them. That sub-section deals with property over which a Hindu has a power of disposition by a testament. Such property, in the case of a Hindu governed by the Dayabhaga School, is his separate property as well as ancestral property in his hands and his share in joint family property. And in case of a Hindu governed by the Mitakshara, it means his separate property. Sub-section (2) of section 3 applies to his 'interest in joint family property' which, as pointed out later, would mean all other property in which he had under Mitakshara law interest at the time of his death. The Act puts the widow of a member of the joint family in the place of her deceased husband and the husband's interest in the joint family property under the Mitakshara, though undefined, vests immediately upon his death in the widow and does not devolve by survivorship. Section 2 provides that, notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate. Therefore, wherever the provisions of s. 3 apply any other rule or custom of Hindu law which would otherwise have applied ceased to govern the parties and such rule or custom must be ignored as being superseded by the Act. Sub-section (4) of s. 3 confers on the widow the same right of claiming partition of the joint family property in the same way as any other coparcener entitled to do so under the general law.

The acquisition by the widow of the same interest as her deceased husband in the joint family property does not of itself disrupt the Mitakshara joint family and the widow continues as before to be a member of the joint family. Her rights are augmented but there is no immediate severance of

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(q) ('45) A.F.C. 25, (1945) F.C.R. 1, (1945) 1 M.L.J. 108.

the joint family (*r*). Though her position in the joint family may in many respects be analogous to that of any undivided male coparcener in the joint family it would be a misnomer to call her a coparcener. All the High Courts are agreed that she does not by operation of the Act become a coparcener (*s*). But it would not be correct to describe her interest as inchoate or imperfect till she claims partition (*s*1). She becomes entitled to the undivided interest of her deceased husband and takes "the same interest as her husband" and not "the same right as her husband" (*t*). And when the deceased has left a son she becomes entitled to be in the same position as the son. She may or may not choose to demand partition. Therefore, where she does not enforce partition and the joint family continues as before without any severance of the joint status the incidents of the coparcenary continue to apply to all the members including the widow with this reservation that her existence suspends the rule of survivorship. And even then the rule of survivorship continues to operate quod the other coparceners; and their interest as also the interest of the widow is liable to fluctuation by births and deaths in the joint family which continues as before but subject to her statutory right (*u*). And founded on the same principle is the view expressed by a Full Bench of the High Court of Madhya Pradesh that the widow who has under sub-section (2) of section 3 obtained interest in her husband's estate and holds the estate with her minor (unmarried) son, takes upon the death of the son the whole estate by survivorship (*u*1).

On the same principle the rights and powers of the Karta of the joint family to deal with and alienate for legal necessity the coparcenary property including the widow's interest and represent all the members of the joint family to the outside world continue as before (*v*). The position of the Karta remains unaffected as long as there is no partition and the position of the widow is somewhat analogous to that of a male coparcener in the family. The Karta, though he is entitled to exercise his ordinary powers under the ordinary law, is not competent to make a gift of the property belonging to the family and the widow is entitled to challenge any unjustified alienation if her interest is sought to be defeated (*w*). And even where the joint family after

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(*r*) *Parappa* v. *Nagamma* (1954) Mad. 183, ('54) A.M 576; *Kamal Kishore* v. *Harihar* (1951) 30 Pat. 357, ('51) A.P. 645; *Gangadhar* v. *Subhashini* ('55) A. Orissa 135. Also see f.n. (*s*) below.

(*s*) *Parappa* v. *Nagamma* (1954) Mad. 183, ('54) A.M. 576; *Radha Ammal* v. *I.T. Commissioner, Madras* (1950) 1 M.L.J. 399, ('50) A.M. 538; *Rathnasabapathy* v. *Yellawa* (1953) 2 M.L.J. 459, ('54) A.M. 307; *Lakshmi Ammal* v. *Ramachandra* ('60) A. Mad. 568; (1960) Mad. 991; *Gangadhar* v. *Sbhashini* ('55) A. Orissa 135; *Shankar* v. *Gangram* (1952) Bom. 485, (1952) 54 Bom. L.R. 75; *Umsaran* v. *Bhagwat* ('54) A.P. 318. *Manicka* v. *Arnachala* ('65) A.M. 1 (F.B.).

(*s*1) *Sankara Rao* v. *Rajyalakshamma* ('61) A.A.P. 241.

(*t*) *Jagdu* v. *Namdeo* (1954) Bom. 1069, 56 Bom. L.R. 513, ('55) A.B. 152. The Madras and Bomby High Courts have held that the widow not being a coparcener is not entitled to become the Krta of the family, *Radha Ammal* v. *C.I.T. Madra* ('50) A.M. 538; *Contra C.I.T.* v. *Laxminaraya* (1948) Nag. 775, ('49) A.N. 128. In *Comnssioner of I.T.* v. *G. S. Mills* the Supreme Court held that a widow cannot become the Karta of the family: See ('66) A.S.C. 24.

(*u*) See cases cited in footnotes (*s*) and (*t*) above. Also see *Seethamma* v. *Veerana* (1950) Mad. 1076, ('50) A.M. 785; *Kamalabala* v. *Jiban Krishna* (1941) 2 Cal. 32, 227 I.C. 291, ('46) A.C. 461.

(*u*1) *Bhondu* v. *Ramdayal* ('60) A.M.P. 51 (F.B.).

(*v*) *Ahuja* v. *Rameshwarlal* ('71) A. Raj. 269; *Seethamma* v. *Veerana* ('50) A.M. 785; *Radha Ammal* v. *I.T. Commissioner, Madras* (1950) 1 M.L.J. 399, ('50) A.M. 538 (she cannot ask for accounts); *Shivappa* v. *Yellawa* (1953) Bom. 958, 55 Bom. L.R. 659 ('54) A.B. 47; *Mahadu* v. *Gajarabai* ('54) A.B. 442, (1954) Bom. 885, 56 Bom. L.R. 387; *Parvathamma* v. *Subhadramma* ('63) A.A.P. 236; *Fateh Chand* v. *Bhushan Prakash* ('57) A.All 801.

(*w*) *Shivappa* v. *Yellawa* ('54) A.B. 47, (1953) Bom. 958, 55 Bom. L.R. 659; *Ramalingam* v. *Ramalakshmi* ('58) A.M. 228; (1958) Mad. 7; (1957) 2 Mad. L.J. 382. *Lakshmi Ammal* v. *Ramachandra* ('60) A.M. 568; (1960) Mad. 991, (dissenting from *Rathinasabapathi* v. *Saraswathi* ('54) A.M. 307). *Papayamma* v. *Gopalakrishnamurthy* ('69) A.A. Pra. 341.

the death of her husband consists of herself and a sole surviving coparcener, the latter cannot make a gift of the entire property because the widow's existence would prevent the vesting of all the coparcenary interest in him (*x*). The widow has during her lifetime all the powers which her husband had save that her interest is limited to a widow's estate. She can alienate her widow's interest in her husband's share; she can even convey her interest in the same for necessity or other binding purposes. She can ask for partition and separate possession of her husband's share. In case she asks for partition her husband's interest would be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to other members of the joint Hindu family (*y*).

Where property devolves on a widow and the property was the separate property of her husband, she takes in it the same share as a son. This is by inheritance under s. 3(1). The interest that she acquires in a case where the husband was a member of a joint family does not devolve on her by survivorship. All the High Courts are agreed on this but there was some difference of opinion on the question whether she can be said to have acquired her interest in such property by inheritance till the conflict was set at rest by the Supreme Court in *Lakshmi Perumallu* v. *Krishnavenamma* (*z*). According to the Nagpur (*a*), earlier decisions of Patna (*b*) and Madhya Pradesh (*c*) High Courts such interest devolved on her by inheritance as the only modes of devolution known to Hindu law are survivorship and inheritance. The High Courts of Madras (*d*), Bombay (*e*), Andhra Pradesh (*f*), Calcuta (*f*1), Rajasthan (*f*2) and Orissa (*g*) had taken the view that such interest is neither by survivorship nor by inheritance but a special type of interest which is the creation of statute. The Supreme Court has now approved of the latter view (*g*1). According to this latter view, it is not necessary for the widow to take out a succession certificate for enforcing any claim or right of the husband which devolves on her under the Act (*h*).

The Act seeks to make fundamental changes in the concept of a coparcenery and the rights of the members of the family in coparcenery property. In investing the widow of a member of a coparcenery with the interest which the member had at the tine of

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(*x*) *Shivappa* v. *Yellawa* (1953) Bom. 958, 55 Bom. L.R. 659, ('54) A.B. 47; *Harekrishna* v. *Jujesthi* ('56) A. Orissa 73. Also see *Ramsaran* v. *Bhagwat* ('54) A.P. 318.

(*y*) *Parappa* v. *Nagamma* (1954) Mad. 183, ('54) A.M. 576 (F.B.); *Ramaswami* v. *Lakshmamma* ('63) A.A.P. 199. Also see *Rup Raut* v. *Basudeo Raut* ('62) A.P. 436.

(*z*) ('65) A.S.C. 825.

(*a*) *Jadaobai* v. *Puranmal* (1944) Nag. 832, 219 I.C. 158, ('44) A.N. 243. Also see *Jugalkishore* v. *Wardhasa* (1955) Nag. 446, ('55) A.N. 166.

(*b*) *Mt. Rajendra Bati* v. *Mungalal* ('53) A.P. 129; *Siveshwar* v. *Har Narain* (1944) 23 Pat. 760, ('45) A.P. 116; *Kedar Nath* v. *Radha Shyam*, ('53) A.P. 81; *Sahujpari* v. *Satrughan* ('58) A.P. 405.

(*c*) *Bhagobai* v. *Bhaiyalal* ('57) A.M. Pra. 29.

(*d*) *Saradambal* v. *Subbaram* (1942) Mad. 630, 201 I.C. 152, ('42) A.M. 212; *Rathinasabapathy* v. *Saraswati* ('54) A.M. 307; *Natarajan* v. *Perumal* ('43) A.M. 246, (1942) 2 M.L.J. 668, 206 I.C. 356.

(*e*) *Shankar* v. *Gangaram* (1952) 54 Bom. L.R. 75; *Nagappa* v. *Mukumbe* (1951) Bom. 442 ('51) A.B. 309, 53 Bom. L.R. 177.

(*f*) *I.L.T. Development* v. *Kotayya* ('55) A. Andhra 135.

(*f*1) *Ratan Kumari* v. *Sunder Lal* ('59) A.C. 787.

(*f*2) *Chhotki* v. *Chandra Prakash* ('64) A. Raj. 32.

(*g*) *Harekrishna* v. *Jujesthi* ('56) A. Orisa 73; *Gangadhar* v. *Subhashini* ('55) A. Orissa 135; *Keluni Dei* v. *Jagabandhu Naik* ('58) A. Orisa 47.

(*g*1) See f.n. (*z*) above.

(*h*) *Natarajan* v. *Perumal* (1942) 2 M.L.J. 668, 206 I.C. 356, ('43) A.M. 246; *Gangadhar* v. *Subhashini supra*; *Rakhmabai* v. *Gangaram supra*; *I.L.T. Development* v. *Kotayya, supra*; *Chhotki* v. *Chandra Prakash* ('64) A. Raj. 32. Also see f.n. (*d*) above. The contrary view was taken in *Jadaobai* v. *Puranmal* (1944) Nag. 832, ('44) A.N. 243 and in the cases cited in f.n. (*b*) above.

his death, the Act has introduced changes which are alien to the structure of a coparcenery. The interest of the widow arises not by inheritance, nor by survivorship, but by statutory substitution. Her interest in the property is the limited interest known as a Hindu woman's estate, but the Act gives her the same power to claim partition as a male owner has. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenery. She is thereby introduced into the coparcenery, and between the surviving coparceners of the husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener. Because of statutory substitution of her interest in the coparcenery property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. If the widow after being introduced into the family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenery property. But if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenery property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenery property which has vested in her will devolve upon the heirs of her husband. To effect such partition it is not necessary that there should have been actual division of interest by metes and bounds. Mere severence of status is enough (*h*1).

There is nothing in the Act to show that the widow takes in the joint family property a defined and divided share as if the husband had separated from the joint family at the time of his death. The Act vests in the widow immediately upon his death the undefined and fluctuating interest in the joint family property which he himself had till the moment of his death. She will therefore get a share of the joint family property as at the date of demand by her for partition or at the date of partition at the instance of any coparcener as the case may be and not a share of the property as at the date of the death of her husband (*h*2).

Under the law prior to the Act, the widow of a person governed by the Mitakshara had only a right of maintenance in respect of coparcenary property in which the husband had interest. In respect of separate property left by her husband, she had only the right of maintenance when the husband had left a son, grandson or a great-grandson. She could inherit his separate property only in the absence of these immediate heirs. All this was changed and her rights were augmented as pointed out above. As to the effect of adoption by her see the undermentioned case (*i*).

The Bombay High Court has taken the view that unchastity (*j*) of the widow would not operate as a bar to her right to inherit or acquire any interest in her husband's property under the Act. The Madras, Calcutta and Mysore High Courts hold the contrary view (*k*). As under prior law, so under the Act, a widow on remarriage forfeits her right to her deceased husband's property (*l*).

*Agricultural property.*—As already pointed out it was held by the Federal Court (*m*) that the word property in s. 3 does not include agricultural lands (*n*). Legislation was thereafter passed in many provinces extending the operation of the Central Act to succes-

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(*h*1) *Satrughan* v. *Sabujpari* ('67) A.S.C. 272; *Lakshmi Perumallu* v. *Krishnavenamma* ('65) A.S.C. 825.

(*h*2) *Nagappa* v. *Mukumbe* ('51) A.B. 309; *Parappa* v. *Nagamma* (1954) Mad. 183 (F.B.), ('54) A.M. 576; *Bhondu* v. *Ramdayal* ('60) A.M.P. 51 (F.B.). Reference may also be made to the cases on the point collected in abovementioned cases. Also see the decision of the Supreme Court cited in f.n. (*z*) above.

(*i*) *Rani Lachhmi Kunwar* v. *Shiam Singh* (1949) All. 786.

(*j*) *Akoba Laxman* v. *Sai Genu Laxman* ('41) A.B. 204.

(*k*) *Ramaiyya* v. *Motayya* (1952) Mad. 187, ('51) A.M. 954 (F.B.); *Kanailal* v. *Pannasashi* ('54) A.C. 588; *Appa Saheb* v. *Gurubasawwa* ('60) A. Mys. 79.

(*l*) *Manabai* v. *Chandanbai* (1954) Nag. 727, ('54) A.N. 284.

(*m*) See f.n. (*h*) at p. 93, *supra*.

(*n*) Agricultural land has been held to include a mango grove, *Sarojini Devi* v. *Subrahmanyam* (1945) Mad. 61, ('44) A.M. 401.

sion to agricultural lands with the result that the three female heirs mentioned in the Act could claim rights under the Act also in case of such lands (*o*).

S. 3(1) : *"When a Hindu governed by the Dayabhaga . . . dies intestate leaving any property."*—Sub-section (1) of section 3 speaks of "any property". The expression *prima facie* includes all forms or types of interest answering the description of "property" in law. The property must be heritable property in respect of which question of succession may ligitimately arise. It has been held by the Supreme Court that shebaitship is property within the meaning of the Act (*p*).

S. 3(1): *"When a Hindu governed by any other school . . . dies intestate leaving separate property"*.—Speaking generally the effect of the Act, so far as it relates to a person governed by the Mitakshara, is to put the three female heirs—his widow, the widow of a predeceased son and the widow of a predeceased son of a predeceased son—mentioned in section 3 on the same level as the male issue of the last owner along with the male issue or in default of them. The effect of the Act by what is enacted in sub-section (2) of section 3 is to put the widow of a member of a joint family in the place of the deceased husband, and the husband's interest in the joint family property under the Mitakshara vests in her immediately upon his death and does not devolve by survivorship.

The expression *separate property* in section 3(1) was interpreted by the Federal Court in *Umayal Achi* v. *Lakshmi Achi* (*q*) and it was held that it has been used in a narrow and limited sense so as to exclude not merely the interest that the last owner may have had in joint family property but also to exclude from the operation of the sub-section property acquired by him on partition and property which devolved on him as a sole surviving coparcener. That decision was quoted with approval by the Supreme Court in the decision referred to above. In a more recent decision also the Supreme Court expressed the view that property held by a sole surviving coparcener in a family does not become his "separate property" so long as there is a woman in the family who can bring to existence a new coparcener by adoption (*q*1). There has been some divergence of judicial opinion as to the effect of the Federal Court decision. Following that decision it was held in the undermentioned cases by the High Courts of Nagpur (*r*), Patna (*s*) and Allahabad (*t*) that the share received by a father on partition between him and his son

(*o*) Bombay Act 17 of 1942: See *Soniram* v. *Dwarkabai* (1951) 53 Bom. L.R. 325, (1951) Bom. 679, ('51) A.B. 34; C.P. and Berar Act 6 of 1942: Orissa Act 5 of 1944: Assam Act 13 of 1943; U.P. Act 11 of 1942; This enactment was made retrospective in its operation, *Kailash Chandra* v. *Shri Devi* ('51) A.A. 636. As to the application of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act. 26 of 1947 see *Bappu Ayyar* v. *Renganayaki* (1955) 2 M.L.J. 302, ('55) A.M. 394. Reference may be made to the following cases which were governed by the Federal Court decision and did not fall within the purview of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act, 26 of 1947; *Parappa* v. *Nagamma* (1954) Mad. 183, ('54) A.M. 576 F.B. *T. Sarojini Devi* v. *Sri Krishna* (1945) Mad. 61, ('44) A.M. 401; *Dhanam* v. *Varadarajan* ('53) A.M. 176. Debt secured by mortgage of agricultural lands is 'property' under the Act and the widow is entitled to a share therein, *Subba Naicker* v. *Nallammal* ('50) A.M. 192. Reference may also be made to *Hari Dass* v. *Hukmi* ('65) A. Punj. 254; *Kashi Nath* v. *Umapada* ('68) A.C. 83.

(*p*) *Angurbala* v. *Debabrata* (1951) S.C.R. 1125, (1952) 2 Cal. 209, ('51) A.SC. 293. Also see observations at p. 1135 of (1951) S.C.R.

(*q*) ('45) A F.C. 25, (1945) 1 M.L.J. 108.

(*q*1) *Manoharlal* v. *Bhuri Bai* ('72) A.S.C. 1369.

(*r*) *Bhaoorao* v. *Chandrabhagabai* (1948) Nag. 465, ('49) A.N. 108. Reference may also be made to the decisions of the High Court of Andhra Pradesh cited in the f.n. (*t*) and (*t*2) below.

(*s*) *Trisul* v. *Daman* ('57) A.P. 441; *Khatrani* v. *Tapeshwari* ('64) A.P. 261 (F.B.).

(*t*) *Manbhari* v. *Bishun* ('58) A. All. 769. Also see *Seshamma* v. *Ramakoteswara* ('58) A.A.P. 280.

or sons was not his 'separate property' and on his death it passed to the son or sons in preference to his widow. On the other hand it has been held by the High Court of Orissa (*u*) that in case of a share obtained by a father on such partition his widow is entitled to inherit the entire interest to the exclusion of the divided son. The view was taken that in such a case the property which fell to the share of the father was not his separate property for the purpose of s. 3(1) but was joint family property within the meaning of s. 3(2) and after the death of the father, his widow became entitled to that entire share to the exclusion of the divided son. In *Subramanian* v. *Kalyanaram*, a case decided by the High Court of Madras (*v*), the view was taken that if the property which a coparcener obtains at a family partition with his son or sons is not separate property within the meaning of s. 3(1), it must be deemed to be an "interest in Hindu joint family property" within the meaning of sub-section (2) of the section. In another decision the same High Court (*v*1) has expressed its agreement with the view taken by the High Court of Orissa. The High Court of Andhra Pradesh (*v*2) has held that property received by a coparcener by virtue of a deed of settlement is not separate property.

There seems little doubt that the expressions "separate property" and "interest in Hindu joint family property" are used in juxtaposition in sub-sections (1) and (2) which sub-sections between them deal with all property left by such owner. The same conclusion was reached on the vexed question in a decision of a single Judge of the Bombay High Court (*w*). A Division Bench of that High Court has expressed agreement with that view and held that the property left by a Hindu male obtained at a partition between such male person and other members of the family where the partition was between a father and a son or between a father and the other members of the family is covered by sub-section (2) (*w*1). The question whether in such a case the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons was not decided in the Madras and Bombay cases referred to immediately above (*x*). The Madhya Pradesh High Court (*xx*) and the Madras High Court (*x*1) have now expressed their agreement with the view taken by the High Court of Orissa (*x*2)

S. 3(2): *"When a Hindu governed by the Mitakshara dies having at the time of his death an interest in a Hindu joint family property."*—As already mentioned the preferable view would seem to be that the expressions "separate property" used in sub-section (1) and "interest in a Hindu joint family property" used in this sub-secton must be read in juxtaposition and that between them the two sub-sections deal with all property left by such owner. All cases, therefore, where the last owner died leaving property other than his self-

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(*u*) *Visalamma* v. *Jagannadha Rao* ('55) A. Orissa 160.

(*v*) ('57) A.M. 456.

(*v*1) *Onnamalai* v. *Seethapathi* ('61) A.M. 90. Also see *Commissioner of Income Tax* v. *Thiagarajan* ('64) A.M. 58. Reference may be made to *Venkatasubramania* v. *Easwara Iyer* ('66) A.M. 266.

(*v*2) *Lakshmamma* v. *Kondayya* ('61) A.A.P. 505.

(*w*) *Jana Gadi* v. *Parvati Santosh* (1958) 60 Bom. L.R. 553.

(*w*1) *Parvati* v. *Janabai* ('69) A.B. 77.

(*x*) See f.n. (*v*) and (*w*) above.

(*xx*) *Jhangalu Shivcharan* v. *Pancho Bai* ('68) A.M.P. 172.

(*x*1) *Onnamalai Ammal* v. *Seethapathi* ('61) A.M. 90; *Commissioner of Income Tax* v. *Thiagarajan* ('64) A.M. 58. Also see f.n. (*v*1) above.

(*x*2) *Visalamma* v. *Jagannadha Rao* ('55) A. Orissa 160.

acquired property must in view of the decision of the Federal Court (*y*), it is submitted, fall under this section. In this context it may be noted that the sub-section has adopted the Hindu conception that a widow is the surviving half of the deceased husband and introduced the *fictio juris* that she continues the legal persona of her husband. Of course, this does not mean that the husband is for all purposes to be deemed to live till the widow claims partition or files a suit for working out her rights. No difficulty arises where the husband was at the time of his death a member of a joint family and died leaving him surviving his widow and undivided coparceners. In any such case if there was no son the widow would become immediately entitled to the same interest in the property which the husband himself had and on partition take the share that he would have taken. And if there was a son who was a member of the joint family the widow would be entitled to the same share as the son. Difficulty, however, arises where the husband held property which was ancestral and was survived by the widow and a son or sons who had separated from him. Question arises whether in any such case the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons. The High Courts of Orissa (*y*1) and Madras (*y*2), as already mentioned, have taken the view that in such a case the widow is entitled to inherit the entire interest to the exclusion of the divided son or sons and the High Court of Bombay has left the question open. Serious difficulties have already arisen and, even though the law has been altered after the passing of the Hindu Succession Act, 1956, will continue to arise particularly when rights of third parties who are alienees of any such property are involved and questions of title have to be decided. These are some of the problems which have arisen because of the extreme difficulty of fitting in any piecemeal legislation howsoever beneficial in the integrated and complicated structure of Hindu law. Reference may be made to Notes under s. 14 of the Hindu Succession Act, 1956 for the effect of that section on the interest taken by a Hindu widow in joint family property under this section.

*Quantum of share on partition.*—The quantum of interest to which a widow is entitled under this sub-section is to be determined as on the date on which she seeks to enforce partition under sub-section (3) (*z*). The share which devolves on a widow of a deceased coparcener is not a fixed and determinate share but what she takes is the "same interest as he himself had." Therefore, until there is partition, she cannot predicate the particular fraction of her share for it is likely to increase or decrease by birth or death of other coparceners (*b*). Her share would include a share in accretions to the joint family property till partition is effected (*c*).

Prior to the Act, a widow was entitled to a share on partition among her sons in her capacity as a mother (except in Madras.) It has been held in a number of cases, that after the Act, the widow cannot claim a double share on partition between the

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(*y*) *Umayal Achi* v. *Lakshmi Achi* (1945) F.C.R. 1. ('45) A.F.C. 25.

(*y*1) See f.n. (*u*) above.

(*y*2) See f.n. (*x*1) above.

(*z*) *Lakshmi Perumallu* v. *Krishnavenamma* ('65) A.S.C. 825.

(*b*) *Nagappa* v. *Mukumbe* (1951) Bom. 442, ('51) A.B. 309, 53 Bom. L.R. 177; *Mahadu* v. *Gajarabai* ('54) A.B. 422; *Shivappa* v. *Yellawa* (1953) Bom. 958, ('54) A.B. 47; *Gangadhar* v. *Subhashini* ('55) A. Orissa 135; *Tukaram* v. *Gangi* ('57) A.N. 28; *Ramchandra* v. *Ramgopal* ('56) A.N. 228 [crucial date for determining interest is when right to partition is exercised.]. *Suryanarayana* v. *Sugunavathi* ('61) A.A.P. 939.

(*c*) *Gangadhar* v. *Subhashini* ('55) A. Orissa 135.

sons, one in her capacity as a widow and another as a mother (*d*). Under the prior law, stridhan acquired by a female from her husband or father-in-law was taken into account when a share was allotted to her on partition amongst the sons. The share she gets under section 3(2) is not affected by any rule of Hindu law to the contrary and it has been held in a Nagpur case that such stridhan received by her would not be deducted from her share on partition (*e*).

S. 3(3): *"Limited interest known as a Hindu Woman's estate . . . shall have the right of claiming partition."*—Sub-section (3) expressly declares that the interest devolving upon a widow under sec. 3 is a limited interest known as "Hindu Woman's Estate". This expression has been interpreted to mean Hindu widow's estate (*f*). On a plain reading of sub-sections (2) and (3) it is clear that the widow on her husband's death in a joint family gets the same interest that her husband had with the limitation that the interest is not absolute but is limited in the manner of a Hindu widow's estate. It would not be correct to equate the interest which she gets with the share a widow used to get under the orthodox law at a partition between her sons (*f*1). It is also clear that having confined the interest devolving upon her to a widow's limited estate, the Legislature was at pains to stress that nonetheless she was to have the same right of partition as a male coparcener would have. It follows that all the incidents of a widow's estate should attach to the interest which devolves on her by virtue of the express statutory estate created in her favour with the added right to claim partition as its outstanding feature. It has accordingly been held that she can alienate her interest in the coparcenary property for legal necessity (*g*); and her interest is liable to be attached and sold in execution of a decree obtained against her (*g*1). And though she cannot alienate the property without legal necessity, she can alienate her own restricted interest to enjoy the property during her lifetime. The alienee in such a case can enjoy the property during her lifetime and is also by virtue of that right entitled to claim partition (*h*).

Prior to the enactment a widow-mother could not herself claim partition unless the sons chose to effect severance of the joint status. In Madras no female heirs got a share on such partition and in Bengal a sonless step-mother did not have the right to claim a share on a partition among the sons of her deceased husband. This sub-section has the effect of putting the widow in the same position as a son in the matter of claiming partition.

The right to claim partition given to a widow under this sub-section does not negative her right to claim maintenance. It is only an enabling right and she may ask for maintenance instead of partition (*i*). But she cannot enforce both the rights simultaneously (*j*). The share she gets on partition, it has been held, is in lieu of maintenance and if she can get a share in all the coparcenary property including agricultural lands, her right to maintenance would

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(*d*) *Shyamu* v. *Vishwanath* (1955) Bom. 890, 57 Bom. L.R. 807, ('55) A.B. 410; *T. Sarojini Devi* v. *Sri Krishna* ('44) A.M. 401. (1945) Mad. 61; *Indu Bhusan* v. *Mrityunjoy* (1946) 1 Cal. 128.

(*e*) *Hanuman* v. *Tulsabai* ('56) A.N. 63.

(*f*) *Dagadu* v. *Namdeo* (1954) Bom. 1069, 56 Bom. L.R. 513, ('55) A.B. 152.

(*f*1) *Bepin Behary* v. *Lakshsona*, A.I.R. (1959) Cal. 27, 30.

(*g*) *Harekrishna* v. *Jujesthi* ('56) A. Orissa 73; *Pem Mahton* v. *Bandhu Mahto* ('58) A.P. 20.

(*g*1) *Thimmi Ammal* v. *Venkatarama* ('60) A.M. 347.

(*h*) *Dagadu* v. *Namdeo* (1954) Bom. 1069, 56 Bom. L.R. 513, (55) A.B. 152; *Pem Mahton* v. *Bandhu Mahto supra*. Also see *Suryanarayana* v. *Sugunavathi* ('61) A.A.P. 393; *Mahipat Missir* v. *Ganpat Sah* ('63) A.P. 277; *Kunja Sahu* v. *Bhagaban* ('51) A. Orissa 35.

(*i*) *Rathinasabapathy* v. *Saraswathi* ('54) A.M. 307, (1953) 2 Mad. L.J. 459; *Gajavalli Ammal* v. *Narayanaswami* ('62) A.M. 187; *Varahalamma* v. *Ammathalli* ('59) A.A.P. 590.

(*j*) The position was different when she could not get a share of agricultural lands: *Parappa* v. *Nagamma* (1954) Mad. 183, ('54) A.M. 576.

cease (*k*). The right of claiming partition conferred upon a widow under the Act is personal to her. The right being personal would come to an end on her death if no partition had taken place (*k*1). It has been held in a number of cases that, if she died pending a suit for partition, her undivided interest would devolve by survivorship and would not go to her husband's heirs as reversioners (*l*). The reason generally adopted is that she got her interest in lieu of maintenance and the right conferred upon her being personal would not be crystallised until actual partition by metes and bounds. An alienee of the widow's interest for legal necessity can, however, claim the right to partition the joint family property even after her death.

*Husband's death pendente lite.*—In view of the peculiar status created for the widow under the Act entitling her to claim partition in her own right, the sons cannot represent her interest. So where a husband dies pending a suit or appeal, his widow must be substituted as a party in his place. Otherwise the suit or appeal would abate (*m*). Where a coparcener dies pending a suit brought against the individual members of the joint family and not in a representative capacity, the interest of the deceased coparcener cannot be represented by the other members and his widow must be brought on record (*n*). Where a coparcener brings a suit for partition and dies *pendente lite* his widow can continue the suit as representing her husband (*o*).

*Interest liable to attachment and sale in execution.*—The interest devolving on a widow under section 3(2) is liable to attachment and sale in execution of a decree obtained against her (*o*1). Where a creditor has obtained a decree against a coparcener, in his lifetime, he can execute it against the interest devolving on the widow. The rule of survivorship, which operates in case of the death of a widow who dies before there is any partition of the joint family property, does not have the effect of defeating the rights of any creditor of the deceased coparcener. The creditor can proceed against the interest which devolved on the widow for satisfaction of such liability (*p*).

*Devolution of interest on the death of the widow.*—The Act is silent as to what is to be the devolution of the interest of the widow upon her death. The separate property of her husband inherited by her would, it is clear, devolve upon her husband's heirs as reversioners. And in case of joint family property it would seem, having regard to the provisions of s. 3 and the scheme and object of the Act, that if she dies without any partition having taken place her interest in the property would pass by survivorship to the coparceners though the decisions on the subject cannot be said to be quite uniform. It

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(*k*) *Shyamu* v. *Vishwanath* (1955) Bom. 890, ('55) A.B 410; *T. Sarojini Devi* v. *Sri Krishna* (1945) Mad. 61, ('44) A.M. 401.

(*k*1) *Alamelu Ammal* v. *Chellammal* ('59) A.M. 100 (F.B.), (1959) Mad. 106.

(*l*) *Shyamu* v. *Vishwanath, supra; Subba Rao* v. *Krishna Prasadam* (1954) Mad. 227, ('54) A.M. 227; *Kachra Khan* v. *Khant Ram* ('53) A. Sau. 175. Also see *Shankar* v. *Gangaram* (1952) Bom. L.R. 75; *Nagappa* v. *Mukambe* (1951) Bom. 442, 53 Bom. L.R. 177, ('51) A.B. 309.

(*m*) *Dhanukha* v. *Saudagar* (1955) 32 Pat. 1003, ('55) A.P. 240; *Sariu Singh* v. *Ramsaroop* ('55) A.P. 155; *Jugal Kishore* v. *Wardhasa* ('55) A.N. 166; *Ramnath* v. *Ramgopal* ('51) A.N. 434; *Shivrajsingh* v. *Gaurishankar* ('61) A.M.P. 147.

(*n*) *Awadh Behari* v. *Jhaman Mahton* ('53) A.P. 324.

(*o*) *Shankar* v. *Gangaram* (1952) Bom. 485, 54 Bom. L.R. 75, ('52) A.B. 127.

(*o*1) *Thimmi Ammal* v. *Venkatarama* ('60) A.M. 347.

(*p*) *Saradambal* v. *Subbarama Ayyar* (1941) 2 M.L.J. 287, 201 I.C. 301, ('42) A.M. 272; *Siveshwar* v. *Har Narain* (1944) 23 Pat. 760, 219 I.C. 405, ('45) A.P. 116; *Co-operative Society of Patur* v. *Vasant* ('46) A.N. 317; *Shankar* v. *Gangaram* (1952) Bom. 485, 54 Bom. L.R. 75, ('52) A.B. 127.

would also seem that if she sought partition and divided herself from the joint family, the property taken by her would on her death pass to her husband's heirs as reversioners. The High Court of Madhya Bharat has taken the view that the interest taken by the widow is like the interest of her husband, an undivided interest in the joint family property, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate until the suit for partition is filed by her (*q*). The High Court of Orissa has held that the interest of the widow succeeding to her husband's interest in coparcenary property goes to the heirs of her husband after her, in the absence of any coparcener living at the time of her death (*r*). A Full Bench of the Madras High Court (*s*) has held that if the widow divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to other members of the joint family. A Full Bench of the Patna High Court has taken the same view (*s*1). A Full Bench of the Bombay High Court also took the same view in the undermentioned case (*s*2). This view was dissented from in a recent decision of the Madhya Pradesh High Court, where it was held that on the death of a widow who has taken on partition her husband's share, there is a reverter of the property back to the coparcenary (*t*). The Supreme Court has finally held that if the widow in such a case died after partition or her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of the husband (*u*). Upon the death of a widow governed by Dayabhaga law, the share which she inherited from her husband under sec. 3 of the Act devolves on the husband's heirs under the Hindu law as modified by the Act, as if he died simultaneously with her. Similarly the share which the widow of a predeceased son gets under the Act, devolves after her death upon the heirs of her father-in-law (*v*).

Reference may be made to Notes under s. 14 of the Hindu Succession Act 1956 for the effect of that section on the interest taken by a Hindu widow under this section.

**35A. Hindu Law Women's Rights Act (Mysore Act 10 of 1933).—** Reference may be made to the undermentioned case (*v*1).

**36. Propinquity the governing factor.**—Under the Mitakshara, the right to inherit arises from propinquity, that is, proximity of relationship (*w*).

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(*q*) *Laxman* v. *Gangabai* ('55) A.M.B. 138.

(*r*) *Harekrishna* v. *Jujesthi* ('56) A. Orissa 73: *Keluni Devi* v. *Jagadambhu Naik* ('56) A. Orissa 47.

(*s*) *Parappa* v. *Nagamma* (1954) Mad. 183 ('54) A.M. 576 (F.B.).

(*s*1) *Khatrani* v. *Tapeshwari* ('64) A.P. 261 (F.B.).

(*s*2) *Ranu Thaku* v. *Santu Goga* ('68) A.B. 1 (F.B.). Also see *Manda* v. *Pandurang* ('68) A.B. 340. Remarriage of widow after partition.

(*t*) *Bhagobai* v. *Bhaiyalal* ('57) A.M. Pra. 29.

(*u*) *Satrughan* v. *Sabujpari* ('67) A.S.C. 272.

(*v*) *Kamalabala* v. *Jiban* (1946) 2 Cal. 32, ('46) A.C. 461; *Provash Chandra* v. *Prokash Chandra* (1946) 2 Cal. 164.

(*v*1) *Nagendra Prasad* v. *Kempananjamma* ('68) A.S.C. 209.

(*w*) *Lallubhai* v. *Cassibai* (1881) 5 Bom. 110, 121, 7 I.A. 212, 234; *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 95, 6 Pat. L.J. 140, 60 I.C. 251, ('21) A.PC. 53; *Vedachela* v. *Subramania* (1921) 48 I.A. 349, 354, 44 Mad. 753, 64 I.C. 402, ('22) A.PC. 33; *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631; *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339; *Suba Singh* v. *Sarafraz* (1897) 19 All. 215 [F.B.]; *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316; *Appandai* v. *Bagubai* (1910) 33 Mad. 439, 444, 5 I.C. 280; *Chinnasami* v. *Kunju Pillai* (1923) 35 Mad. 152. *Pichandi* v. *E. Ramaswami* ('71) A.M. 206. Father's father's son's son's daughter's son and second husband's son of mother of the propositus—latter preferred.

Under the Dayabhaga, it arises from spiritual efficacy, that is, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors [s. 79].

But though under the Mitakshara the right to inherit does not arise from the right to offer oblations, the test to be applied, when a question of *preference* arises is, in the case of sagotra sapindas, the capacity to offer oblation (*x*), but, in the case of bhinnagotra sapindas, the "primary test" is "propinquity in blood" (*y*) and, "when the degree of blood relationship furnishes no certain guide," the test is the capacity for conferring spiritual benefit (*z*).

*Different meanings of "sapinda" in the Mitakshara and the Dayabhaga.*—In *Buddhu Singh* v. *Laltu Singh* (*a*), their Lordships of the Privy Council said: "It is now well settled by the decisions of this Board, *Lallubhai Bappoobhoy* v. *Cassibai* (*b*) and *Ramchandra's* case (*c*), that under the Mitakshara the sapinda-relationship arises 'between two people through their being connected by particles of one body', namely, that of the common ancestor, in other words, from community of blood in contra-distinction to the Dayabhaga notion of 'community in the offering of religious oblation'." (*d*)

The doctrine of spiritual benefit is explained in § § 79 to 87.

*Illegitimate offspring.*—The general principle of Hindu law is to limit heirship to a legitimate issue. The rules of inheritance relating to sapindas, samanodakas and bandhus are based upon marriage and a legitimate descent. They can only be departed from in favour of an illegitimate offspring on the basis of some well-established principles. One principle is that such departure can be made where there is a text or any statutory provision. In a case decided by the High Court of Nagpur, *Sadu Ganaji* v. *Shankerrao* (*e*), it was observed that there is no text or statutory provision to cover a case of succession to stridhan of a shudra woman where the question is whether an illegitimate son of a predeceased daughter of the woman succeeds in preference to the husband of the woman. There is a text in favour of an illegitimate son of a shudra. There is no text dealing with the share of an illegitimate daughter or an illegitimate grandson or any other illegitimate relation. It was held that the illegitimate son of the daughter was not entitled to succeed in preference to her husband.

**37. Gotraja sapindas and bhinna-gotra sapindas.**—(1) The Mitakshara divides sapindas or blood relations into two classes, namely:—

(a) gotraja sapindas, that is, sapindas belonging to the same *gotra* or family as the deceased; and

(b) bhinna-gotra sapindas, that is, sapindas belonging to a different *gotra* or family from the deceased.

Gotraja sapindas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent, as for instance, a son's son, a son's son's son, or a brother's son. If challenged, the identity of gotra (*f*) and the continuity of the lineage, not broken by an adoption into another gotra (*g*) must be established. Bhinna-gotra sapindas are all cognates, that is, persons related to the deceased through a female such as a sister's son, a brother's daughter's son, etc. Bhinna-gotra sapindas are called bandhus in the Mitakshara, and are commonly known by that name.

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(*x*) *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1872) 13 M.I.A. 373, 392; *Buddha Singh* v. *Laltu Singh* (1915) 42 I.A. 208, 217, 227, 228, 37 All. 604, 613, 623, 624, 30 I.C. 5, ('15) A.PC. 70.

(*y*) *Balasubrahmanya Pandea Thalaivar* v. *Subbayya Tevar* (1938) 65 I.A. 93 (1938) Mad. 551, 40 Bom. L.R. 704, 172 I.C. 724, ('38) A.PC. 34.

(*z*) *Vedachela* v. *Subramana* (1921) 48 I.A. 349, 41 Mad. 753, 64 I.C. 402, ('22) A.PC. 33; *Jatindranath Ray* v. *Nagendranath Ray* (1931) 58 I.A. 72, 59 Cal. 576, 135 I.C. 637, ('31) A.PC. 268; *Ademma* v. *Hanuma Reddi* (1938) Mad. 260, ('37) A.M. 967.

(*a*) (1915) 42 I.A. 208, 217, 37 All. 604, 613 30 I.C. 529, ('15) A.PC. 70.

(*b*) (1880) 5 Bom. 110, 121, 7 I.A. 212, 234.

(*c*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 298, 42 Cal. 384, 404, 25 I.C. 290, ('14) A.PC. 1.

(*d*) *Ibid.*

(*e*) (1955) Nag. 467, ('55) A.N. 84.

(*f*) *Jadunath Kuar* v. *Bisheshar Bakhsh Singh* (1932) 59 I.A. 173, 36 C.W.N. 1073, 136 I.C. 747, ('32) A.PC. 142.

(*g*) *Lal Hari Har Partap Baksh Singh* v. *Raja Bajrang Bahadur Singh* (1938) 9 Luck. 121, 144 I.C. 529, (33) A.O. 197.

(2) Gotraja sapindas are sub-divided into two classes, namely, (1) sapindas technically so called, and (2) samanodakas.

It will be seen from the above that the word "sapinda" is used in the Mitakshara in two senses. In its larger sense it means a person having the same pinda or community of particles of the same body with the deceased, that is, a blood relation. In its narrower sense, the sapindaship ceases with the fifth degree on the mother's side and the seventh degree on the father's side. That is, a person is said to be the sapinda of another if, when he is related through his father, he is not more than seven degrees from the common ancestor, and when related through the mother not more than five degrees from the common ancestor (*h*). In this sense, as there are no females in the pedigree of a gotraja sapinda, the sapindas include blood relations to the seventh degree only reckoned from and inclusive of the deceased as defined in sec. 39.

In the following sections of this chapter the word "sapinda" is used in its narrower sense.

**38. The three classes of heirs.**—(1) There are three classes of heirs recognized by the Mitakshara, namely:—

(a) Gotraja sapindas;

(b) Samanodakas; and

(c) Bandhus.

(2) The first class succeeds before the second, the second succeeds before the third.

**39. Gotraja Sapindas.**—The gotraja Sapindas of a person, according to the Mitakshara (*i*), are—

(i) his 6 male descendants in the male line;

that is, his son, son's son, son's son's son, etc. being $S_1$ to $S_6$ in the table given on p. 107 below.

(ii) his 6 male ascendants in the male line, the wives of the first three of them, and probably also of the next three;

that is his father, father's father, father's father's father, etc., being $F_1$ to $F_6$ in the table and their wives, that is $M_1$ to $M_6$ being the mother, father's mother, father's father's mother, etc.

(iii) the 6 male descendants in the collateral male line of each of his male ascendants;

(1) that is, $x_1$ to $x_6$ in the line of $F_1$, being his brother, brother's son, brother's son's son, etc.

(2) $x_1$ to $x_6$ in the line of $F_2$, being his paternal uncle, paternal uncle's son, etc.;

(3) $x_1$ to $x_6$ in the line of $F_3$, being his paternal grand-uncle, paternal grand-uncle's son, etc.;

(4) $x_1$ to $x_6$ in the line of $F_4$;

(5) $x_1$ to $x_6$ in the line of $F_5$; and

(6) $x_1$ to $x_6$ in the line of $F_6$.

(iv) his wife, daughter, and daughter's son.

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(*h*) Mitakshara chap. III, v. 53, quoted in *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 42 Cal. 384, 408, 25 I.C. 290, ('14) A.PC. 1.

(*i*) Sarkar's Hindu Law, 7th ed., p. 97; Sarvadhikari's "Principles of Hindu Law of Inheritance" 2nd ed., p. 530; *Bhyah Ram* v. *Bhyah Ugur* (1870) 13 M.I.A. 373, 394.

The sapindas are 57 in number as shown below:—

| | |
|---|---|
| $S_1$ to $S_6$ .. .. .. .. .. | 6 |
| $F_1$ to $F_6$ and their wives $M_1$ to $M_6$ .. .. .. | 12 |
| $x_1$ to $x_6$ in each of the six lines from $F_1$ to $F_6$ .. .. | 36 |
| Wife, daughter and daughter's son .. .. .. | 3 |
| | 57 |

It will be seen that the sapinda relationship extends to seven degrees reckoned from and inclusive of the deceased, this being the Hindu mode of counting degrees. It is six degrees, if you exclude the deceased. The wife becomes a sapinda of the husband on marriage. The daughter's son is not a gotraja sapinda: he is a bandhu for he is related to the deceased through a female. For the purposes of succession, however, he is ranked with gotraja sapindas.

A sapinda, according to the Mitakshara, means a person connected with the same *pinda* or body. See § 36 above.

In the case of the sons of a prostitute, there can be no gotraja sapinda relationship between them or their agnate male descendants as the father is unknown (*j*).

**40. Samanodakas.**—The sapinda relationship, as stated above, extends to seven degrees reckoned from and inclusive of the deceased. The samanodakas of a person include all his agnates from the 8th to the 14th degree (*k*).

The samanodakas are shown in the table given on p. 107 in thick black type. They are 147 in number counting up to the 14th degree only; they are:—

| | |
|---|---|
| $S_7$ to $S_{13}$ in the descending line .. .. .. | 7 |
| $F_7$ to $F_{13}$ in the ascending line .. .. .. | 7 |
| $x_7$ to $x_{13}$ in each of six collateral lines from $F_1$ to $F_6$ | $7 \times 6 = 42$ |
| $x_1$ to $x_{13}$ in each of the 7 collateral lines $F_7$ to $F_{13}$ | $13 \times 7 = 91$ |
| | 147 |

Samanodakas are those male relations of a Hindu to whom he offers oblations of *water* while performing the Sradha ceremony. See sec. 80.

**41. Table of Gotraja sapindas and samanodakas.**—The table given on p. 107 is a table of Gotraja sapindas and samanodakas (*l*).

The thick black lines show where the sapinda relationship ends, and the samanodaka relationship begins.

The samanodakas are shown in thick black type; the rest are sapindas.

*W* is the widow of the deceased owner, *d* is his daughter and *d*'s *son* is his daughter's son.

$S_1$ to $S_{13}$ are the son, the son's son, the son's son's son, etc., of the deceased.

$F_1$ to $F_{13}$ are his father, father's father, father's father's father, etc.

$M_1$ to $M_6$ are his mother, father's mother, father's father's mother, etc.

$x_1$ to $x_{13}$ in the line of $F_1$ are his brother, brother's son, brother's son's son, etc.

$x_1$ to $x_{13}$ in the line of $F_2$ are his paternal uncle, paternal uncle's son, paternal uncle's son's son, etc.

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(*j*) *Krishna Mudaliar* v. *Marimuthu Mudaliar & Ors.* (1940) Mad. 109, ('39) A.M. 862, (1939) 2 M.L.J. 423.

(*k*) *Atmaram* v. *Baitrao* (1935) 62 I.A. 139, 155 I.C. 330, ('35) A.PC. 57, approving *Naraini* v. *Chandi* (1887) 9 All. 467; *Rama Row* v. *Kuttiya* (1917) 40 Mad. 654, 659, 34 I.C. 294, ('17) A.M. 872 and disapproving *Devkore* v. *Amritram* (1885) 10 Bom. 372; *Ram Baran* v. *Kamla Prasad* (1910) 32 All. 594, 6 I.C. 698.

(*l*) This table is an enlargement of the table given in Saravadhikari's "Principles of the Hindu Law of Inheritance", 2nd ed., p. 527.

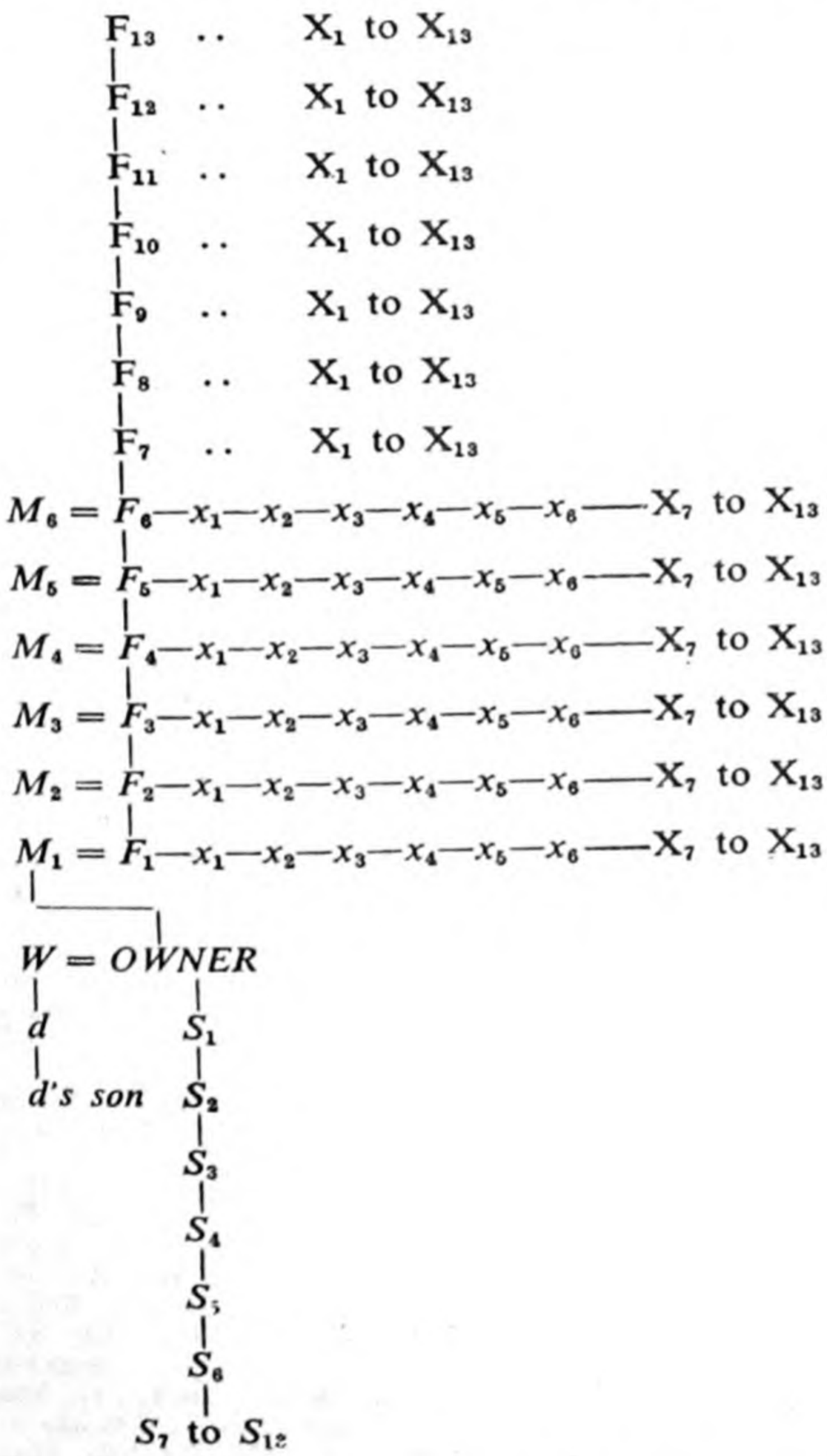
$x_1$ to $x_{13}$ in the line of $F_3$ are his paternal grand-uncle, paternal grand-uncle's son, etc. and so on in the remaining lines from $F_4$ to $F_{13}$.

The table does not include female heirs recognised in the Bombay State.

$F_1$ to $F_{13}$ is the ascending line; $S_1$ to $S_{13}$ is the descending line; $x_1$ to $x_{13}$ are the thirteen collateral lines.

**42. Succession in the Bombay State.**—The rules of inheritance in force in the Bombay State differ in some respects from those in force in the Benares, Mithila and Madras schools. Again in those parts of the Bombay State where the Mayukha is the prevailing authority, that is, the island of Bombay, Gujarat and the North Konkan, the rules of inheritance are in some respects different from those prevailing in other parts of that State. The order of succession in the Bombay State is given separately in Chapter VI (§§ 71-77).

**Table of Sapindas and Samanodakas according to the Mitakshara Law.**




*Note* :—For explanation of the table, see § 41.

**43. Order of succession among sapindas.**—The sapindas succeed in the following order:—

1-3. **Son, grandson (son's son) and great-grandson (son's son's son), and (after 14th April 1937) widow, predeceased son's widow, and predeceased son's predeceased son's widow.**—A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed *simultaneously as a single* heir to the separate or self-acquired property of the deceased with rights of survivorship (*m*). See § 31, ill. (a) and § 32.

After 14th April 1937, a widow takes the same share as a son. The widow of a predeceased son inherits in like manner as a son if there is no son surviving of such predeceased son: and in like manner as a son's son, if there is surviving a son or son's son of such predeceased son. The same rule applies *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(i) *Take per stirpes.*—The son, grandson and great-grandson take *per stirpes* and not *per capita*. See § 29 and illustration thereto.

(ii) *Son born after partition.*—Where there has been a partition between a father and his sons, and a son is subsequently born to him, such son takes not only the share of the father in the joint property obtained by him on partition, but the whole of the property acquired by the father before or after partition to the exclusion of the divided son (*n*). *A* and his two sons, *B* and *C*, constitute together a joint family. *B* and *C* separate from *A*. After the division a son *D* is born to *A*. *A* and *D* remain joint. *A* then dies leaving *D*. *D* is entitled not only to *A*'s separated share of the joint property, but to the whole of *A*'s self-acquired property. See § 310.

(iii) *Divided and undivided.*—Where there are sons by different wives, it often happens that the sons by one wife take their share of the joint property from the father and separate from him, and the father continues joint with the sons by his other wife. Suppose now that the father dies leaving self-acquired property, some acquired before and some after partition. Who is entitled to the property? According to a Full Bench decision of the Allahabad High Court (*o*) and rulings of other High Courts (*p*) the undivided sons and their branches succeed to the whole of such property to the exclusion of the divided sons and their branches.

(iv) *Adopted son.*—Adoption confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, subject to certain qualifications. See § 494. Also see § 497. In Andhra an illatom son-in-law is a boy incorporated in the family with a view to give the daughter in marriage and is customarily recognised as an heir in the absence of a natural born son (*s*).

(v) *Illegitimate sons.*—The illegitimate sons of a Brahman, Kshatriya, or Vaisya are entitled to maintenance, and not to any share of the inheritance (*t*). See Mitakshara, ch. I, s. 12, v. 3.

The illegitimate son of a Sudra, however, is entitled to a share of the inheritance *provided* (1) he is the son (*putra*) of a *dasi*, that is, a *Hindu* (*u*) concubine in the continuous and exclusive keeping of his father at the time of his birth *and* (2)

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(*m*) *Marudayi* v. *Doraisami* (1907) 30 Mad. 348; *Gangadhar* v. *Ibrahim* (1923) 47 Bom. 556, 72 I.C. 307, ('23) A.B. 265.

(*n*) *Nawal Singh* v. *Bhagwan Singh* (1882) 4 All. 427, 429.

(*o*) *Mst. Ram Dei* v. *Mst. Gyarsi* (1949) All. 160 (F.B.)

(*p*) *Fakirappa* v. *Yellappa* (1898) 22 Bom. 101; *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 2 I.C. 510; *Viravan* v. *Srinivasachariar* (1921) 44 Mad. 499, 503-504, 62 I.C. 944, ('21) A.M. 168 [F.B.]; *Narasimham* v. *Narasimham* (1932) 55 Mad. 577, 137 I.C. 765, ('32) A.M. 361; *Badri Nath* v. *Hardeo* (1930) 5 Luck. 649, 123 I.C. 861, ('30) A.O. 77 [The case of *Kunwar Bahadur* v. *Madho Prasad* (1918) 17 All. L.J. 151, 49 I.C. 620, ('19) A.A. 223, relied upon in *Badri Nath's* case does not support the decision in that case]; *Ambika* v. *Jamuna Prasad* (1942) 17 Luck. 72; *Satruhan Prasad* v. *Sudip Narain* ('55) A.P. 408, I.L.R. (1955) Pat. 298. *Vishweshwarlal* v. *Bhuramal* ('68) A. Raj. 277; *Inder Narayan* v. *Rup Narayan* ('65) A.M.P. 107; *Girdharilal* v. *Fatehchand* ('55) A. Madh. Bha. 148.

(*s*) *P. Lakshmi Reddy* v. *L. Lakshmi Reddy* ('57) A.SC. 314; *P. Venkateswarlu* v. *Raghavulu* ('57) A. Andh. Pra. 604.

(*t*) *Roshan Singh* v. *Balwant Singh* (1902) 22 All. 191, 27 I.A. 51; *Chuoturya* v. *Sahub Purhulad* (1857) 7 M.I.A. 18; *Hiralal Laxmandas* v. *Meghraj Bhickchand* (1938) Bom. 779, ('58) A.B. 433. Also see *Mothey Anja Ratna* v. *Narayana Rao* (1952) S.C.J. 507, (1952) 2 M.L.J. 342, ('53) S.C. 433 (factors to be considered in fixing maintenance).

(*u*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 [a Christian woman is not a *dasi*]; *Sitaram* v. *Ganpat* (1923) 25 Bom. L.R. 429, 73 I.C. 412, ('23) A.B. 384 [a Mahomedan woman is not a *dasi*]; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585 (Thakur woman).

he is not the fruit of an adulterous or incestuous intercourse (*v*). It is not necessary that his mother should remain a permanent concubine till the day of his father's death (*w*). A Brahmin mistress of a Sudra does not become a Sudra herself and their son is not a Dasiputra (*x*). It is not necessary to constitute a woman a *dasi* that she should not have been a married woman (*y*). She may be a widow when the illicit connection begins (*z*), or she may even be a married woman when such connection begins, provided that in the latter case the connection has ceased to be adulterous when the son is conceived, as where the husband dies before conception (*a*). The condition that the connection should not be adulterous or incestuous is not to be found in the texts; it seems to have been imposed on grounds of general morality (*b*). Nor is it necessary that a marriage could have taken place between the boy's father and his mother (*c*). He is not, however, entitled to full rights of inheritance. The text of the Mitakshara bearing on the subject is as follows:—

> "The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate *for half a share;* that is, let them give him half [as much as is the amount of one brother's] allotment": Mitakshara, chap. I, sec. 12, verse 2.

The above text refers to the property of a *separated* householder (*d*).

In *Ajit Kumar* v. *Ujayar Singh* (*d*1) the Supreme Court summarised the law pertaining to the rights of inheritance of an illegitimate son to his putative father's self-acquired property.

In *Kamulammal* v. *Visvanathaswami* (*e*), the above text was interpreted by the Privy Council to mean that an illegitimate son takes one-half of what he *would have* taken if he was legitimate, that is to to say, the illegitimate son takes one-fourth ($\frac{1}{2} \times \frac{1}{2}$), and the legitimate son takes three-fourth. If a Sudra die leaving one legitimate son and 6 illegitimate sons, then if the 6 illegitimate sons were legitimate, they would each take 1/7; being illegitimate, each of them will take 1/2 of 1/7, that is, 1/14 and the six together will take 3/7, and the remaining 4/7 will go to the legitimate son (*f*). This interpretation placed on the relevant text by the Privy Council has been accepted by the Supreme Court (*g*).

Where there is no legitimate son, the illegitimate son is entitled to a moiety only of his father's estate when there is a widow, daughter or daughter's son (*d*1). Where there is no legitimate son, but a daughter or daughter's son, the illegitimate son takes one-half of the whole estate, and the other half goes to the daughter, or to the daughter's son, as the case may be (*h*). According to the

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(*v*) *Rahi* v. *Govind* (1876) 1 Bom. 97; *Sadu* v. *Baiza* (1880) 4 Bom. 37; *Gangabai* v. *Bandu* (1916) 40 Bom. 369, 32 I.C. 986 ('16) A.B. 283; *Ram Kali* v. *Jamma* (1908) 30 All. 508; *Rajani Nath Das* v. *Nitai Chandra Dei* (1921) 48 Cal. 643, 63 I.C. 50, ('21) A.C. 820 [F.B.] overruling *Narain* v. *Rakhal* (1876) 1 Cal. 1; *Kirpal* v. *Sukurmoni* (1882) 19 Cal. 91, and *Ram Saran* v. *Tek Chand* (1901) 28 Cal. 194 See *Bai Nagubai* v. *Bai Monghibai* (1926) 52 I.A. 153, 50 Bom. 604, 96 I.C. 20, ('26) A.PC. 73 [on appeal from (1923) 47 Bom. 401, 69 I.C. 291, ('23) A.B. 190]. *Manickchand* v. *Bhagwandas* ('64) A.P. 353; *Shibu* v. *Pandu* ('67) A.J.&K. 81. The illegitimate son of a Sudra who is the offspring of an adulterous or incestuous intercourse is entitled to maintenance only [§ 551]. Reference may also be made to *Gopala Rao* v. *Sitharamamma* ('65) A.S.C. 1970.

(*w*) *Uderam* v. *Thagga* (1949) Nag. 248.

(*x*) *Ramchandra Doddappa* v. *Hanamnaik Dodnaik* (1936) 60 Bom. 75, 37 Bom. L.R. 920, 160 I.C. 99, ('36) A.B. 1; *Bachubhai* v. *Dhanlaxmi* ('61) A. Guj. 141.

(*y*) (1876) 1 Bom. 97, *supra*: *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 47, 42 I.C. 556, ('18) A.M. 1346. *Ramchandra* v. *Sadashiva Rao* ('68) A. Mys. 85.

(*z*) (1916) 40 Bom. 369, 32 I.C. 986, ('16) A.B. 283, *supra.*

(*a*) *Tukaram* v. *Dinkar* (1931) 33 Bom. L.R. 289, 131 I.C. 883, ('31) A.B. 221; *Mt. Daulat Kuar* v. *Bishundeo Singh* (1940) 19 Pat. 382, 189 I.C. 883, ('40) A.P. 310. Reference may also be made to *Tatayya* v. *Nakaraju* ('58) A.A.P. 611.

(*b*) *Soundararajan* v. *Arunachalam* (1916) 39 Mad. 136, 151, 33 I.C. 858, ('16) A.M. 1170 [F.B.].

(*c*) (1916) 39 Mad. 136, 33 I.C. 858, ('16) A.M. 1170 [F.B.], *supra*; *Rajani Nath Das* v. *Nitai Chandra Dei* (1921) 48 Cal. 643, 63 I.C. 50, ('21) A.C. 820 [F.B.].

(*d*) *Ranoji* v. *Kandoji* (1885) 8 Mad. 557, 561 *Cf. Deivanai Achi* v. *Chidambaram Chettiar* ('54) A.M. 657, 671, (1955) 1 M.L.J. 120.

(*d*1) ('61) A.S.C. 1334, 1337. Also see *Sadashiv* v. *Bala* ('72) A.B. 164.

(*e*) (1923) 50 I.A. 32, 46 Mad. 167, 71 I.C. 643, ('23) A.PC. 8 disapproving: *Kesarce* v. *Samardhan* (1873) 5 N.W.P. 9: *Chellammal* v. *Ranganatham* (1911) 34 Mad. 277, 12 I.C. 247, (1916) 40 Bom. 369, 32 I.C. 986, ('16) A.B. 283, *supra.*

(*f*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*g*) *Gur Narain Das* v. *Gur Tahal Das* (1952) S.C.R. 869, 875, (1952) 2 M.L.J. 251, ('52) A.SC. 225.

(*h*) *Shesgiri* v. *Girewa* (1890) 14 Bom. 282; *Meenakshi* v. *Appakutti* (1910) 33 Mad. 226, 4 I.C. 299; *Annayyan* v. *Chinnan* (1910) 33 Mad. 366, 5 I.C. 84.

Privy Council decision in *Kamulammal's* case referred to above, the half share which an illegitimate son takes is a half of that which he would have taken had he been legitimate. Applying that test, it is clear that had the illegitimate son been legitimate, he would have taken the *whole* estate to the exclusion of the daughter: being illegitimate, he takes one-half of the whole, and the daughter or daughter's son, as the case may be, takes the other half (*i*). If there be no widow, daughter, or daughter's son, the illegitimate son takes the whole estate (*j*). An adopted son stand on the same footing as a legitimate son (*k*).

Where an illegitimate son and a widow of the deceased Sudra inherit his property in equal shares and the widow thereafter dies, the illegitimate son, by operation of the doctrine of reverter, becomes entitled to the other half share taken by the widow (*k*1).

The share allotted to the illegitimate son under the Mitakshara is not in lieu of maintenance: it is in recognition of his status as a son (*l*).

The legitimate son and the illegitimate son inherit their father's property as *coparceners* with a right of *survivorship* and necessarily the right to claim partition of the self-acquired as well as ancestral property left by the father belongs to them (*l*1). Thus if a Sudra dies leaving a legitimate son *A*, and an illegitimate son *B*, and *A* dies before partition without leaving male issue, *B* will take *A*'s share by *survivorship* to the exclusion of *A*'s daughter, mother or other heir (*m*). See § 312.

The right of an illegitimate son of a Sudra to inherit to his father is *not merely a personal right*: it passes on his death to his *legitimate* issue. Thus if a Sudra *A* has a legitimate son *B* and an illegitimate son *C* and *C* predeceases *A*, leaving a legitimate son *D*, then on *A*'s death, *D* will take a moiety of the share of *B*, that is, *B* will take 3/4, and *D* will take 1/4, that being the share of his father *C*. But it would seem that an illegitimate son of a predeceased legitimate son of a Sudra is not entitled to succeed on the ground of representation (*n*).

Where, on partition between a legitimate son and an illegitimate son, property is allotted to the widow, the illegitimate son can claim, on the widow's death, a share in the property allotted to her, as it stands on the same footing as property inherited from her husband (*o*).

The illegitimate son of a Sudra inherits only to his father, he has no claim to inherit to *collaterals*. Thus if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, they will both inherit their father's property as coparceners. If they divide the property, *A* will take 3/4 and *B* will take 1/4. If *A* dies *after* partition, his share will pass to his own heirs, *but in no case to B*, *B* not being amongst his heirs. *B* can inherit to his father alone, and not to his father's legitimate sons, nor his father's brothers nor any other collaterals (*p*). If *A* dies while he is *joint* with *B* without leaving male issue his share would go to *B* by *survivorship*. But *A*'s separate property would pass to his own heirs, and not in any case to *B*. On the same principle, if a Sudra dies leaving an illegitimate son of his father and a half-brother, the half-brother is entitled to succeed, the illegitimate son being excluded from all collateral succession (*q*). And just as an illegitimate son is not entitled to inherit to collaterals, so a collateral is not entitled to inherit to him. Thus if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, and *A* dies leaving a legitimate son *C*, and *B* dies without leaving any relations, *C*, who is a collateral, is not entitled to succeed to *B*'s property (*r*).

The son of a Zamindar born of the *katar* form of marriage among the Tanwars or Kanwars (Sudra) is illegitimate and is not entitled to the Zamindary in prefer-

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(*i*) *Karuppayee* v. *Ramaswami* (1932) 55 Mad. 856, 137 I.C. 645, ('32) A.M. 440.

(*j*) *Sarasvati* v. *Mannu* (1879) 2 All. 134, Mitakshara, chap. 1, sec. 12, para 1.

(*k*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*k*1) *Ajit Kumar* v. *Ujayar* ('61) A.S.C. 1334. Also see *Karuppayee* v. *Ramaswami* cited in f.n. (*i*) above.

(*l*) *Vellaiyappa Chetty* v. *Natarajan* (1931) 55 Mad. 1, 58 I.A. 402, 134 I.C. 1084, ('31) A.PC. 294.

(*l*1) See cases noted in *Apparao* v. *Narasimha Rao* ('62) A.A.P. 515.

(*m*) *Raja Jogendra* v. *Nityanund* (1891) 18 Cal. 151, 17 I.A. 128, [on app. from (1885) 11 Cal. 702], approving *Sadu* v. *Baiza* (1884) 4 Bom. 37; *Gur Narain Das* v. *Gur Tahal Das*, *supra*.

(*n*) *Govindarajulu* v. *Balu Ammal* (1951) 2 M.L.J. 209, ('52) A.M. 1 (case-law considered).

(*o*) *Bhagwantrao* v. *Punjaram* (1938) Nag. 255, 174 I.C. 201, ('38) A.N. 1.

(*p*) *Shome Shankar* v. *Rajesar* (1899) 21 All. 99; *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 42 I.C. 556, ('18) A.M. 1346 [F.B.]: *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928, ('26) A.M. 84; *Raj Fateh Singh* v. *Baldeo Singh* (1928) 3 Luck. 416, 109 I.C. 310 ('28) A.O. 233.

(*q*) *Dharma* v. *Sakharam* (1920) 44 Bom. 185, 55 I.C. 306, ('20) A.B. 205.

(*r*) *Zipru* v. *Bomtya* (1922) 46 Bom. 424, 64 I.C. 975, ('22) A.B. 175.

ence to the Zamindar's cousin (*s*). The only question raised before the Judicial Committee was as to the validity of the marriage. The other point was conceded obviously because the Zamindari was impartible and the cousin took by survivorship. (See § 587).

The illegitimate son is not entitled to succeed to the stridhan of his father's wife (*t*).

There can be no coparcenary between a Sudra father and his illegitimate sons. But it has been held by the High Court of Bombay that on the *father's death* they hold the property inherited by them from him as coparceners and none of them can dispose of his interest in it by will (*u*).

(iv) *Son born of anuloma marriage.*—Under the Hindu law as administered in the Bombay State, the marriage of a Brahman male with a Sudra woman is an *anuloma* marriage and is valid. A son born of such a marriage is legitimate, but he is entitled only to a one-tenth share in the estate of his father. As regards the estate of his uncle also, he is entitled not to the whole of it, but only to a one-tenth share in it (*v*).

**4. Widow:**

(i) *Widow's estate.*—The widow takes only a limited interest called the *widow's estate* in the estate of her husband [§ 176]. On her death the estate goes not to her heirs, but to the next heirs of her husband, technically called reversioners (*w*) [§§ 168, 170]. She is entitled only to the income of the property inherited by her. She has no power to dispose of the *corpus* of the property except in certain cases [§§ 178-180]. She may, however, alienate her life interest in the estate. Sec. 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

(ii) *Unchastity.*—An unchaste widow was not entitled, under Hindu law to inherit to her husband. But once the husband's estate had vested in her (which could only happen if she was chaste at the time of her husband's death), it was not divested by unchastity *subsequent* to her husband's death (*x*). It has been held in a decision of the Bombay High Court (*y*) that the effect of the Hindu Women's Rights to Property Act, 1937, was to remove the bar of unchastity because the Act applied notwithstanding any rule of Hindu law or custom to the contrary. The Calcutta High Court (*z*) and the Madras High Court (*a*) have taken the contrary view.

(iii) *Re-marriage.*—The re-marriage of a widow, though now legalized by the Hindu Widow's Re-marriage Act, 1856, divests the estate inherited by her from her deceased husband. By her second marriage she forfeits the interest taken by her in her husband's estate, and it passes to the next heirs of her husband as if she were dead (s. 2 of the Act) (*b*). In a recent decision the High Court of Bombay explained the effect of section 2 of that Act read with S. 14(1) of the Hindu Succession Act, 1956 (*b*1). The reason for the rule laid down in section 2 is that a widow succeeds as the surviving half of her husband, and she ceases to be so on re-marriage. But a widow does not by re-marriage lose her right to succeed to the estate of her son (*c*) or her daughter (*d*), by her first

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(*s*) *Ram Saran Singh* v. *Mahabir Sewak Singh* (1934) 61 I.A. 106, 147 I.C. 667, ('34) A.PC. 74.

(*t*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928 ('26) A.M. 84.

(*u*) *Shamu* v. *Babu Aba* (1928) 52 Bom. 300, 100 I.C. 116, ('28) A.B. 153. See *Packiriswamy* v. *Doraswamy* (1931) 9 Rang. 266, 271, 272, 132 I.C. 817, ('31) A.R. 216.

(*v*) *Natha* v. *Mehta Chhotalal* (1931) 55 Bom. 1, 130 I.C. 17, ('31) A.B. 89.

(*w*) *Bhagwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487.

(*x*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 7 I.A. 115; *Sellam* v. *Chinnammal* (1901) 24 Mad. 441; *Gangadhar* v. *Yellu* (1912) 36 Bom. 138, 12 I.C. 714; *Jadho Nagu* v. *Jadho Gangu* ('58) Andh. Pra. 19.

(*y*) *Akoba* v. *Sai Genu* (1941) Bom. 438, ('41) A.B. 204, (1941) 43 Bom. L.R. 338.

(*z*) *Kanailal* v. *Pannasashi Mitra* (1953) 58 C.W.N. 743, ('54) A.C. 588.

(*a*) *Ramaiyya* v. *Motayya* (1952) Mad. 187, ('51) A.M. 954 (F.B.).

(*b*) *Mussadi* v. *Mst. Chando* ('56) A. Him. Pra. 45; *Setabi Dei* v. *Ramdhani* ('66) A.C. 60.

(*b*1) *Pandurang* v. *Sindhu* ('71) A.B. 413.

(*c*) *Akora Suth* v. *Boreani* (1869) 2 Beng. L.R. A.C. 199; *Chamar Haru* v. *Kashi* (1902) 26 Bom. 388; *Basappa* v. *Rayava* (1905) 29 Bom. 91 [F.B.]; *Ramaswamy* v. *E. Thevar* ('72) A.M. 314. In *Pichandi* v. *E. Ramaswami* ('71) A.M. 204 the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the propositus. The latter was preferred. Also see § 54: *Atma bandhus*: Entry No. 27. Also see § 43-7(iv)—Mother. *Lakshmana* v. *Siva* (1905) 28 Mad. 425; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 673; *Pannalal* v. *Harna Bai* ('50) A. Hyd. 37; *Fagunswami* v. *Dhum Lal* ('51) A.C. 269; *Fagunswani Das* v. *Dhum Lal* (1951) 2 Cal. 76 (third marriage); *Thyamma* v. *Giryamma* ('60) A. Mys. 176.

(*d*) *Bhiku* v. *Keshav* (1924) 26 Bom. L.R. 235, 80 I.C. 512 ('24) A.B. 360.

husband. In a recent case a Full Bench of the High Court of Madhya Pradesh has held that a widow is upon her re-marriage divested of her husband's property which she has already obtained by inheritance to her son. She does not, however, forfeit self-acquired property of the son which she has inherited (*d*1).

Section 2 of the Hindu Widow's Re-marriage Act, 1856, does not apply to estate legally and wholly acquired by the widow, e.g. where under the husband's will she is permitted to re-marry or where an absolute estate is conferred on her. The question would be one of construction in any such case (*e*).

Does a Hindu widow who has *ceased* to be a Hindu before her re-marriage e.g. by conversion to Mahomedanism, forfeit her rights to her husband's property? Yes, according to the Calcutta (*f*), Madras (*g*), Bombay (*h*), and Patna (*i*) decisions. No, according to the Allahabad decisions (*j*).

There is a conflict of opinion as to whether a widow who is entitled to re-marry by the *custom of the caste* to which she belongs, forfeits her interest in her husband's estate by re-marriage. It has been held by the High Court of Allahabad and the Chief Court of Oudh, that she does not; by the other High Courts, that she does (*k*). The Allahabad view is that if the marriage of a Hindu widow takes place under an ancient custom existing from before 1856 when the Hindu Widow's Re-marriage Act was passed, the question whether or not she is divested of her interest in the estate of her previous husband depends upon that custom and that custom alone. In other words she would be divested of her interest only if such forfeiture is proved to be an incident of the custom itself and not otherwise (*l*). See the cases cited in § 563 below. The mere fact that there is a practice of re-marriage after 1856, would not necessarily be indicative of any ancient custom existing before the Act; such a custom has to be proved by the party relying on it (*m*).

(iv) *Two or more widows.*—Two or more widows succeeding as co-heirs to the estate of their deceased husband take as joint tenants with rights of survivorship and *equal beneficial enjoyment.* Thus if a Hindu dies leaving two widows *A* and *B*, they are entitled as between themselves to an equal share of the income, and on the death of either of them, the other is entitled to the whole of the income by *survivorship.* Though co-widows take as joint tenants, no one of them has a right *to enforce* an *absolute partition* of the estate against the others *so as to destroy their right of survivorship.* But they are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the *income* accruing therefrom, and the Court may, at suit of any one of them, pass a decree for *separate possession and enjoyment.* Each can deal as she pleases with her own *life-interest,* but she cannot alienate any part of the *corpus* of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime (*n*). But the right

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(*d*1) *Bhondu* v. *Ramdayal* ('60) A.M.P. 51.

(*e*) *Thangavelu Asari* v. *Lakshmi Ammal* ('57) A.M. 534.

(*f*) *Matungini* v. *Ram Rutton* (1892) 19 Cal. 289 [F.B.].

(*g*) *Vitta* v. *Chatakondu* (1918) 41 Mad. 1078, 48 I.C. 50, ('19) A.M. 854 (F.B.).

(*h*) *Raghunath Shankar* v. *Lakshmibai* (1935) 59 Bom. 417, 37 Bom. L.R. 150, 157 I.C. 658 ('35) A.B. 298.

(*i*) *Mussammat Suraj* v. *Attar* (1922) 1 Pat. 706, 67 I.C. 550, ('22) A.P. 378.

(*j*) *Abdul Aziz* v. *Nirma* (1913) 35 All. 466, 20 I.C. 335.

(*k*) See cases cited in § 563 below.

(*l*) *Bhola Umar* v. *Mt. Kausilla* (1933) 55 All. 24, 140 I.C. 631, ('32) A.A. 617, *Jileba* v. *Parmesra* ('50) A.A. 700.

(*m*) *Bhola Umar* v. *Kausilla* (1936) 58 All. 1034, 169 I.C. 504, ('37) A.A. 230.

(*n*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A 487; *Karpagathachi* v. *Nagarathinathachi* ('65) S.C. 1752; *Comm. of I.T.* v. *Indira* ('60) A.S.C. 1172; *Sri Gajapathi Nilamani* v. *Radhamani* (1877) 1 Mad. 290, 4 I.A. 212, followed in *Chhittar* v. *Gaura* (1912) 34 All. 189, 13 I.C. 320; *Mst. Sundar* v. *Parbati* (1889) 12 All. 51, 16 I.A. 186; *Gauri Nath Kakaji* v. *Gaya Kaur* (1928) 55 I.A. 399, 111 I.C. 485, ('28) A.PC. 251; *Appalasuri* v. *Kannamma* (1926) 90 I.C. 881, ('26) A.M. 6; *Mt. Gaya Dei* v. *Mt. Tulsha Deci* (1935) 10 Luck. 567, 154 I.C. 125 ('35) A.O. 296. See also *Jainarayan* v. *Hira* (1933) 12 Pat. 778, 146 I.C. 322, ('33) A.P. 464; *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518; *Sivanancha* v. *Thirunamakarsu* ('51) A. Tra.-Cochin 26; *Chanderjit Das* v. *Debi Das* (1953) I All. 437, ('51) A.A. 522; *Vaijnath* v. *Dagdudas* ('54) A. Hyd. 65. *Swaroop Narain* v *Bhanwar Kunwar* ('67) A.M.P. 152 (no adverse possession).

of survivorship may be relinquished by *agreement* between the widows. Such an agreement may be effected orally and without a registered instrument (*o*). See § 181(C).

Co-widows being entitled to estate of their husband jointly with the incident of survivorship as mentioned above, it follows that if one of them re-marries her interest would pass to the other (*o*1).

Where a Hindu dies leaving *only one widow*, she can alienate her life-interest in the property inherited by her from her husband, but she cannot alienate the *corpus* of the property except for legal necessity. An alienation of the *corpus* except for legal necessity does not bind the next heirs of her husband who succeed to his estate after the widow's death. Thus if a Hindu dies, leaving a widow and a brother, and the widow sells or mortgages the *corpus* of the estate without legal necessity, the sale or mortgage binds only her life-interest. On her death, her husband's brother would succeed to the estate as his heir, and he would not be bound by the sale or mortgage, the same having been made without legal necessity (§§ 181-181B, 185).

Where a Hindu dies leaving *two* or *more widows*, and they are in *joint* possession of the estate, any one of them may alienate her *undivided* interest in her husband's property. If any one of the widows is in possession of a *separate* portion of the property whether it be by mutual agreement between them or under a decree of the Court, she may alienate her *share* of the income which is derived from that portion. But in either case the alienation cannot take effect or have validity *beyond her lifetime*. It is good only for her life, and on her death her interest in the property goes to the co-widow by *survivorship*. She cannot alienate her interest so as to defeat the right of *survivorship* of the co-widow. That can only be done with the *consent* of the co-widow (*p*). Thus it is possible for two co-widows, by an agreement among themselves to make an absolute partition of their joint estate so as to extinguish the right of survivorship-*inter se*. But any alienation on the strength of such arrangement will not affect the rights of the reversioners in anyway (*q*).

Two or more widows cannot by any agreement between them affect the rights of the ultimate reversioners (*r*).

**4A. Predeceased son's widow, widow of predeceased son of predeceased son—** (See § 35, *supra*.)

**5. Daughter.—**

(i) *Priority among daughters.*—Daughters do not inherit until all the widows are dead. As between daughters, the inheritance goes, first, to the unmarried daughters (*s*), next, to daughters who are married and "unprovided for", that is indigent, and lastly, to daughters who are married and are "enriched," that is, possessed of means (*t*). A married daughter may be a widow (*u*). No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence. The rule about one married daughter excluding the other married daughter from inheritance comes into

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(*o*) *Latchumammal* v. *Gangammal* (1911) 34 Mad. 72, 7 I.C. 858.

(*o*1) *Baratilal* v. *Bindabai* ('63) A.M.P. 122.

(*p*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487; *Hari Narayan* v. *Vitai* (1907) 31 Bom. 560; *Rammakkal* v. *Ramasami* (1899) 22 Mad. 522; *Nagarathinathachi* v. *Karpagathachi* ('62) A.M. 482; *Janoki Nath* v. *Mothuranath* (1883) 9 Cal. 580; *Durga Dat* v. *Gita* (1911) 33 All. 443, 449, 9 I.C. 498; *Nandi* v. *Sarap Lal* (1917) 39 All. 463, 40 I.C. 71, ('17) A.A. 179.

(*q*) *Hazarilal* v. *Halkulal* (1948) Nag. 662.

(*r*) *Sri Gajapati* v. *Pusapati* (1893) 16 Mad. 1, 19 I.A. 184; *Mahadevappa* v. *Basagawada* (1904) 29 Bom. 346; *Vadali* v. *Kotipalli* (1903) 26 Mad. 334. See also *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3.

(*s*) *Jamnabai* v. *Khimji* (1890) 14 Bom. 1, 13; *Gobind* v. *Ram Adhin* (1933) 8 Luck. 182, 140 I.C. 556, ('33) A.O. 31; *Bayava* v. *Parvateva* (1933) 35 Bom. L.R. 118, 144 I.C. 442, ('33) A.B. 126.

(*t*) *Manki* v. *Kundan* (1925) 47 All. 403, 87 I.C. 121, ('25) A.A. 375; *Totawa* v. *Basawa* (1899) 23 Bom. 229, *Audh Kumari* v. *Chandra Dai* (1879) 2 All. 561; *Danno* v. *Darbo* (1882) 4 All. 243; *Savitribai* v. *Sidu* (1945) Nag. 871. Reference may also be made to *Dewala* v. *Rupsir* ('60) A.M.P. 35. *Latabati Palrani* v. *Dhubani* ('66) A. Orissa 73 (each case may depend on its own facts); *Sarala Bala* v. *Banamali* ('64) A. Orissa 140.

(*u*) *Rajrani* v. *Gomati* (1928) 7 Pat. 820, 111 I.C. 673, ('28) A.P. 466.

operation only if one daughter is indigent while the other one is possessed of wealth. It does not apply where both the daughters are financially well off and well placed in life (*v*). The rules of preference are those stated above and there is no rule of preference that a daughter who is without issue is to be preferred to one with issue (*w*). Nor is there any rule that a daughter who is married to an idol and leads a life of prostitution is to be preferred to her married sisters (*x*). Reference may also be made to § 147 *post*.

(ii) *Survivorship*.—Two or more daughters of a class take the estate jointly as in the case of widows, with rights of survivorship (*y*). Any one daughter may alienate her *life-interest* in the property, but not so as to affect the rights of survivorship of the other daughters (*z*). And, like widows, daughters may enter into any agreement regarding their respective rights in their father's estate, provided such agreement does not prejudice the rights of reversioners (*a*). They may divide the estate merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them, or they may agree that the right of survivorship should be extinguished as between themselves (*b*). The agreement may be effected orally and without a registered writing (*c*). As to Bombay State, see note (iv) below.

(iii) *Limited estate*.—The daughter takes a limited interest in the estate of her father corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to the next heirs of her father (*d*) [see § 169]. The next heirs of the father are called reversioners. As to Bombay State, see note (iv) below.

Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

(iv) *In the Bombay State*.—Rules (ii) and (iii) do not apply in the Bombay State [see § 72, No. 7]. *A* has two daughters *B* and *C*. *B* has a daughter *D*. On *A*'s death, his estate will go to *B* and *C*. In places other than the Bombay State, they each take a "woman's estate" with rights of survivorship. Therefore, on *B*'s death, her interest in the estate will go, not to her daughter *D*, but to her sister *C* by survivorship. In the Bombay State, however, it is different. There on *A*'s death *B* and *C* will each take an absolute interest in a moiety of the estate so that on *B*'s death, her moiety will go to her heir *D*, and on *C*'s death, her moiety will go to her own heirs.

(v) *Unchastity*.—Unchastity of a daughter is no ground for exclusion from inheritance (*e*), except that in Bombay, where there is an unmarried daughter who is a prostitute and a married daughter who is chaste, the latter succeeds in preference to the former (*f*). It may here be observed that under the Mitakshara law, a widow is the only female who is excluded from inheritance by reason of unchastity (*g*).

(vi) *Illegitimate daughter*.—The illegitimate daughter, even of a Sudra, has no rights of inheritance to her father (*h*). But she is entitled to inherit to her mother (*i*). An illegitimate daughter is not, however, entitled to succeed to the collaterals of her mother (*j*). See § § 163 and 164.

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(*v*) *Shivprasad* v. *Jankibai* (1953) Bom. 219, (1952) 54 Bom. L.R. 940, ('53) A.B. 321.

(*w*) *Rajamma* v. *Padmavatamma* (1952) Mad. 668, ('51) A.M. 1047.

(*x*) *Saraswathi Ammal* v. *Jagadambal* (1953) S.C.R. 939, (1953) 1 M.L.J. 697, ('53) A.S.C. 201.

(*y*) *Aumirtolall* v. *Rajoneekant* (1875) 2 I.A. 113, 126, 15 Beng. L.R. 10, 24; *Karpagathachi* v. *Nagarathinathachi* ('65) A.S.C. 1752; *Chhattar Singh* v. *Hukum Kunvar* (1936) 58 All. 391; *Surendranath Basu* v. *Radha Rani Debi* (1940) 2 Cal. 41.

(*z*) *Kanni* v. *Ammakannu* (1900) 23 Mad. 504; *Yelumalal Chetty* v. *Natesachari* (1945) Mad. 35; *Pathumma Beebi* v. *Krishna Asari* ('61) A. Kerala 247.

(*a*) *Kailash* v. *Kashi* (1897) 24 Cal. 339; *Alamelu* v. *Balu* (1920) 43 Mad. 849, 26 I.C. 455, ('15) A.M 103.

(*b*) *Sundarasiva* v. *Viyamma* (1925) 48 Mad. 933, 91 I.C. 40, ('25) A.M. 1267.

(*c*) (1920) 43 Mad. 849, 853, 26 I.C. 455, ('15) A.M. 103, *supra*.

(*d*) *Chotay Lall* v. *Chunnoo Lall* (1879) 4 Cal. 744, 6 I.A. 15; *Muttu* v. *Dorasinga* (1881) 3 Mad. 290, 8 I.A. 99.

(*e*) *Adoyapa* v. *Rudrava* (1880) 4 Bom. 104; *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149, 156.

(*f*) *Tara* v. *Krishna* (1907) 31 Bom. 495; *Govind Bhawshet* v. *Bhike Mahadeoshet* (1945) 5 F.C.R. 1.

(*g*) *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100.

(*h*) *Bhikya* v. *Babu* (1908) 32 Bom. 562.

(*i*) *Arunagiri* v. *Ranganayaki* (1898) 21 Mad. 40.

(*j*) *Pandurang* v. *Administrator-General of Bombay* (1953) Bom. 435, ('53) A.B. 127, (1952) 54 Bom. L.R. 892.

(vii) *Exclusion by custom.*—A daughter may be excluded from inheritance by special family or local custom (*k*).

In the Makkathayee Ezhava community of the erstwhile State of Cochin there is no custom entitling a daughter to any share along with the son in property left by the deceased father (*k*1).

**6. Daughter's son—**

(i) *When entitled to succeed.*—The daughter's son is not entitled to succeed if there be any daughter living and capable of inheriting (*l*). A daughter's son is strictly a bandhu or bhinna-gotra sapinda, being related to the deceased through a *female,* but he inherits with gotraja sapindas by virtue of express texts (*m*); see note (v). He succeeds not as an heir to his mother, but as an heir to his own maternal grandfather.

(ii) *Takes as full owner.*—The daughter's son takes the estate as full owner like any other male heir, and on his death the succession passes to his heirs and not to the heirs of his maternal grandfather (*n*).

(iii) *Take per capita.*—Daughters' sons take *per capita,* not *per stirpes. A* has two daughters *B* and *C. B* has two sons, and *C* has three. *B* and *C* die in *A*'s life-time. *A* then dies leaving the five grandsons. The estate will be divided into five shares, each grandson taking one share.

(iv) *Where daughter's sons are joint.*—It was held by the Judicial Committee in 1902 that two or more sons by a daughter, living as members of a joint family, take the estate inherited by them from their maternal grandfather as joint tenants with rights of survivorship (*o*). It is doubtful how far this remains good law [See § 31(1)(b) and § 223(2)]. But sons by different daughters would take as tenants-in-common, for there can be no coparcenary between sons by different daughters (*p*). A dies leaving two grandsons *C* and *D* by different predeceased daughters, *C* dies leaving a widow. *C*'s interest in the estate will pass to her as his heir, and not to *D* by survivorship.

(v) The daughter's son occupies a peculiar position in the Hindu law. He is a bhinna-gotra sapinda or bandhu, but he comes in before parents and other more remote gotraja sapindas. The reason is that according to the old practice it was competent to a Hindu who had no son to appoint a daughter to raise up issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called *putrika putra,* became the son of her father. Such a son was equal to an *aurosa* or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. Although the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically next after the male issue, the widow and the daughters being simply interposed during their respective lives (*q*). The difference in his position under the old law and the present law is, that under the former he became by a fiction of law a member of his maternal grandfather's family while under the present law he is a member of his own father's family, but is also regarded as a son's son to his maternal grandfather for purposes of inheritance (*r*). "In regard to the obsequies of ancestors," says the Mitakshara, "daughter's sons are considered as son's sons": Mit. ch. ii, sec. 2, v. 6.

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(*k*) *Bajrangi* v. *Monokarnika* (1908) 30 All. 1, 35 I.A 1; *Parbati* v. *Chandarpal* (1909) 31 All. 457, 36 I.A. 125, 4 I.C. 25; *Balgobind* v. *Badri Prasad* (1923) 50 I.A. 196, 45 All. 413, 74 I.C. 449, ('23) A.PC. 70; *Raj Bachan Singh* v. *Bhanwar* (1929) 4 Luck. 690, 118 I.C. 760, ('29) A.O. 296. In *Rajpati* v. *Jagmohan* ('52) A.A. 309 the anomaly that can arise by operation of S. 3(*a*) of the Act II[2] of 1929 was pointed out.

(*k*1) *Kamalakshy* v. *Narayani* ('68) A. Kerala 123.

(*l*) *Bajinath* v. *Mahabir* (1878) 1 All. 608; *Sant Kumar* v. *Deo Saran* (1886) 8 All. 365.

(*m*) *Srinivas* v. *Dandayudapani* (1889) 12 Mad. 411.

(*n*) *Muttu* v. *Dorasinga* (1881) 3 Mad. 290, 8 I.A. 99; *Muttuvaduganadha* v. *Periasami* (1896) 19 Mad. 451, 23 I.A. 128.

(*o*) *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156.

(*p*) *Vythinatha* v. *Yeggia* (1904) 27 Mad. 382, 385.

(*q*) In Bombay, the daughter takes not for life but absolutely.

(*r*) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300, 311-312. See also *Babui Rita* v. *Mal Puran* (1916) 1 Pat. L.J. 581, 38 I.C. 44, ('16) A.P. 8; *Ghanta China* v. *Moparthi* (1947) 51 C.W.N. 875, 883 (P.C.).

**7. Mother (*t*).—**

(i) *Mayukha Law.*—In cases governed by the Mayukha, the father is preferred to the mother (*u*).

(ii) *Limited interest.*—The mother takes a limited interest in the estate of her son corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to her son's heirs (*v*).
Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

(iii) *Unchastity and remarriage.*—Unchastity of a mother is no bar to her succeeding as heir to her *son*, nor does remarriage constitute any such bar (*w*).

(iv) *Step-mother.*—A step-mother is not entitled to inherit to her step-son (*x*). In the Bombay State, however, she is an heir for she is there regarded as a sagotra sapinda but she comes after the female heirs recognised in Bombay are exhausted (*y*). See § 68 below (*z*).

(v) *Adoptive mother.*—Mother includes adoptive mother, so that an adoptive mother, according to the Mitakshara law, succeeds before the adoptive father (*z*). On the death of a son adopted in *dwyamushyayana* form, the adoptive mother and natural mother both inherit equally as co-heiresses (*a*).

**8. Father.—**

*Mayukha Law.*—In cases governed by the Mayukha, the father succeeds before the mother. See above, "mother," note No. 7.

**9. Brother.—**

**(a) of the whole blood.**

**(b) of the half-blood.**

(i) *Whole before half-blood.*—Brothers of the whole blood succeed before those of the half-blood (*b*). The half-brothers referred to here are sons of the same father by a different mother. Sons of the same mother by a different father are not entitled to succeed as "brothers" (*c*).

(ii) *Takes before brother's son.*—The brother succeeds before the brother's son (*d*).

(iii) *Mayukha Law.*—In cases governed by the Mayukha, brothers of the half-blood share with the father's father (*e*).

(iv) To the separate property of a person all his brothers succeed though some are joint with him as to other property and others are completely divided from him (*f*).

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(*t*) *Anandi* v. *Hari* (1909) 33 Bom. 404, 3 I.C. 745.

(*u*) *Khodabhai* v. *Bahadhar* (1882) 6 Bom. 541.

(*v*) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26; *Jullessur* v. *Uggar* (1883) 9 Cal. 725.

(*w*) *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100; *Dal Singh* v. *Dini* (1910) 32 All. 155, 5 I.C. 521; *Baldeo* v. *Mathura* (1911) 33 All. 702, 11 I.C. 43 [unchastity]; *Basappa* v. *Rayava* (1905) 29 Bom. 91 (F.B.) [remarriage]; *Bhondu* v. *Ramdayal* ('60) A.M.P. 51 (F.B.); *Thayamma* v. *Giriyamma* ('60) A. Mys. 176. *Ramaswamy* v. *E. Thevar* ('72) A.M. 314. Also see *Pichandi* v. *E. Ramaswami* ('71) A.M. 204. Also see § 43-4(iii)—Widow and § 54; *Atma Bandhu*: Entry 27.

(*x*) *Pitra Kueri* v. *Ujagir Rai* ('58) A.A. 101; *Rama Nand* v. *Surgiani* (1894) 16 All. 221; *Ramasami* v. *Narasamma* (1885) 8 Mad. 133; *Tahaldai* v. *Gaya Pershad* (1910) 37 Cal. 214, 5 I.C. 135; *Seethai* v. *Nachiyar* (1914) 37 Mad. 286, 22 I.C. 18, ('14) A.M. 30; *Navanitha Krishna* v. *Collector of Tinnevelly* (1935) M.W.N. 1001; *Chattar Singh* v. *Roshan Singh* ('46) A.N. 277 (case from Central Province, where the *lex loci* is Benares law). *Gorulal* v. *Gopichand* ('63) A. Raj. 149.

(*y*) *Kesserbai* v. *Vallab* (1880) 4 Bom. 188; *Russoobai* v. *Zoolekhabai* (1895) 19 Bom. 707; *Pannalal* v. *Harna Bai* ('50) A. Hy. 57.

(*z*) *Anandi* v. *Hari* (1909) 33 Bom. 404, 3 I.C. 745.

(*a*) *Basappa* v. *Gurlingawa* (1933) 57 Bom. 74, 142 I.C. 634, ('33) A.B. 137; *Kantawa* v. *Sangangowda* (1942) Bom. 303, 201 I.C. 633, ('42) A.B. 143.

(*b*) *Anant Singh* v. *Durga Singh* (1910) 37 I.A. 191, 32 All. 363, 6 I.C. 787; *Mannalal* v. *Ishwariprasad* ('66) Cal. 447.

(*c*) *Ekoba* v. *Kashiram* (1922) 46 Bom. 716, 60 I.C. 341, ('22) A.B. 27; *Chhinu* v. *Kata* ('72) A. Orissa 153.

(*d*) *Chinnaswami* v. *Ponginanna Goundar* ('57) A.M. 40.

(*e*) Chap. v. s. 8, para. 20.

(*f*) *Shamrao* v. *Krishnarao* (1941) Nag. 598, ('41) A.N. 297; *Deivanayagam* v. *Subbiah* (1954) Mad. 741, ('54) A.M. 727; *Karhiley* v. *Hira* ('52) A.A. 229 (F.B.).

**10. Brother's son.—**

(a) **of the whole blood.**

(b) **of the half-blood.**

(i) *Takes before brother's son's son.*—The brother's son succeeds before the brother's son's son (*g*).

(ii) *Whole blood before half-blood.*—Sons of brothers of the whole blood succeed before sons of brothers of the half-blood [see § 44].

(iii) *Take per capita.*—Brother's sons take *per capita* [§ 32].

Note.—The Mitakshara, in discussing the place of the father's mother in the order of succession, says: "No place, however, is found for her in *the compact series of heirs* from the father to the nephew. . . . . She must, therefore, of course succeed immediately after the *nephew*": Mit., ch. II. s. 5, v. 2. According to this text, as literally interpreted "*the compact series of heirs*", that is the series of heirs first entitled to inherit, ends with the brother's son. But it has been held by the Privy Council in *Buddha Singh* v. *Laltu Singh* (*h*), that the expression "brother's son" in the above text includes "brother's son's son," so that the compact series ends not with the brother's son, but with the brother's son's son [No. 11], and the father's mother [No. 12], takes not after the brother's son, but after the brother's son's son.

**11. Brother's son's son.—**

(i) See notes to No. 10 above.

(ii) *Whole blood before half-blood.*—Grandsons of the whole brother take before the grandsons of the half-brother [see § 44].

(iii) Brother's son's son take *per capita* [§ 32].

(iv) The compact series of heirs under the Mitakshara as interpreted by the Privy Council ends with the brother's son's son. See No. 10 above.

**12. Father's mother.**

**13. Father's father.**

**13A. Son's daughter.—**

(i) This is the place assigned to the son's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act she was recognized as an heir only in the Bombay [§ 55(1)] and Madras [§ 56(1)] States, where she ranked as a bandhu. Under the Act she inherits as an heir in *all* places where the Mitakshara law applies, and succeeds immediately after the father's father. See note to No. 13D below, "Hindu Law of Inheritance (Amendment) Act 2 of 1929."

(ii) *Estate.*—The son's daughter takes an absolute estate in Bombay [§ 170(2)]. In Madras, she takes a limited estate [§ 168]. She would also take a limited estate elsewhere.

Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

**13B. Daughter's daughter.—**

(i) This is the place assigned to the daughter's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 and she comes before the sister (*i*). Before this Act, she was recognized as an heir only in the Bombay [§ 55(1)] and Madras [§ 56(1)] States, where she ranked as a bandhu. Under the Act she inherits as an heir in *all* places where the Mitakshara law applies, even in States where before the Act she was not an heir (*j*). and succeeds next after the son's daughter. See note to No. 13D below, "Hindu Law of Inheritance (Amendment) Act 2 of 1929."

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(*g*) *Sher Singh* v. *Basdeo Singh* (1928) 50 All. 904, 110 I.C. 712, ('28) A.A. 612.

(*h*) (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70 approving *Kalian Rai* v. *Ram Chandra* (1902) 24 All. 128 and disapproving *Suraya* v. *Lakshminarasamma* (1882) 5 Mad. 291.

(*i*) *Ben Madhu* v. *Kalidas* (1949) Bom. 722.

(*j*) *Dalsingar Singh* v. *Jainath Kuar* (1940) 15 Luck. 229, 136 I.C. 753, ('40) A.O. 138.

(ii) *Estate.*—The daughter's daughter takes an absolute estate in Bombay (§ 170 (2)]. In Madras, she takes a limited estate [§ 168]. She would also take a limited estate elsewhere. See also 13A above.

**13C. Sister.**

(i) This is the place assigned to the sister by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, she was recognized as an heir only in the Bombay [§ 64] and Madras States [§ 56]. But the Act is applicable even where the sister had not been previously recognized as an heir (*k*).

*As regards the Bombay State*, she is expressly mentioned as an heir in the Mayukha. She is not, however, expressly mentioned as such in the Mitakshara, but her right as an heir has long since been recognized [§ 64(1)]. Her place also in the order of succession has long since been established: she succeeds immediately after the father's mother, and *before the father's father* [§ 65(1), § 72(12), § 77(12)]. Her place in the order of succession is not affected by the Act, for the Act contemplates succession *after* the father's father, while her place as determined by a series of decisions since 1865 is immediately after the father's mother whether under the Mitakshara or the Mayukha (*l*). A different view has however been taken in a later Bombay case and it has been held that the position of the sister under Mayukha law has been adversely affected by the Hindu Law of Inheritance Act (*m*).

*In the Madras State*, the sister ranked as a bandhu before the Act [§ 56(1)]. Under the Act she succeeds next after the daughter's daughter.

*In the Punjab*, as recently held by the Supreme Court the Sikh Jats of Amritsar District are governed by Hindu law and under the Hindu Law of Inheritance (Amendment) Act, 1929 the sister is an heir in preference to collaterals (*m*1).

(ii) *Half-sister.*—The question whether a half-sister gets the benefit of the Act has given rise to difference of opinion. The Privy Council have held (thus settling the difference between the various High Courts) that the term 'sister' includes a half-sister; but a full sister and a half-sister do not take together. The latter takes only in default of the full sister (*n*).

(iii) *Estate.*—The sister takes an absolute estate in Bombay [§ 170(2)]. In Madras, she takes a limited estate [§ 168]. She would also take limited estate elsewhere. Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that enactment.

(iv) In *Lala Duni Chand* v. *Anarkali* the Judicial Committee (*o*) held and it has also now been held by the Supreme Court (*o*1) that the Act applies not only to the case of a Hindu male dying intestate on or after February 21, 1929 when it came into force but also to the case of such a male dying intestate before that date if he was succeeded by a female heir who died after that date. In such a case succession to the estate of the last male who died intestate does not open until the death of the life-estate holder. In consequence the questions as to who is the nearest reversionary heir, or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life or lives and the one most nearly related at that time to the last full owner becomes entitled to the estate. But the Act obviously does not apply where succession opened before the Act (*p*).

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(*k*) *Bindeshwari Singh* v. *Baij Nath Singh* (1938) 13 Luck. 380, 168 I.C. 733, ('37) A.O. 402; *Mt. Rajpali Kunwar* v. *Surju Rai* (1936) 58 All. 1041 (F.B.), 163 I.C. 756, ('36) A.A. 507.

(*l*) *Shidramappa* v. *Neelavabai* (1933) 57 Bom. 377, 144 I.C. 925, ('33) A.B. 272; *Virbhadrappa* v. *Babu Virbhadrappa* (1946) Bom. 1003.

(*m*) *Ben Madhu* v. *Kalidas* (1949) Bom. 722.

(*m*1) *Ujagar Singh* v. *Jeo* ('59) A.S.C. 1041.

(*n*) *Mt. Sahodra* v. *Ram Babu* (1943) 69 I.A. 145, 45 Bom. L.R. 350, 206 I.C. 396, ('43) A.PC. 10.

(*o*) *Lala Duni Chand* v. *Mt. Anar Kali* (1946) 73 I.A. 187, 51 C.W.N. 223 (1946) All. 748; *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, 162 I.C. 718, ('36) A.L. 124; *Mt. Sattan* v. *Janki* ('36) A.L. 139, 163 I.C. 480; *Bindeshwari Singh* v. *Baij Nath Singh* (1938) 13 Luck. 380, 168 I.C. 733, ('37) A.O. 402; *Pokhan Dusadh* v. *Must. Manoa* (1937) 16 Pat. 215 (F.B.), 167 I.C. 17, ('37) A.P. 117; *Jitendra Pratap* v. *Bhagwati Prasad* ('56) A.P. 457; *Mt. Rajpali Kunwar* v. *Surju Rai* (1936) 58 All. 1041 (F.B.), 163 I.C. 756, ('36) A.A. 507; *Lakshmi* v. *Anantharama* (1937) Mad. 948 (F.B.), 171 I.C. 7, ('37) A.M. 699.

(*o*1) *Fateh Bibi* v. *Charan Das* ('71) A.S.C. 789 (sister's son).

(*p*) *Kanhaiya Lal* v. *Mt. Champa Devi* (1935) 153 I.C. 545, ('35) A.A. 203.

**13D. Sister's son.—**

(i) This is the place assigned to the sister's son by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, he ranked as a bandhu [§ 64, No. 3]. Under the Act, he succeeds next after the sister.

(ii) *Hindu Law of Inheritance (Amendment)* Act 2 of 1929.—This Act applies only to cases "subject to the Law of Mitakshara." The expression "law of Mitakshara" includes all sub-divisions of the Mitakshara law including Mayukha and excludes the law of Dayabhaga (*q*). The material section is section 2 which is as follows:—"A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father [No. 13] and before a father's brother [No. 14]: Provided that a sister's son shall not include a son adopted after the sister's death."

The Act came into force on 21st February 1929. See 13C (iv) above.

The Act applies to Jains in Gujarat governed by Mayukha, the sister's son is therefore preferred to father's sister (*r*).

In ascertaining the heirs of a maiden's father—they being her heirs in respect of her stridhana when she dies leaving neither brother, mother nor father—Act II of 1929 is not applicable. But see further under § 147 below.

**13E. Half-sister's son.—**

This is the place which should be given to the half-sister's son according to the Act (See note under Half-sister, *supra.*).

**14. Paternal uncle.**

**15. Paternal uncle's son [see § 32].**

**16. Paternal uncle's son's son.**

He succeeds before 20 (*s*).

*Whole blood and half-blood.*—See s. 44 and notes thereto.

**17. Father's father's mother.**

**18. Father's father's father.**

**19. Father's paternal uncle.**

**20. Father's paternal uncle's son.**

**21. Father's paternal uncle's son's son.**

**22. Brother's son's son's son** (t).

**23. Uncle's son's son's son.**

Following the reasoning of the Privy Council in *Buddha Singh* v. *Laltu Singh* (*u*) the Madras High Court held that the father's paternal uncle's son's son (x3 in the third line of the Table at p. 107) should be preferred to the great-great-grandson of the grandfather (x4 in the second line of that Table) (*v*). The decision implies that he would be also preferred to the great-great-grandson of the father (x4 in the first line of the Table at p. 107), who will also be postponed to the paternal uncle's son's son (x3, in the second line of that Table) (*w*).

So far as ancestors and descendants are concerned, the further continuation of the table is of no practical importance. As to collaterals beyond this stage, it is difficult to see that one claimant can be superior to another in the capacity to confer spiritual benefit. The rules of preference will then probably be:

(1) He who claims through a nearer ancestor will be preferred to one claiming through a remoter ancestor.

(2) In the line of any ancestor, the nearer excludes the more remote.

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(*q*) *Ben Madhu* v. *Bai Mahakore* ('50) A.B. 66.
(*r*) *Ambabai* v. *Keshav Bandochand* (1941) Bom. 250, 195 I.C. 172, ('41) A.B. 233, 43 Bom. L.R. 114.
(*s*) *Buddha Singh* v. *Laltu Singh* (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70.
(*t*) *Venilal* v. *Parjaram* (1896) 20 Bom. 173.
(*u*) (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70.
(*v*) *Soobramiah* v. *Nataraja* (1930) 53 Mad. 61, 127 I.C. 113, ('30) A.M. 534.
(*w*) *Venkateswara Rao* v. *Adinarayana* (1935) 58 Mad. 323, 154 I.C. 923, ('35) A.M. 129.

**44. Whole blood and half-blood.**—(1) A sapinda of the whole blood is preferred to a sapinda of the half-blood. This preference, however, is confined to sapindas of the *same* degree of descent from the common ancestor; it does not apply to sapindas of *different* degrees (*x*).

In Uttar Pradesh (*y*), Bengal (*z*) and Madras (*a*), this rule applies not only to brothers and brothers' sons, but to remoter sapindas. It has now been held by the Privy Council that the rule applies to all the Mitakshara Schools (*b*) and the Bombay cases (*c*) holding a different view are overruled. The Punjab case (*d*) holding a view similar to Bombay must also be regarded as overruled.

Thus a paternal uncle of the whole blood is entitled to succeed in preference to a paternal uncle of the half-blood, they being sapindas of the same degree of descent. But a paternal uncle of the half-blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood, the former being a nearer sapinda of the deceased than the latter.

According to the Customary Law of Kumaon, applicable to the Khasas, if a man dies sonless, his brothers do not inherit as brothers but as sons of the father to whom the estate reverted on the sonless man's death. When nephews or cousins succeed, they take their father's share, *i.e. per stirpes* and not *per capita* (*e*). But this principle does not apply to the Manrals (*f*).

### *Samanodakas*

**45. Order of succession among Samanodakas.**—Failing all sapindas, the inheritance passes to samanodakas, the nearer line excluding a remoter kinsman in the same line (*g*) [§§ 40, 44].

### *Bandhus*

**46. Bandhus.**—(1) On failure of sapindas and samanodakas, but not until then, the inheritance passes to bandhus (*h*).

(2) The gotraja sapindas and samanodakas of a Hindu are all agnates, that is, persons connected with him by an unbroken line of male descent. The bandhus or bhinna-gotra sapindas are all cognates, that is, persons connected with him through a female or females. The bandhus of a person are his blood-relations connected *through females* who have passed into other families or gotras (*i*).

(3) Every bandhu must be related to the deceased through at least one female. He may, however, be related to him through two females (*j*) or even more than two.

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(*x*) *Suba Singh* v. *Sarafraz* (1897) 19 All. 215 [F.B.]; *Ganga Sahai* v. *Kesri* (1915) 42 I.A. 177, 37 All. 545, 30 I.C. 265, ('15) A.PC. 81.

(*y*) (1897) 19 All. 215 [F.B.], *supra*.

(*z*) *Sham Singh* v. *Kishun Sahai* (1907) 6 Cal. L.J. 190.

(*a*) *Nachiappa* v. *Rangasami* (1915) 28 Mad. L.J. 1, 26 I.C. 757, ('15) A.M. 1088 [F.B.].

(*b*) *Garudas* v. *Laldas* (1933) 60 I.A. 189, 142 I.C. 807, ('33) A.PC. 141; *Kalagouda* v. *Annagouda* ('62) Mys. 65.

(*c*) *Samat* v. *Amra* (1882) 6 Bom. 394, 397, *Vithalrao* v. *Ramrao* (1900) 24 Bom. 317; *Saguna* v. *Sadashiv* (1902) 26 Bom. 710, 715; *Shankar Baji* v. *Kashinath* (1927) 51 Bom. 194, 100 I.C. 430, ('27) A.B. 97.

(*d*) *Hira Nand* v. *Maya Das* (1894) Punj. Rec. No. 83.

(*e*) *Tula Ram* v. *Shyam Lal* (1924) 49 All. 848; *Gangi Sah* v. *Harlal Sah* (1939) All. 122.

(*f*) *Lachhan Singh* v. *Jhagar Singh* (1939) All. 406, ('39) A.A. 437.

(*g*) Sarvadhikari's Hindu Law of Inheritance, 2nd ed., p. 687.

(*h*) *Ram Baran* v. *Kamla Prasad* (1910) 32 All. 594, 6 I.C. 698.

(*i*) *Vedachela* v. *Subramania* (1921) 48 I.A. 349, 354, 44 Mad. 753, 64 I.C. 402, ('22) A.PC. 33.

(*j*) *Krishna* v. *Venkatarama* (1906) 29 Mad. 115; *Venkatagiri* v. *Chandra* (1900) 23 Mad. 123; *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631.

The Mitakshara [ch. 2, sec. 6, para 1] mentions three classes of bandhus, namely (1) *Atma bandhus*, that is, one's own bandhus, (2) *Pitri bandhus*, that is, the father's bandhus, and (3) *Matri bandhus*, that is, the mother's bandhus. and enumerates the following nine relations as bandhus:—

I. *Atma bandhus*:—

1. father's sister's son,
2. mother's sister's son,
3. mother's brother's son.

The word "son" is used in a generic sense and includes son's son (*k*).

II. *Pitri bandhus*:—

4. father's father's sister's son,
5. father's mother's sister's son,
6. father's mother's brother's son.

III. *Matri bandhus*:—

7. mother's father's sister's son,
8. mother's mother's sister's son,
9. mother's mother's brother's son.

It was at one time thought that only the nine relations expressly mentioned in the Mitakshara were bandhus. But it is now well established that the enumeration of bandhus in the Mitakshara is illustrative and not exhaustive. For it would be unreasonable to hold that the mother's brother's son is a bandhu, and his father, that is, the mother's brother, is not a bandhu (*l*). And likewise, it would be unreasonable to hold that the mother's brother is a bandhu and his father, that is, the maternal grandfather is not a bandhu. Thus the mother's brother, the maternal grandfather, and several other relations have been held to be bandhus.

*Besides* the nine relations enumerated in the Mitakshara, the following relations have been held to be bandhus, namely:—

[*Sister's son(m)*.]. Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the sister's son inherits with gotraja sapindas, and succeeds next after the sister. See § 43, No. 13D.

Half-sister's son (*n*) but not a sister's step-son (*o*).

Brother's daughter's son (*p*).

Daughter's son's son (*q*).

Sister's son's son (*r*).

Daughter's daughter's son (*s*).

Sister's daughter's son (*t*).

Father's sister's son's son (*u*).

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(*k*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 6 Pat. L.J. 140, 60 I.C. 251, ('21) A.PC. 53 where it was held that a mother's sister's son's son is an *atma bandhu*.

(*l*) *Girdhari Lall* v. *Bengal Government* (1869) 12 M.I.A. 448; *Muthusami* v. *Simambedu* (1896) 19 Mad. 405, 23 I.A. 83.

(*m*) *Amrita Kumari* v. *Lakhinarayan* (1868) 2 Beng. L.R. [F.B.] 28; *Chelikani* v. *Vencata* (1871) 6 Mad. H.C. 278; *Raghunath* v. *Munnan Misr* (1898) 20 All. 191.

(*n*) *Subbaraya* v. *Kylasa* (1892) 15 Mad. 300.

(*o*) *Saminatha* v. *Angammal* (1922) 45 Mad. 257, 65 I.C. 736, ('22) A.M. 46.

(*p*) *Mussamutt Doorga Bibee* v. *Janki* (1873) 10 Beng. L.R. 341.

(*q*) *Krishnayya* v. *Pichamma* (1888) 11 Mad. 287; *Sheobarat* v. *Bhagwati* (1895) 17 All. 523; *Tirumalachariar* v. *Andal* (1907) 30 Mad. 406.

(*r*) *Balusami* v. *Narayana* (1897) 20 Mad. 342.

(*s*) (1907) 30 Mad. 406, *supra*; *Ajudhia* v. *Ram Sumer* (1909) 31 All. 454, 2 I.C. 376; *Ramphal* v. *Pan Mati* (1910) 32 All. 640, 7 I.C. 292; *Kalimuthu* v. *Ammamuthu* (1934) 58 Mad. 238, 153 I.C. 107, ('34) A.M. 611.

(*t*) *Umaid Bahadur* v. *Udoi Chand* (1881) 6 Cal. 119 [F.B.]; *Sham Devi* v. *Birbhadra Prasad* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178.

(*u*) *Harihar* v. *Ram Daur* (1925) 47 All. 172, 82 I.C. 1032, ('25) A.A. 17.

Father's sister's daughter's son (*v*).
Mother's father (*w*).
Maternal uncle (*x*).
Grandfather's son's daughter's son (*y*).
Great grandfather's son's daughter's son (*z*).
Great great grandfather's son's son's daughter's son (*a*).
Father's father's father's daughter's son (*b*).
Father's father's sister's son's son (*c*).
Father's mother's brother (*d*).
Father's maternal grandfather's daughter's son (*e*).
Mother's mother's brother's son's son (*f*).
Mother's mother's brother's daughter's son (*g*).
Mother's sister's son's son (*h*).
Mother's father's adopted son (*i*).
Mother's father's grand nephew (*j*).
Father's sister's son's daughter's son (*k*).
Mother's paternal grandfather's daughter's son's son (*l*).
Mother's paternal grandfather's son's son's son (*l*).
Father's father's maternal grandfather's son's son (*m*).

**47. Rules for determining heritable bandhus.**—Are all the blood relations of a person connected through a female, heritable bandhus or bhinna-gotra sapinda?

(i) The question naturally arises whether the term 'sapinda' in this connection, is used in the general sense (§ 36) or the narrower sense (§ 37). In other words, whether all the relations connected by community of particles of the same body (whatever the degree of relationship to and from a common ancestor may be) are entitled to inherit as bandhus or only those who are connected within certain specified degrees.

In *Ramchandra* v. *Vinayak* (*n*) the Judicial Committee held that the term bandhus was used in the Mitakshara "in a restricted and technical sense".

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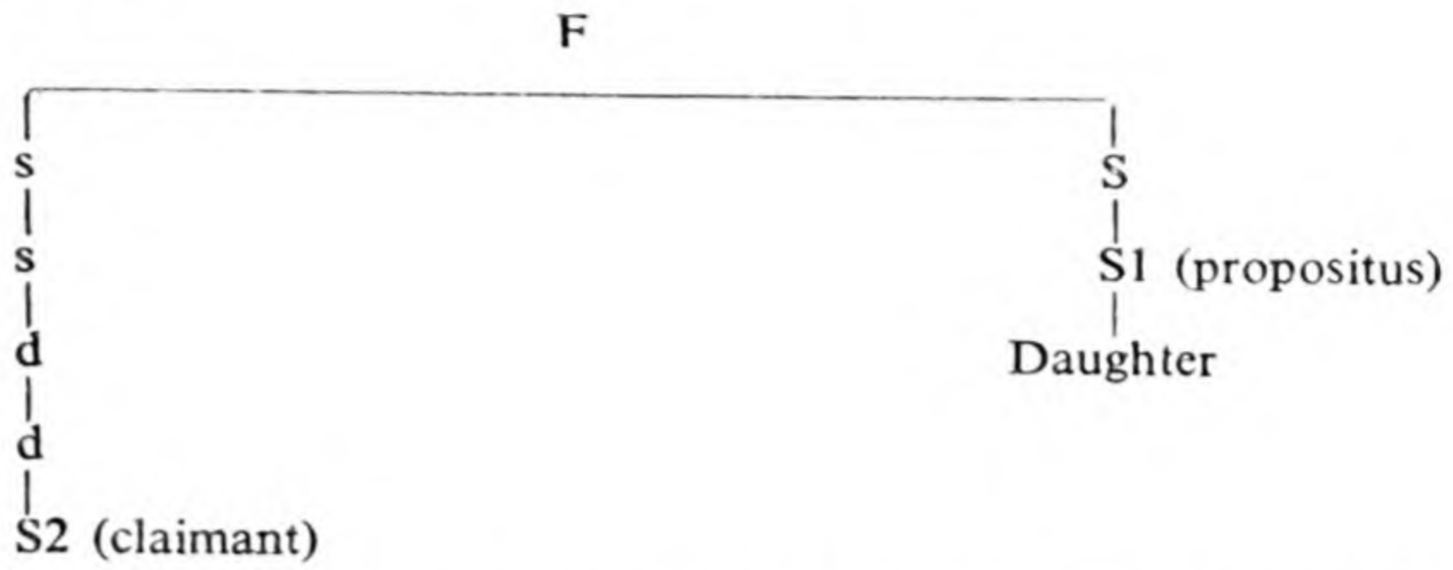
(*v*) *Parot Bapulal* v. *Mehta Harilal* (1895) 19 Bom. 631; *Venkatagiri* v. *Chandru* (1900) 23 Mad. 123; *Krishna* v. *Venkatarama* (1906) 29 Mad. 115.
(*w*) *Chinnammal* v. *Venkatachala* (1892) 15 Mad. 421.
(*x*) *Muthusami* v. *Simambedu* (1896) 19 Mad. 405, 23 I.A. 83; *Vedachela* v. *Subramania* (1921) 48 I.A. 349, 44 Mad. 753, 64 I.C. 462, ('22) A.PC. 33.
(*y*) *Tirath Ram* v. *Mst. Kahan Devi* (1920) 1 Lah. 588, 595-6, 60 I.C. 101, ('21) A.L. 149.
(*z*) *Ram Sia* v. *Bua* (1925) 47 All. 10, 84 I.C. 360, ('24) A.A. 790; *Parmanandas* v. *Parbhudas* (1912) 14 Bom. L.R. 630, 16 I.C. 591.
(*a*) *Manik Chand* v. *Jagat Settani* (1890) 17 Cal. 518.
(*b*) *Krishna* v. *Venkatarama* (1906) 29 Mad. 115.
(*c*) *Sethurama* v. *Ponnammal* (1889) 12 Mad. 155; *Chamanlal* v. *Ganesh* (1904) 28 Bom. 453.
(*d*) *Gridhari Lall* v. *Bengal Government* (1869) 12 M.I.A. 448.
(*e*) *Ananda Bibee* v. *Nownit Lal* (1883) 9 Cal. 315, 327.
(*f*) *Ratnasubbu* v. *Ponnappa* (1882) 5 Mad. 69.
(*g*) *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339.
(*h*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 6 Pat. L.J. 140, 60 I.C. 251, ('21) A.PC. 53; *Bai Vijli* v. *Bai Prabhalakshmi* (1907) 9 Bom. L.R. 1129.
(*i*) *Padma Kumari* v. *Court of Wards* (1881) 8 I.A. 229, 8 Cal. 302.
(*j*) 8 I.A. 229, 8 Cal. 302, *supra*.
(*k*) *Kesar Singh* v. *Secretary of State* (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.
(*l*) *Chengiah* v. *Subbaraya* (1930) 58 Mad. L.J. 562, 128 I.C. 172, ('30) A.M. 555.
(*m*) *Kasa* v. *Vinayak* (1947) Bom. 770.
(*n*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 312, 42 Cal. 384, 420, 25 I.C. 290, ('14) A.PC. 1.

In that case the relationship between the deceased and the claimant was as appears from the following diagram:—




After the death of the last male owner (S1), his daughter enjoyed the property. On her death without issue the claimant (S2) claimed the property. He traced his relationship to the common ancestor through his mother. If the narrower sense of the term 'sapinda' is adopted, he is beyond five degrees (*Vide* explanation I below) and he is not entitled to inherit. It was accordingly argued on his behalf that any person related through a female is a heritable bandhu, and there is no restriction as to degrees. It was also contended that the narrower sense of 'sapinda' in Mitakshara chap. III is confined to prohibition in respect of marriage and has nothing to do with inheritance. The Judicial Committee did not accept the contention.

When the claimant claims through a male, according to the restricted sense of the term "sapinda" he must be within seven degrees. The Allahabad and Bombay High Courts have held that, even when the claimant traces relationship through his father, heritable bandhuship ceases with the fifth degree (*o*). It is submitted that, in such a case, the rule of seven degrees would apply.

The *general* conclusion arrived at in *Ramchandra* v. *Vinayak* that "the sapinda relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the common ancestor" (*p*), is applicable only to cases where the claimant claims through his mother as in that case. This is the view of Venkatasubba Rao, J., in *Kesar Singh* v. *Secretary of State for India* (*q*). He said "I have said in the course of this judgment that in the case of bandhus, sapinda relationship ceases beyond the fifth from the mother and the seventh from the father. This is repeatedly referred to in the judgment of the Judicial Committee in *Ramchandra* v. *Vinayak*. The question in that case was whether the plaintiffs who claimed through their mother but who were bhinna-gotra sapinda beyond the fifth degree could inherit. It was held that he could not. I referred to this point because there are some observations in the judgment which may at first sight seem to imply that the limit of sapinda relationship in the case of bandhus ceases with the fifth degree irrespective of whether the claim is traced through the father or the mother.... There is nothing in the judgment to suggest that their Lordships intended to do away in the case of bhinna-gotra sapindas the well recognised distinction dependent upon whether the claim is traced through the father or the mother. The view which their Lordships refused to accept is that of Gopalchandra Sarkar Shastri—the view which was pressed before the Judicial Committee by Mr. De Gruyther to the effect that the word 'bandhu' includes either all cognate relations without any restriction or at any rate all cognates within seven degrees on both the father's as well as the mother's side. The distinction to which I have referred is recognised in all work of Hindu law whether the writer belongs to the school of Sarvadhikari or not."

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(*o*) *Brij Mohan* v. *Kishun Lal* (1938) A.L.J. 670, ('38) A.A. 443; *Hanmant Ramaji* v. *Vasudeo Hanmant* (1943) Bom. 465, 206 I.C. 152, ('43) A.B. 89; *Kasa* v. *Vinayak* (1947) Bom. 770.

(*p*) (1914) 41 I.A. 290, 312, 42 Cal. 384, 420, 25 I.C. 290, ('14) A.PC. 1; *Kartar Singh* v. *Niranjan Singh* ('55) A. Pepsu 79.

(*q*) (1926) 49 Mad. 652, 689, 95 I.C. 651, ('26) A.M. 881.

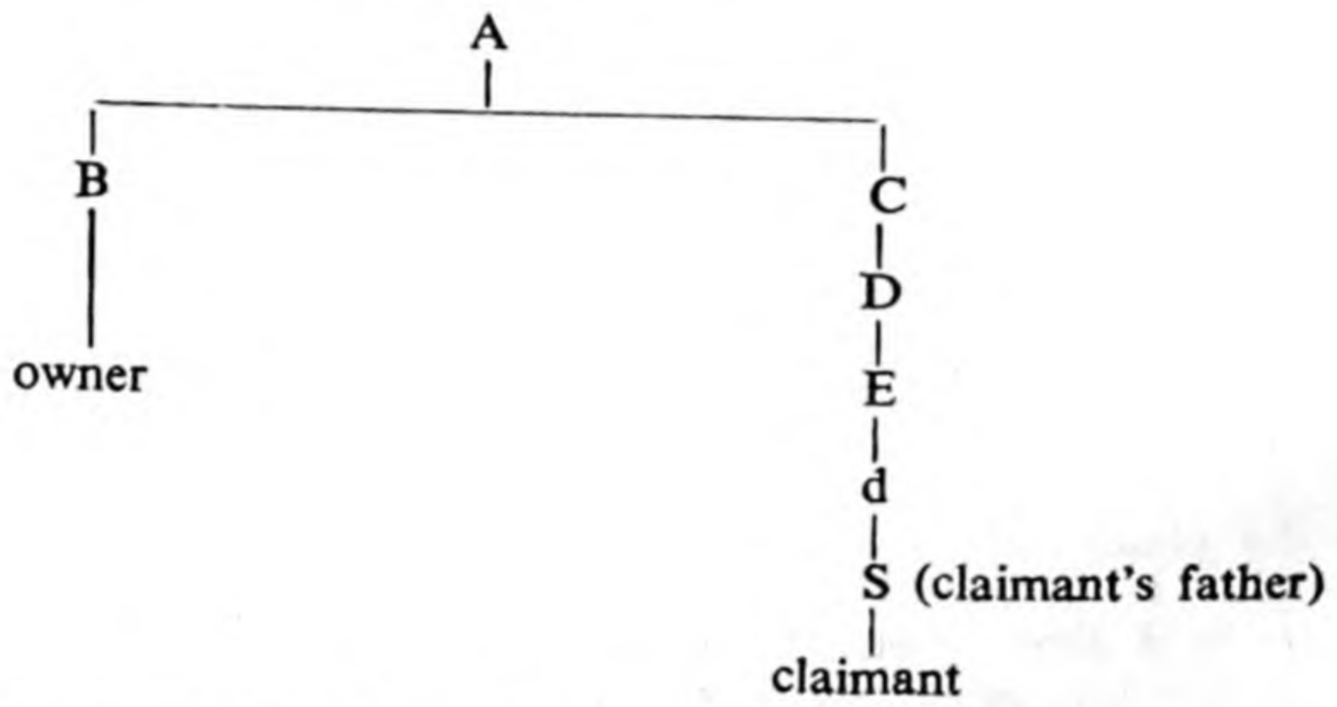
*Explanation I.*—The five degrees, according to the Hindu mode of computation, are to be calculated from and inclusive of the deceased in the case of ascendants and descendants of the deceased, and from and inclusive of the common ancestor in the case of descendants of the common ancestor.

The father's father's son's son's daughter's daughter's son is not a heritable bandhu for he is in the *sixth* degree from the common ancestor, that is, the father's father (*r*). For the same reason the father's father's son's son's son's daughter's son is not a heritable bandhu (*s*); so also the great-great-grandfather's great-grandson's daughter's son is not a heritable bandhu (*t*). In these cases, as the claimants trace their descent through their mothers, the sapinda relationship ceases with five degrees.

Cases of claimants claiming through the fathers being more than five degrees but not more than seven degrees have not come up for decision before the Courts. The following special cases may be noted. It is assumed that there is no difficulty as to the number of degrees on the owner's side:—

(1)

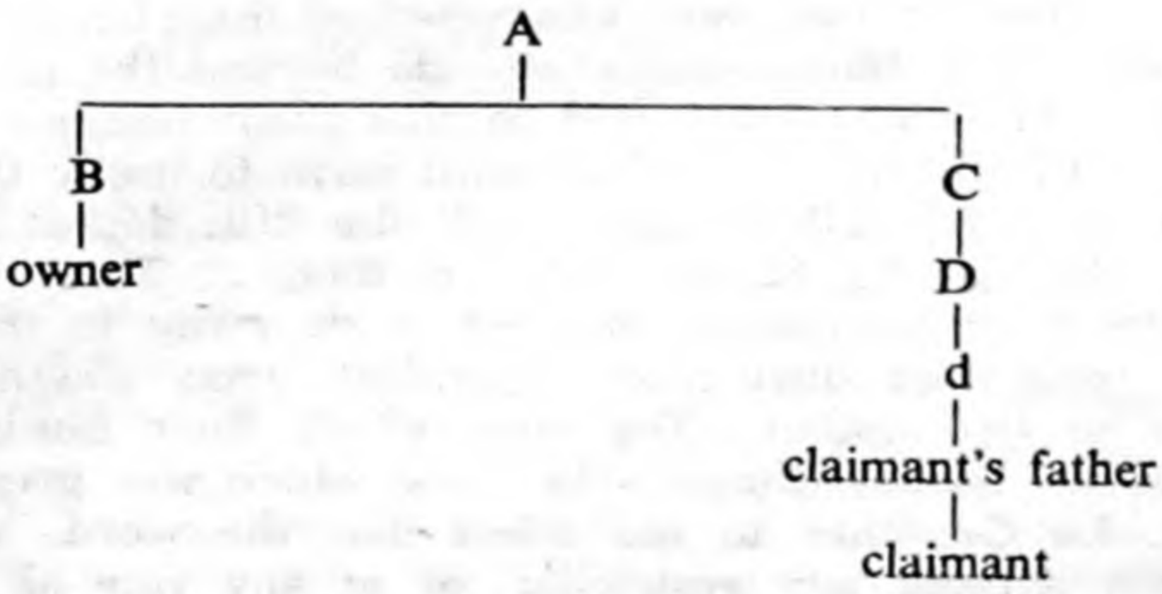
Diagram 1.




In this case the claimant (tracing his relationship through his father) is not more than seven degrees from the common ancestor; and may, at first sight, be regarded as a heritable bandhu. But *S* (his father) who claims through his mother is more than five degrees from *A*, and is not a heritable bandhu. To hold that the claimant is a bandhu and *S*, his father is not a heritable bandhu, is an anomaly. The sapindaship of the claimant in such a case is described as a sapindaship by frog's leap (Dr. Sarvadhikari's Principles of Hindu Law, 2nd ed., p. 592). He is not a heritable bandhu.

(2)

Diagram 2.




In this case, the claimant (claiming through his father) is within seven degrees. His father (claiming through his mother) is not beyond five degrees. Both are heritable bandhus.

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(*r*) (1914) 41 I.A. 290, 42 Cal. 384, 25 I.C. 290, ('14) A.PC. 1, *supra.*

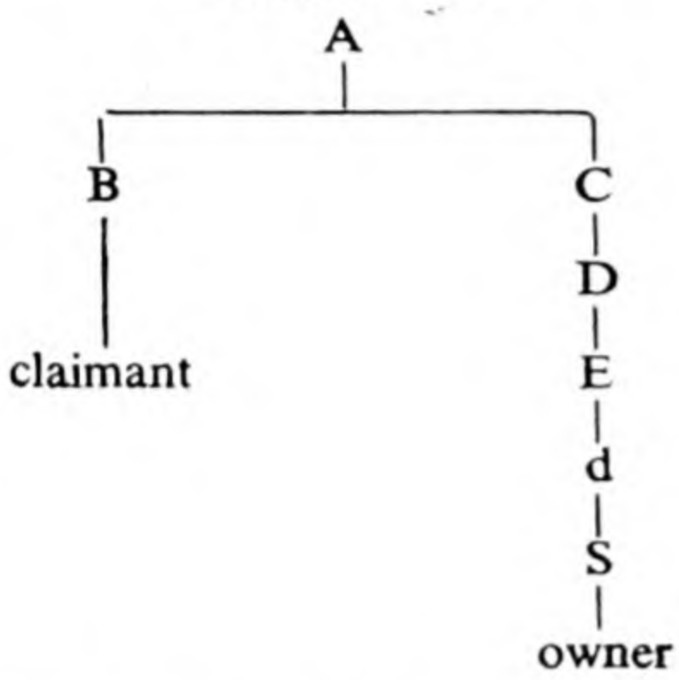
(*s*) *Shib Sahai* v. *Saraswati* (1915) 37 All. 583, 30 I:C. 903, ('15) A.A. 409. The decision is correct, but the mode of computation adopted in the case is, it is submitted, incorrect. This has now been recognized in *Ram Sia* v. *Bua* (1925) 47 All. 10, 84 I.C. 360, ('24) A.A. 790.

(*t*) *Ram Parshad* v. *Idu Mal* (1932) 13 Lah. 249, 134 I.C. 122, ('32) A.L. 394.

(ii) "In order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other" (*u*); in other words, the right of inheritance accrues to a bandhu, if the late owner and the person claiming the inheritance were related as sapindas to each other.

By reason of the principle of mutuality, the diagrams in the preceding rule will hold good, if the owner and claimant are interchanged. Thus, the first diagram becomes the accompanying diagram, by the principle of mutuality. Just as the claimant in Diagram 1 is a sapinda by frog's leap and is not a heritable bandhu, the owner in the Diagram 3 is a sapinda by frog's leap and is not a heritable bandhu of the claimant. Therefore, by the rule mentioned in this paragraph, the claimant is not a heritable bandhu of the owner.

Diagram 3.




But if the interchange is made in Diagram 2, the result is that the owner is a heritable bandhu of the claimant. Therefore, the claimant is also a heritable bandhu of the owner.

(iii) Is there any other principle limiting heritable bandhus? There are two views on this matter.

(a) Dr. Sarvadhikari noticing the fact that the nine bandhus enumerated in the Mitakshara are descendants from common ancestors who are members of the following four families, namely,

(1) The family of the propositus and his agnate ancestors, *e.g.*, one's father's sister's son, one's father's father's sister's son.

(2) The family of the mother's agnate ancestors, *e.g.*, one's mother's sister's son, one's mother's brother's son, one's mother's father's sister's son.

(3) The family of the father's mother's agnate ancestors, *e.g.*, one's father's mother's sister's son and one's father's mother's brother's son.

(4) The family of the mother's mother's agnate ancestors, *e.g.*, one's mother's mother's sister's son and one's mother's mother's brother's son,

and applying the principle of mutuality, infers that the propositus must be a descendant of a common ancestor who is a member of the following families, *viz.*, (i) claimant's agnate family, (ii) claimant's mother's agnate family, (iii) claimant's father's mother's agnate family, (iv) claimant's mother's mother's agnate family, that is to say the claimant must be either

(a) a member of the families 2, 3, 4
or (b) a daughter's son
or (c) a daughter's son's son
or (d) a daughter's daughter's son

} of an agnate member of the four families 1, 2, 3 and 4.

Accordingly the following four kinds of descendants are excluded:—

(1) Daughter's daughter's son's son—*Umaid Bahadur* v. *Udai Chand* (1880) 6 Cal. 119. This is only an *obiter dictum*. The actual decision related to daughter's daughter's son.

(2) Daughter's son's son's son—*Chinna Pichu* v. *Padmanabha* (1921) 44 Mad. 121, 59 I.C. 690, ('21) A.M. 671. Only one judgment is based on Dr. Sarvadhikari's reasoning. The reasons given by the other judge are different. The decision cannot be regarded as of much weight: *Lowji* v. *Mithabai* (1900) 2 Bom. L.R. 842. The decision assumes that the bandhus should be found only in the above-mentioned four families.

(3) Daughter's son's daughter's son—*Gajadhar Prasad* v. *Gauri Shankar* (*v*).

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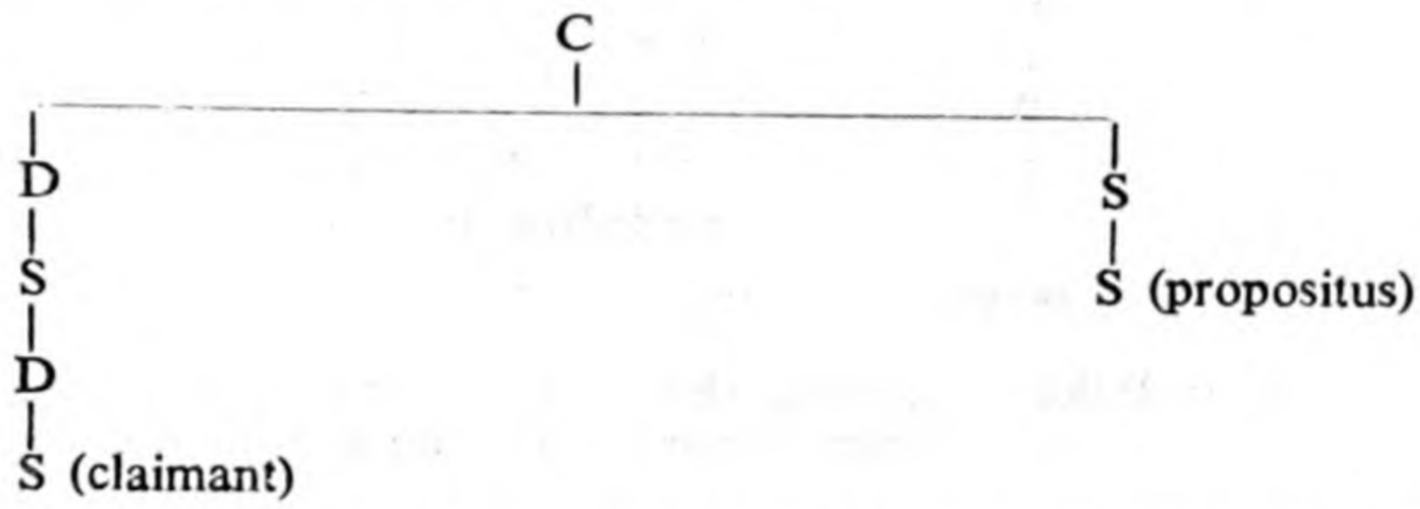
(*u*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 312, 42 Cal. 384, 25 I.C. 290, ('14) A.PC. 1; *Umaid Bahadur* v. *Udoi Chand* (1881) 6 Cal. 119 [F.B.]: *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339.

(*v*) (1932) 54 All. 698, 138 I.C. 561, (32) A.A. 417.

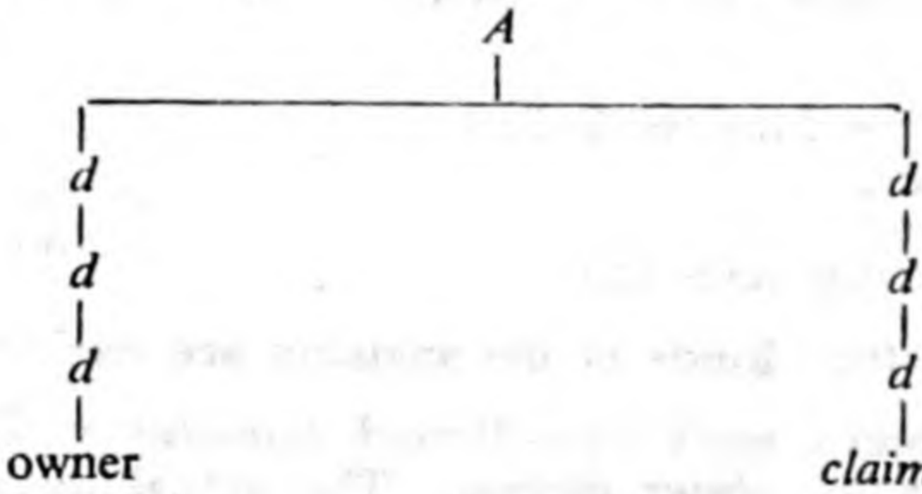
(4) Daughter's daughter's daughter's son—That is, there cannot be three females between a common ancestor and the claimant or the propositus.

(b) According to the second view, the Mitakshara merely enumerates the first cousins of the propositus, of his father and of his mother. It was not intended to limit heritable bandhuship to particular individuals or to descendants of particular families, or to certain kinds of descendants in these families. No ancient text supports such limitation. The definition of a bandhu as a bhinna-gotra sapinda even adopting the narrower meaning of the term 'sapinda' does not involve such limitation. The Judicial Committee has held (§ 46) that the enumeration of the bandhus in the Mitakshara is not exhaustive. Then why should one infer by implication that the families in which bandhus are to be found—families not mentioned as such by Vijnaneswara—are exhausted by the enumeration of the bandhus? Similarly, why should the enumeration be considered exhaustive as to the type of descendants in these families? Accordingly it was held in *Kesar Singh* v. *Secretary of State* (*w*) by the High Court of Madras that the father's father's daughter's son's daughter's son was a heritable bandhu. The following diagram explains the relationship of the claimant with the propositus in that case:




In the above diagram C represents the common ancestor. S represents the son and D the daughter. Here the claimant claims relationship through his *mother* and is *fifth* in descent from the common ancestor C. The propositus traces relationship through his *father* and is *third* in descent from the common ancestor, C, that is, within *seven* degrees from him. The test of degree is thus satisfied. Upon the same facts the test of mutuality is also satisfied. No other test or limitation is essential.

According to this view, there may be three females intervening between the common ancestor and the claimant propositus, that is, in the line of ascent or line of descent. For example, in the accompanying diagram, the owner and claimant are each within five degrees and each is sapinda of the other. Here the claimant is a heritable bandhu though there are six females intervening between him and the owner.




The 'line theory' of Dr. Sarvadhikari has been rejected by a Full Bench of the Madras High Court in *Seelam Nagamma* v. *Reddam* (*x*) and the decision of the Allahabad Full Bench in *Gajadhar* v. *Gauri Shankar* (*y*) has been expressly dissented from. The same view has been taken by the Calcutta High Court in *Panchu Gopal* v. *Bata Mall* (*z*) and by the Bombay High Court in *Kasa* v. *Vinayak* (*a*). The view propounded by Dr. Sarvadhikari thus appears to be unsupportable.

**48. Who are heritable bandhus.**—We are now in a position to enumerate the *heritable* bandhus whichever view—that of Madras or Allahabad—ulti-

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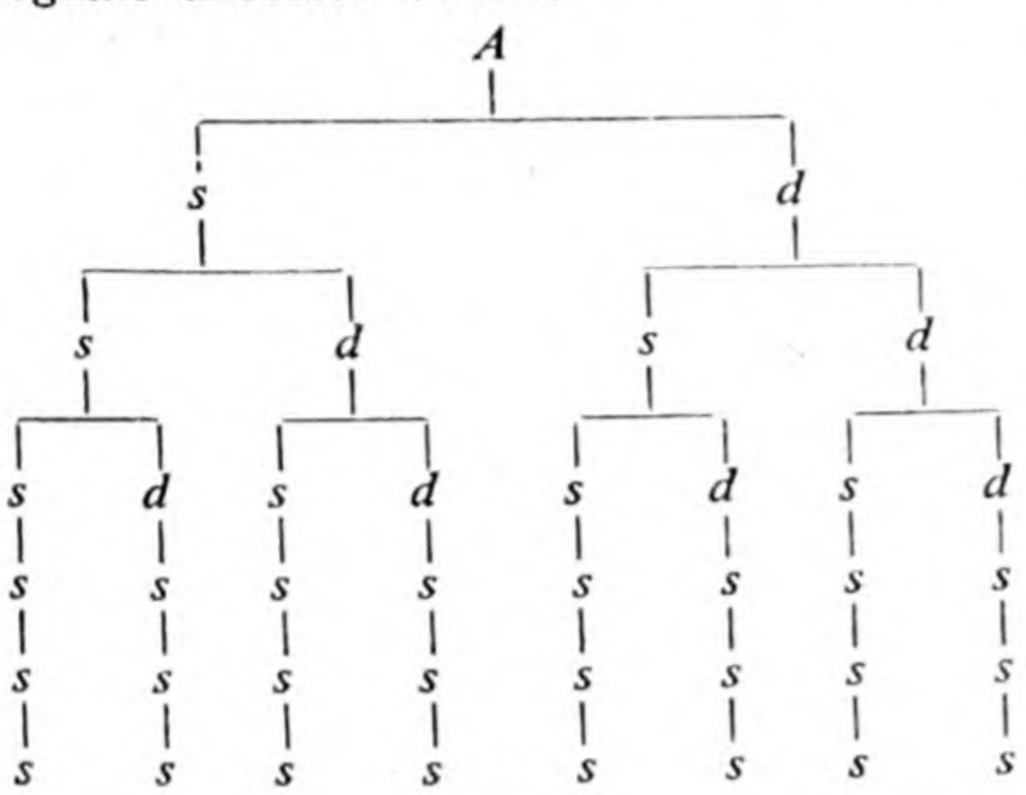
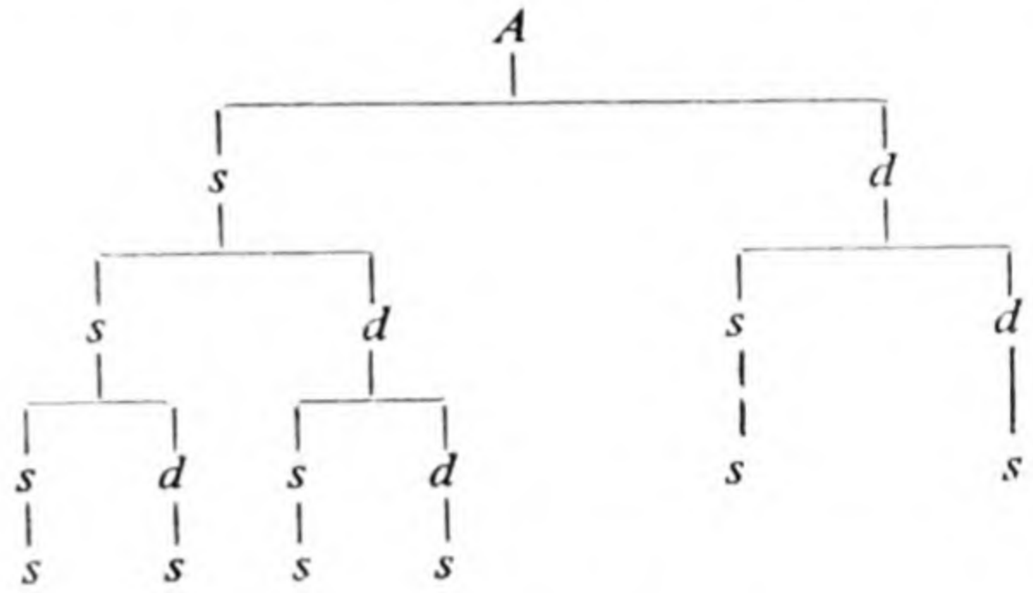
(*w*) (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.
(*x*) (1943) Mad. 759 (F.B.).
(*y*) (1932) 54 All. 698, ('32) A.A. 417.
(*z*) ('49) A.C. 157.
(*a*) (1947) Bom. 770.

mately prevails. In each particular case, it is enough to see (1) whether he is a sapinda in the narrower sense, and (2) whether there is mutuality between the owner and the claimant. If the Madras view prevails, all other conditions are immaterial. If the Allahabad view is accepted, (3) he must belong to one of the four types of descendants and he must be descended from an agnate member of any of the four families (*b*) and must be within five degrees of the common ancestor. The last clause also represents the Bombay view (*c*).

In the following diagram the males (*s*) are all bandhus of the propositus, *A* being a cognate ancestor of his.



Madras.



Allahabad.

In the above diagrams sapindas by frog's leap are excluded. *A*'s daughter's son's daughter's son shown in the Madras diagram was recognized in *Kesar Singh's* case (*d*) but not in *Gajadhar* v. *Gauri Shankar* (*e*). *A's* son's son's daughter's son's son shown in the Madras diagram is not now held to be an heir in *Brij Mohan* v. *Kishun Lal* (*f*).

If *A* is an agnate ancestor of the owner, all the *s*'s on the extreme left are Gotraja Sapindas. The others are bandhus.

**49. Three classes of bandhus.**—Three classes of bandhus have already been mentioned [§ 46(4)].

*Atma bandhus* may be subdivided into—

(1) *owner's* cognate descendants,
(2) *father's* cognate descendants—of these the *sister's son* has gone higher up by legislation.
(3) cognate descendants of *father's father*, and *mother's father* and his descendants.

} an ancestor and collaterals.

*Pitri bandhus* may be subdivided into—

(1) *father's father's father's* cognate descendants,
(2) *father's mother's father* and his descendants.

*Matri bandhus* may be subdivided into—

(1) *mother's father's father* and his descendants.
(2) *mother's mother's father* and his descendants.

All the above bandhus should satisfy the limit of degrees.

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(*b*) *Gajadhar Prasad* v. *Gauri Shankar* (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.

(*c*) See cases cited in footnote (*o*) at p. 123, *supra*.

(*d*) (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.

(*e*) (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.

(*f*) (1938) A.L.J. 670, ('38) A.A. 443.

**50. Rules for determining order of succession among male bandhus.—First rule laid down by the Judicial Committee.**—In *Muthusami* v. *Muthukumarasami* (*g*) the claimants were (1) mother's half brother and (2) father's father's sister's son. The Madras High Court in the course of the judgment (*h*) laid down four propositions. The first proposition defines bandhu. The second proposition lays down that the three classes *atma bandhus*, *pitri bandhus*, and *matri bandhus* succeed in the order in which they are named. Accordingly the mother's half brother who was an *atma bandhu* was preferred to the rival claimants who were *pitri bandhus*. This judgment was affirmed by the Privy Council. Thus, the first rule we get relating to the order of succession among the bandhus is (1) *Atma bandhus* (one's own bandhus) succeed before *pitri bandhus* (father's bandhus), and *pitri bandhus* succeed before *matri bandhus* (mother's bandhus).

*Illustrations*

(a) The mother's father's daughter's son's son (mother's sister's grandson), [§ 54, no. 25 at p. 133], being an *atma bandhu*, is entitled to succeed in priority to the mother's father's father's daughter's son (mother's paternal aunt's son) [p. 136, no. 6] who is a *matri bandhu*: *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 6 Pat. L.J. 140, 60 I.C. 251, ('21) A.PC. 53.

(b) Father's sister's daughter's son being an atma bandhu is entitled to succeed in priority to paternal grandfather's sister's son. who is a pitri bandhu (*i*).

It is important to note, as observed by the Privy Council, that rule (1) is *not* dependent on individual propinquity or on the efficacy of offerings to the deceased (*j*).

**50A. Descendants preferred to those who are not descendants.**—We have seen (§ 49) that *atma bandhus*, may be divided into (1) descendants of the propositus, (2) those who are not descendants.

No case of rival claimants, one being a descendant and the other not, has come up before the Judicial Committee. The Bombay and Madras High Courts have held that the descendants of the propositus are entitled to preference over those who are not descendants. In *Dattatraya* v. *Gangabai* (*k*), the rival claimants were a son's daughter's son and the father's daughter's daughter. The claim of the latter would be disallowed in Madras on the ground that all female bandhus rank after male bandhus and in any other State on the ground that no female bandhus are recognized. But this ground for rejecting the claim is not available in Bombay where female bandhus are recognised (S. 56 *infra*). The sister's daughter's claim was rejected on the ground that she was a collateral, her rival claimant being a descendant of the propositus. In a Madras case in which the succession opened before the passing of Act II of 1929, the rival claimants were (1) daughter's daughter's son and (2) sister's son. It was held that the former was entitled to preference (*l*).

**51. Second and third rules laid down by the Judicial Committee.**—In *Vedachela* v. *Subramania* (*m*), the claimants were (1) a maternal uncle (appellant) and (2) a paternal aunt's son's son (respondent). The Madras High Court held that the latter who is a bandhu *ex parte paterna* was entitled to succeed in preference to the former who was a bandhu *ex parte materna*. On appeal the Judicial Committee reversed the judgment of the High Court.

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(*g*) (1896) 19 Mad. 405, 23 I.A. 83.
(*h*) *Muttusami* v. *Muttukumarasami* (1893) 16 Mad. 23.
(*i*) *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1906) 29 Mad. 115.
(*j*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 95, 60 I.C. 251 ('21) A.PC. 53.
(*k*) (1922) 46 Bom. 541, 77 I.C. 17, ('22) A.B. 321.
(*l*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I.C. 107, ('34) A.M. 611.
(*m*) (1921) 48 I.A. 349, 364, 44 Mad. 753, 767, 64 I.C. 402, ('22) A.PC. 33; *Laxman* v. *Gangabai* ('55) A. Madh. Bha. 138.

Their Lordships observed *"In the absence of any express authority varying the rule, the propositions enunciated in Muttusami* v. *Muttukumarasami* (*n*), *which on appeal was affirmed by the Judicial Committee* (*o*), *furnish a safe guide."*

Reference may also be made to the undermentioned case where a half brother of the mother was preferred to a father's brother's daughter (*p*).

The first two propositions have been already stated (s. 50). The next two propositions are:—

(3) That the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained;

(4) That as between bandhus of the same class, the spiritual benefit they confer upon the propositus is, as stated in the Viramitrodaya, a ground of preference.

In *Jatindranath Ray* v. *Nagendranath Ray* (*q*), in which the parties were governed by the Benares school of the Mitakshara, the contest was between the mother's sister's son and the father's half-sister's son, both *atma* bandhus, and the latter was preferred to the former on the ground of the superior spiritual efficacy of the pinda offered by him. In that case there Lordships of the Privy Council observed as follows:—

*"No doubt, propinquity in blood is the primary test, but ... the Viramitrodaya brings in the conferring of spiritual benefits as the measure of propinquity where the degree of blood relationship furnishes no certain guide."*

From the above two cases we get the following rules:—

(1) Propinquity in blood or nearness in degree gives a ground of preference (*r*).

(2) When it fails (and not until then), the conferring of spiritual benefit is a ground of preference (*s*).

It looks as if the phrases "nearness in degree", "propinquity in blood", and "degree of blood relationship" are used in the ordinary sense of the steps between the claimant and the propositus and not in the technical sense of ancient Hindu Lawyers. If so, the decision noted below is also an obvious case (*t*).

*Spiritual efficacy as a ground of preference among bandhus.*—In the last mentioned case, their Lordships observed (*u*) "Applying it to the parties in the present appeal, it is obvious that the respondents offer the full cake to the paternal grandfather and great-grandfather of the *propositus*, while the appellant offers it to his maternal grandfather, great-grandfather and great-great grandfather. Thus no doubt the appellant offers three cakes and the respondents only two. But the *propositus* participates only in oblations made to his three immediate paternal ancestors and not in those made to his maternal ancestors. (Dr. Sarvadhikari's Principles of Hindu Law, 1st edition, pp. 817-8) ..... Apart from this, it seems to be well established that cakes offered to the paternal ancestors are of superior efficacy to those offered to maternal ancestors. This was laid down by a Full Bench of the Calcutta High Court in *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (*v*). Their Lordships must, therefore, hold that the offerings made by the res-

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(*n*) (1893) 16 Mad. 23, 30.

(*o*) *Muthuswami* v. *Sunambedu* (1896) 23 I.A. 83, 19 Mad. 405. Also see *Chengiah* v. *Subbaraya* (1930) 58 Mad. L.J. 562, 128 I.C. 172, ('30) A.M. 555, where the rival claimants are both matribandhus.

(*p*) *Gowardhan* v. *Dwarku* ('63) A. Punj. 398.

(*q*) (1932) 59 Cal. 576, 58 I.A. 372, 135 I.C. 637, ('31) A.PC. 268; *Kaliammal* v. *Muthu Pillai* ('66) A.M. 118.

(*r*) *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar* (1938) 65 I.A. 93, (1938) Mad. 551, 40 Bom L.R. 704, 172 I.C. 724, (38) A.PC. 34; *Debi Das* v. *Mukat Behari Lal* (1943) All. 131, 207 I.C. 17, ('43) A.A. 177. (An obvious case).

(*s*) *Ademma* v. *Hanuman Reddi* (1938) Mad. 260, ('37) A.M. 967.

(*t*) *Sobadra* v. *Shri Thakur Behariji Maharaj* (1943) All. 155, 206 I.C. 81, ('43) A.A. 87.

(*u*) *Jatindranath Ray* v. *Nagendranath Ray* (1932) 59 Cal. 576, 584, 58 I.A. 372, 135 I.C. 637, ('31) A.PC. 268, 271.

(*v*) (1870) 5 Beng. L.R. 15, 39, 13 W.R. 49 (F.B.).

pondents confer a greater spiritual benefit upon the *propositus* than those made by the appellant, and that, taking this as a measure of propinquity, the respondents must be held to be the preferential heirs."

**52. Fourth rule laid down by the Judicial Committee.** *Bandhus ex parte paterna and bandhus ex parte materna.*—It has been held by the High Courts of Madras (*w*) and Bombay (*x*), that bandhus *ex parte paterna* (*i.e.*, on the father's side), take before bandhus *ex parte materna* (*i.e.*, on the mother's side). The fourth rule approved by the Judicial Committee is that bandhus *ex parte paterna* are preferred to bandhus *ex parte materna*. This rule must be applied only after the first three rules fail to furnish a guide.

In *Vedachela's case* (*y*), the Judicial Committee disapproved of the application of the rule where a different result would follow by reason of nearness in degree or superior spiritual efficacy. In the case of such a conflict, the rule in this section ought not to be applied; where there is no such conflict, or where the other rules fail to furnish a guide, this rule may be applied. This is how the decision in *Balusami* v. *Narayana* (*z*), was distinguished by the Judicial Committee (*a*). There is nothing in the judgment of the Judicial Committee in that case to suggest that the rule of preference for bandhus *ex parte paterna* is not to be applied in any case. On the contrary, in a later case—*Jatindranath Ray* v. *Nagendranath Ray* (*b*), which was governed by the Benares School of Hindu Law, their Lordships observed that that rule was supported by a considerable volume of authority, such as Mayne (*c*), and Golapchandra Sarkar (*d*) who lay down the rule that as between bandhus of the *same* class and *equal in degree*, one related on the father's side is to be preferred to one related on the mother's side, and Bhattacharya's Commentaries which seem to take the same view (*e*). The contest in *Jatindranath Ray's case* was between the father's half-sister's son and the mother's sister's son. Both were *atma bandhus* in *equal degree* of propinquity to the last owner. The father's half-sister's son was entitled to succeed in preference to the mother's sister's son, if the rule of preference of bandhus *ex parte paterna* were to be applied. He was also entitled to succeed if the test of spiritual efficacy were adopted. Their Lordships, however, thought that "the safer test" was that of spiritual efficacy, and decided on that ground in favour of the father's half-sister's son.

In the light of the two decisions of the Judicial Committee, the decision of the Madras High Court in *Sundarammal* v. *Rangasami* (*g*) is open to the comment that it did not give proper effect to the propositions enunciated in *Muthusami's* case referred to in §§ 50 and 51 above. But the decision in *Balusami* v. *Narayana* (*h*) is still good law. The actual decision was arrived at by the application of the principles (1) The nearer line excludes the more remote and (2) Bandhus *ex parte paterna* are preferred to the bandhus *ex parte materna*. Neither comparison of degrees nor of spiritual efficacy gives a different result. It is submitted that the decision is correct though different reasons might have been given.

**53. Additional rules laid down by the High Courts.**—Leaving the case of descendants as settled for all practical purposes (§ 50A) on the principle that the nearer line excludes the more remote, the further question arises whether it can be applied as between collaterals of different lines. The question is of great practical importance and may frequently arise, among atma bandhus.

We have already seen (§ 49) that atma bandhus who are not descendants may be divided into (1) Father's cognate descendants or father's line;

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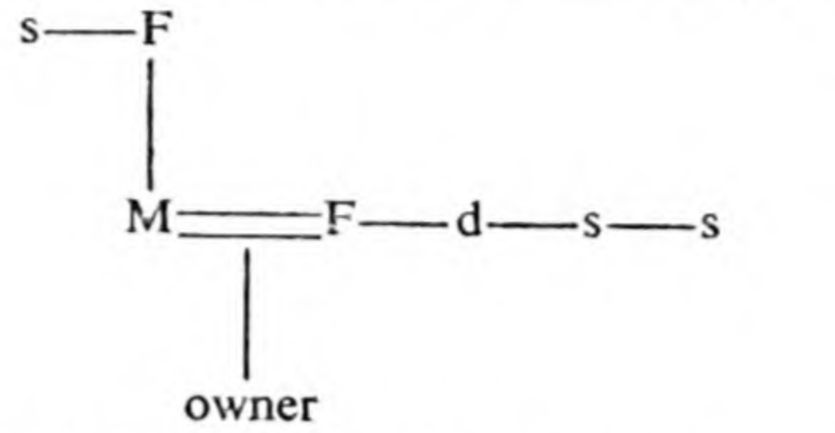
(*w*) *Sundrammal* v. *Rangasami* (1895) 18 Mad. 193; *Balusami* v. *Narayana* (1897) 20 Mad. 342.
(*x*) *Saguna* v. *Sadashiv* (1902) 26 Bom. 710, 715.
(*y*) (1922) 48 I.A. 349, 44 Mad. 753, 64 I.C. 402, ('22) A.PC. 33.
(*z*) (1897) 20 Mad. 342.
(*a*) (1922) 48 I.A. 349, 359, 44 Mad. 753, 761, 762, 64 I.C. 402, ('22) A.PC. 33, *supra*.
(*b*) (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A.PC. 268.
(*c*) Hindu Law, 9th ed. sec. 579.
(*d*) Hindu Law, 7th edition, p. 574.
(*e*) Hindu Law, 2nd edition, 460.
(*g*) (1895) 18 Mad. 193.
(*h*) (1897) 20 Mad. 342.

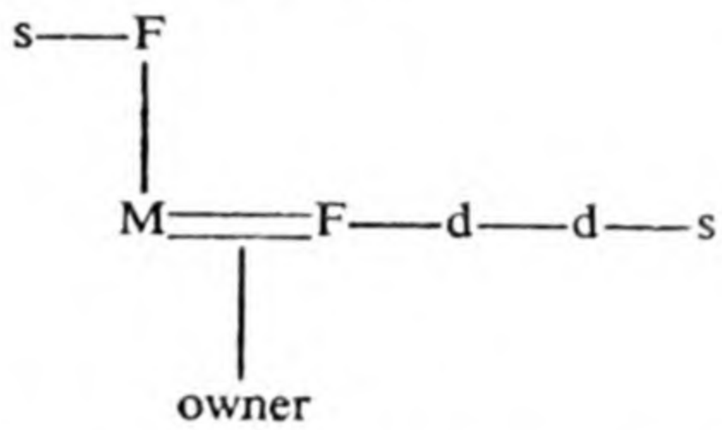
Maternal grandfather and descendants of maternal and paternal grandfathers. The lines of the grandfathers, being equal in degree, may be regarded as one line.

When the rival claimants belong to these two different lines, the question arises whether the principle that the nearer line excludes the more remote applies to them. Where the claimants are equally removed from the propositus, it is reasonable that the rule should apply. But, suppose the claimant in the nearer line is more remotely removed than the claimant in the remoter line as in the following diagram:




In such a case who is the preferable heir? Though the actual point has not arisen before the Madras High Court, the trend of the decisions is in favour of holding that the nearer line excludes the more remote (*i*).

A contrary decision has been arrived at in the Patna High Court, where the rival claimants are as in the following diagram:




It was held by a majority of three that the maternal uncle is entitled to succeed (*j*). The point has not arisen before the Judicial Committee or the other High Courts. The Allahabad High Court has touched upon it but left it open as it did not arise for decision (*k*).

All other considerations being equal, the claimant who is separated by only one female link is to be preferred to one who is separated by two such links (*l*). Another mode of expressing it is that two steps in cognateness are inferior to only one step in cognateness and one in agnateness (*m*).

It has thus been held that a *daughter's* son's son is to be preferred to a *daughter's daughter's* son (*n*). The mother's brother's son is preferred to mother's sister's son in Madras (*o*) and Allahabad (*p*). The Bombay High Court refused to follow the above rule and held that both were entitled to take equally (*q*). The decision seems to be of doubtful authority, and, it is submitted, requires reconsideration. If it is supported on any doctrine peculiar to Bombay, it has to be confined to Bombay. Following the same rule it has been held by the High Court of Allahabad (*r*), that the father's father's *daughter's son's* son [§ 54, no. 23, p. 133] is to be preferred to the father's *daughter's daughter's* son [§ 54, no. 7 at p. 133]. It is submitted that this case was erroneously decided. It was decided before the decisions of the Judicial Committee in *Vedachela* v. *Subramania* (*s*) and *Jatindranath Ray* v. *Nagendranath Ray* (*t*). The rule in this para-

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(*i*) *Balusami* v. *Narayana* (1897) 20 Mad. 342: *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 246, 153 I.C. 107, ('34) A.M. 611.

(*j*) *Umashankar* v. *Msst. Nageshwari* (1918) 3 Pat. L.J. 663, 48 I.C. 625, ('18) A.P. 1.

(*k*) *Sobadra* v. *Shri Thakur Behariji Maharaj* (1942) A.L.J. 732, (1943) All. 155, 206 I.C. 81, ('43) A.A. 87.

(*l*) *Tirumalachariar* v. *Andal Ammal* (1907) 30 Mad. 406.

(*m*) *Rami Reddy* v. *Gangireddi* (1925) 48 Mad. 722, 87 I.C. 609, ('25) A.M. 807.

(*n*) (1907) 30 Mad. 406, *supra.*

(*o*) (1925) 48 Mad. 722, 87 I.C. 609, ('25) A.M. 807, *supra; Appandai* v. *Bagubali* (1910) 33 Mad. 439, 5 I.C. 280, must be regarded as overruled.

(*p*) *Ram Charan Lal* v. *Rahim Baksh* (1916) 38 All. 416, 34 I.C. 108, ('17) A.A. 486.

(*q*) *Rajappa* v. *Gangappa* (1923) 47 Bom. 48, 77 I.C. 219, ('22) A.B. 420.

(*r*) *Sham Devi* v. *Birbhadra Prashad* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178.

(*s*) (1922) 48 I.A. 349, 44 Mad. 753, 64 I.C. 402, ('22) A.PC. 33.

(*t*) (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A.PC. 268.

graph should not be applied before the earlier rules have been tested. Only when they fail to furnish a guide, should we proceed to this rule. If we apply the test of nearness in degree laid down by the Judicial Committee, the result would be different.

**53A.** A summing up of the rules as to the order of succession among the male bandhus has been attempted by the Madras High Court (*u*). They are to be applied in the order in which they are stated.

(1) Atma bandhus succeed in preference to pitri bandhus and matri bandhus.

(2) & (3) Among atma bandhus the nearer line excludes the more remote. This is sub-divided into—

(2) descendants are preferred to ancestors and collaterals;

(3) father's descendants take before the descendants of grandfathers.

(4) Pitri bandhus succeed before the matri bandhus.

(5) Among the bandhus of the same or equal lines the nearer excludes the more remote. If Rule 5 is to be applied before Rule 3, the decision in *Uma Shankar* v. *Nageshvari* (1918) 3 Pat. L.J. 663, 48 I.C. 625, ('18) A.P. I (*vide* s. 53) would be correct. But if Rule 3 is to be first applied it is incorrect.

(6) If the rule of nearness in blood fails to furnish a guide, he who confers a superior spiritual benefit is preferable to one who confers an inferior spiritual benefit or none.

(7) When all the above rules do not work, bandhus *ex parte paterna* are preferred to bandhus *ex parte materna*.

(8) All other things being equal a claimant who is related to the propositus through the intervention of two females is to be postponed to one who is related through the intervention of only one female.

**53B. The last rule laid down by the Judicial Committee.**—Where we come to two equal claimants after the application of the above rules, one of whom is of whole blood and the other is of half blood, the former is preferred to the latter (*v*).

**54. Order of succession among bandhus.**—The following is the order of succession among bandhus [see Table on p. 136A below], based on rules in §§ 50-53A.

*I.—Atma bandhus.*

Descendants.

1. Son's daughter's son.

   Preferred in Bombay to father's daughter's daughter, on the principle that both being equally removed from the deceased, the one in the direct line of descent should be preferred to the one in a collateral (§ 50A).

2. Daughter's son's son (inferior to 1 in spiritual benefit). Preferred by the Madras High Court to no. 3 [53].
3. Daughter's daughter's son.

   Preferred by the Madras High Court to sister's son in a case before the Act of 1929 (*w*), and therefore, preferable to no. 4.

4. Lower descendants are not of practical importance.

   Father's descendants.

5. Father's son's (= brother's) daughter's son.
6. Father's daughter's (= sister's) son's son.

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(*u*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 246, 153 I.C. 107 ('34) A.M. 611.

(*v*) *Jatindranath Ray* v. *Nagendranath Ray* (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A.PC. 268.

(*w*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I.C. 107, ('34) A.M. 611.

Preferred by the Madras High Court to no. 18(*x*) and by the Allahabad High Court to no. 27(*y*).

7. Father's daughter's daughter's son.
   Preferred by the Allahabad High Court to no. 20(*z*).
8. Father's son's son's daughter's son.
9. Father's son's daughter's son's son.
*10. Father's daughter's son's son's son.
11. Father's son's daughter's daughter's son.
*12. Father's daughter's son's daughter's son.
*13. Father's daughter's daughter's son's son.
*14. Father's daughter's daughter's daughter's son.
14-A. Lower descendants of father who are bandhus in Madras but not in Allahabad.
15. Mother's father (= maternal grandfather).

### *Descendants of grandfathers*

16. Mother's father's son (= maternal uncle).
    He succeeds before no. 17(*a*) and before no. 19(*b*).
17. Father's father's daughter's (= father's sister's or half-sisters) son.
    He succeeds before no. 18(*c*) and before no. 19 (§ 51).
18. Mother's father's son's son.
    He succeeds before 19. (The decision in Bombay, holding that both take equally is either doubtful or must be limited to Bombay [§ 53].
19. Mother's father's daughter's son.
20. Father's father's son's daughter's son (*d*).
21. Mother's father's son's son's son.
22. Mother's father's son's daughter's son.
23. Father's father's daughter's son's son.
    It is submitted that the decision in *Sham Devi* v. *Birbhadra Prasad* (1921) 43 All. 463 is erroneous [§ 53] (*e*).
24. Father's father's daughter's daughter's son.
25. Mother's father's daughter's son's son.
26. Mother's father's daughter's daughter's son.
27. Father's father's son's son's daughter's son.

In the undermentioned case the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the propositus and the latter was preferred (*e*1).

28. Mother's father's son's son's daughter's son.
29. Father's father's son's daughter's son's son.
*30. Father's father's daughter's son's son's son.

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(*x*) *Balusami* v. *Narayana* (1897) 20 Mad. 342, 348.

(*y*) *Debi Das* v. *Mukat Behari Lal* (1943) All. 131, 207 I.C. 17, ('43) A.A. 177.

(*z*) *Sabodra* v. *Shri Behariji Mahraji* (1943) All. 155, 206 I.C. 81 ('43) A.A. 87. See also the decision of the Chief Court of Karachi in *Tejumal* v. *Mulchand* (1946) Kar. 467.

(*a*) *Balasubrahamanya Pandya Thalaivar* v. *Subbayya Tevar* (1938) 65 I.A. 93, (1938) Mad. 551, 40 Bom. L.R. 704. 172 I C. 724, ('38) A.PC. 34; *Sakharam* v. *Balakrishna* (1925) 49 Bom. 739, 94 I.C. 817, ('25) A.B. 451 must be regarded as overruled; *Virangauda Lingangauda* v. *Yelappa Shidappa* (1943) Bom. 259, 205 I.C. 328, ('43) A.B. 56.

(*b*) *Mohandas* v. *Krishnabai* (1881) 5 Bom. 597.

(*c*) *Ademma* v. *Hanuman Reddi* (1938) Mad. 260, ('37) A.M. 967.

(*d*) The decision in *Sundrammal* v. *Rangasami* (1895) 18 Mad. 193, must be regarded as overruled. Reference may be made to *Kaliammal* v. *Muthu Pillai* ('66) A.M. 118 where it is pointed out that in Madras a male bandhu is entitled to preference over a female bandhu even though the female bandhu is nearer in degree [see the Entries considered in that case].

(*e*) *United Provinces Through Deputy Commissioner Hardoi* v. *Kanhaiyalal & Ors.* (1941) 16 Luck. 551, 192 I.C. 131, ('41) A.O. 337.

(*e*1) *Pichandi* v. *E. Ramaswami* ('71) A.M. 204 Also see § 43-4(iii) and § 43-7(iv) *supra*.

31. Father's father's son's daughter's daughter's son.
*32. Father's father's daughter's son's daughter's son.
*33. Father's father's daughter's daughter's son's son.
*34. Father's father's daughter's daughter's daughter's son.
*35. Mother's father's son's son's son's son.
36. Mother's father's son's daughter's son's son.
*37. Mother's father's daughter's son's son's son.
38. Mother's father's son's daughter's daughter's son.
*39. Mother's father's daughter's son's daughter's son.
*40. Mother's father's daughter's daughter's son's son.
*41. Mother's father's daughter's daughter's daughter's son.
42. Father's father's son's son's daughter's son's son.
*43. Father's father's son's daughter's son's son's son.
*44. Father's father's daughter's son's son's son's son.
*45. Father's father's son's daughter's daughter's son's son.
46. Father's father's daughter's son's daughter's son's son.
*47. Father's father's daughter's daughter's son's son's son.
*48. Father's father's daughter's daughter's daughter's son's son.
*49. Mother's father's son's son's son's son's son.
50. Mother's father's son's son's daughter's son's son.
*51. Mother's father's son's daughter's son's son's son.
*52. Mother's father's daughter's son's son's son's son.
*53. Mother's father's son's daughter's daughter's son's son.
54. Mother's father's daughter's son's daughter's son's son.
*55. Mother's father's daughter's daughter's son's son's son.
*56. Mother's father's daughter's daughter's daughter's son's son.
*56-A Seven descendants of father's father, a degree lower (sons of nos. 42-48).
*56-B. Eight descendants of mother's father, a degree lower (sons of nos. 49-56).

* These are held to be heirs in Madras but are held not to be heirs in Allahabad according to *Gajadhar Prasad's* case.

According to the Patna view no. 15 will come between no. 3 and no. 4; no. 16 between no. 5 and no. 6; nos. 17, 18 and 19 between no. 8 and no. 9.

No. 28 is placed above Nos. 29 to 35 on account of his spiritual efficacy. It must be admitted that the result is highly anomalous. It is futile to discuss it unless the case actually arises.

## *II.—Pitri bandhus.*

1. Father's maternal grandfather.
2. Father's maternal grandfather's son.
3. Father's paternal grandfather's daughter's son.
4. Father's maternal grandfather's son's son.
5. Father's maternal grandfather's daughter's son.
6. Father's paternal grandfather's son's daughter's son.
7. Father's paternal grandfather's daughter's son's son.
8. Father's maternal grandfather's son's son's son.
9. Father's paternal grandfather's daughter's daughter's son.
10. Father's maternal grandfather's son's daughter's son.
11. Father's maternal grandfather's daughter's son's son.
12. Father's maternal grandfather's daughter's daughter's son.
13. Father's paternal grandfather's son's son's daughter's son.

14. Father's paternal grandfather's son's daughter's son's son.
15. Father's paternal grandfather's daughter's son's son's son.
16. Father's maternal grandfather's son's son's son's son.
17. Father's paternal grandfather's son's daughter's daughter's son.
18. Father's paternal grandfather's daughter's son's daughter's son.
19. Father's paternal grandfather's daughter's daughter's son's son.
20. Father's maternal grandfather's son's son's daughter's son.
21. Father's maternal grandfather's son's daughter's son's son.
22. Father's maternal grandfather's daughter's son's son's son.
23. Father's paternal grandfather's daughter's daughter's daughter's son.
24. Father's maternal grandfather's son's daughter's daughter's son.
25. Father's maternal grandfather's daughter's son's daughter's son.
26. Father's maternal grandfather's daughter's daughter's son's son.
27. Father's maternal grandfather's daughter's daughter's daughter's son.
28. Father's paternal grandfather's son's son's daughter's son's son.
29. Father's paternal grandfather's son's daughter's son's son's son.
30. Father's paternal grandfather's daughter's son's son's son's son.
31. Father's maternal grandfather's son's son's son's son's son.
32. Father's paternal grandfather's son's daughter's daughter's son's son.
33. Father's paternal grandfather's daughter's son's daughter's son's son.
34. Father's paternal grandfather's daughter's daughter's son's son's son.
35. Father's maternal grandfather's son's son's daughter's son's son.
36. Father's maternal grandfather's son's daughter's son's son's son.
37. Father's maternal grandfather's daughter's son's son's son's son.
38. Father's paternal grandfather's daughter's daughter's daughter's son's son.
39. Father's maternal grandfather's son's daughter's daughter's son's son.
40. Father's maternal grandfather's daughter's son's daughter's son's son.
41. Father's maternal grandfather's daughter's daughter's son's son's son.
42. Father's maternal grandfather's daughter's daughter's daughter's son's son.
43. Father's paternal grandfather's son's son's daughter's son's son's son.
44. Father's paternal grandfather's son's daughter's son's son's son's son.
45. Father's paternal grandfather's daughter's son's son's son's son's son.
46. Father's maternal grandfather's son's son's son's son's son's son.
47. Father's paternal grandfather's son's daughter's daughter's son's son's son.
48. Father's paternal grandfather's daughter's son's daughter's son's son's son.
49. Father's paternal grandfather's daughter's daughter's son's son's son's son.
50. Father's maternal grandfather's son's son's daughter's son's son's son.
51. Father's maternal grandfather's son's daughter's son's son's son's son.
52. Father's maternal grandfather's daughter's son's son's son's son's son.
53. Father's paternal grandfather's daughter's daughter's daughter's son's son's son.
54. Father's maternal grandfather's son's daughter's daughter's son's son's son.
55. Father's maternal grandfather's daughter's son's daughter's son's son's son.
56. Father's maternal grandfather's daughter's daughter's son's son's son's son.
57. Father's maternal grandfather's daughter's daughter's daughter's son's son's son.

### *III.—Matri bandhus.*

1. Mother's paternal grandfather (*f*).
2. Mother's maternal grandfather.

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*f*) *Krishnayya* v. *Pichamma* (1888) 11 Mad. 287.

3. Mother's paternal grandfather's son.
4. Mother's maternal grandfather's son.
5. Mother's paternal grandfather's son's son.
6. Mother's paternal grandfather's daughter's son (*g*).
7. Mother's maternal grandfather's son's son.
8. Mother's maternal grandfather's daughter's son.
9. Mother's paternal grandfather's son's son's son.
10. Mother's paternal grandfather's son's daughter's son.
11. Mother's paternal grandfather's daughter's son's son. He is preferred to No. 17 (*h*).
12. Mother's maternal grandfather's son's son's son.
13. Mother's paternal grandfather's daughter's daughter's son.
14. Mother's maternal grandfather's son's daughter's son.
15. Mother's maternal grandfather's daughter's son's son.
16. Mother's maternal grandfather's daughter's daughter's son.
17. Mother's paternal grandfather's son's son's son's son.
18. Mother's paternal grandfather's son's son's daughter's son.
19. Mother's paternal grandfather's son's daughter's son's son.
20. Mother's paternal grandfather's daughter's son's son's son.
21. Mother's maternal grandfather's son's son's son's son.
22. Mother's paternal grandfather's son's daughter's daughter's son.
23. Mother's paternal grandfather's daughter's son's daughter's son.
24. Mother's paternal grandfather's daughter's daughter's son's son.
25. Mother's maternal grandfather's son's son's daughter's son.
26. Mother's maternal grandfather's son's daughter's son's son.
27. Mother's maternal grandfather's daughter's son's son's son.
28. Mother's paternal grandfather's daughter's daughter's daughter's son.
29. Mother's maternal grandfather's son's daughter's daughter's son.
30. Mother's maternal grandfather's daughter's son's daughter's son.
31. Mother's maternal grandfather's daughter's daughter's son's son.
32. Mother's maternal grandfather's daughter's daughter's daughter's son.
33. Mother's paternal grandfather's son's son's son's son's son.
34. Mother's paternal grandfather's son's son's daughter's son's son.
35. Mother's paternal grandfather's son's daughter's son's son's son.
36. Mother's paternal grandfather's daughter's son's son's son's son.
37. Mother's maternal grandfather's son's son's son's son's son.
38. Mother's paternal grandfather's son's daughter's daughter's son's son.
39. Mother's paternal grandfather's daughter's son's daughter's son's son.
40. Mother's paternal grandfather's daughter's daughter's son's son's son.
41. Mother's maternal grandfather's son's son's daughter's son's son.
42. Mother's maternal grandfather's son's daughter's son's son's son.
43. Mother's maternal grandfather's daughter's son's son's son's son.
44. Mother's paternal grandfather's daughter's daughter's daughter's son's son.
45. Mother's maternal grandfather's son's daughter's daughter's son's son.
46. Mother's maternal grandfather's daughter's son's daughter's son's son.
47. Mother's maternal grandfather's daughter's daughter's son's son's son.
48. Mother's maternal grandfather's daughter's daughter's daughter's son's son.
49. Mother's paternal grandfather's son's son's son's son's son's son.

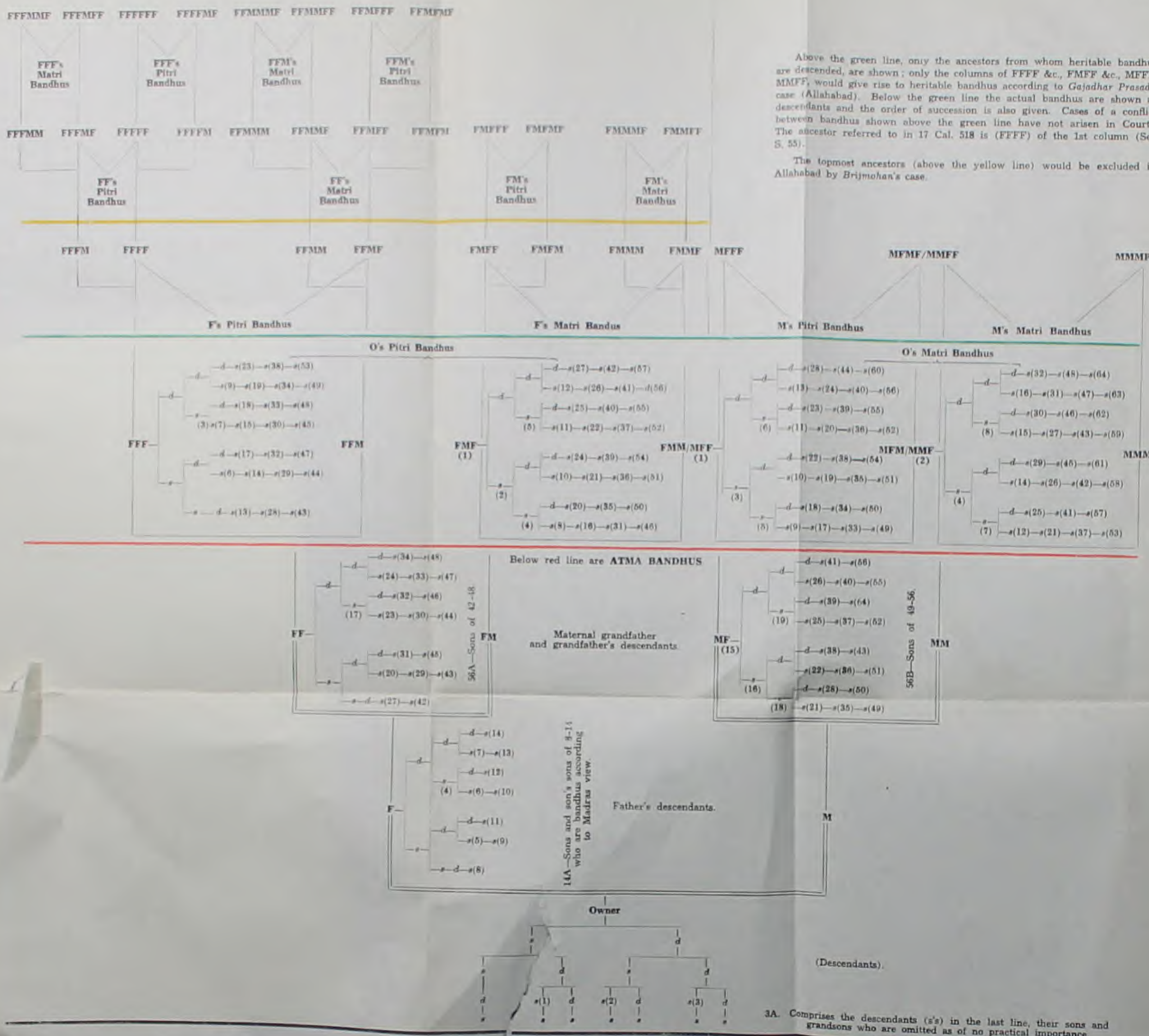
(*g*) *Aait Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 60 I.C. 251, ('21) A.PC. 53.

(*h*) *Chengiah* v. *Subbaraya* (1930) 58 Mad. L.J. 562, 128 I.C. 172, ('30) A.M. 555.

# ORDER OF SUCCESSION AMONG BANDHUS:

[See s. 54.]






Above the green line, only the ancestors from whom heritable bandhus are descended, are shown; only the columns of FFFF &c., FMFF &c., MFFF, MMFF, would give rise to heritable bandhus according to *Gajadhar Prasad's* case (Allahabad). Below the green line the actual bandhus are shown as descendants and the order of succession is also given. Cases of a conflict between bandhus shown above the green line have not arisen in Courts. The ancestor referred to in 17 Cal. 518 is (FFFF) of the 1st column (See S. 55).

The topmost ancestors (above the yellow line) would be excluded in Allahabad by *Brijmohan's* case.

3A. Comprises the descendants (s's) in the last line, their sons and grandsons who are omitted as of no practical importance.

Title
Author
Accession No
Call No.
BORROWER'S NO.
ISSUE DATE
BORROWER'S NO.
ISSUE DATE

50. Mother's paternal grandfather's son's son's daughter's son's son's son.
51. Mother's paternal grandfather's son's daughter's son's son's son's son.
52. Mother's paternal grandfather's daughter's son's son's son's son's son.
53. Mother's maternal grandfather's son's son's son's son's son's son.
54. Mother's paternal grandfather's son's daughter's daughter's son's son's son.
55. Mother's paternal grandfather's daughter's son's daughter's son's son's son.
56. Mother's paternal grandfather's daughter's daughter's son's son's son's son.
57. Mother's maternal grandfather's son's son's daughter's son's son's son.
58. Mother's maternal grandfather's son's daughter's son's son's son's son.
59. Mother's maternal grandfather's daughter's son's son's son's son's son.
60. Mother's paternal grandfather's daughter's daughter's daughter's son's son's son.
61. Mother's maternal grandfather's son's daughter's daughter's son's son's son.
62. Mother's maternal grandfather's daughter's son's daughter's son's son's son.
63. Mother's maternal grandfather's daughter's daughter's son's son's son's son.
64. Mother's maternal grandfather's daughter's daughter's daughter's son's son's son.

The above lists are prepared on the basis of the decision and dictum in *Kesar Singh's* case (*i*). But nos. 14A and 42-56B of the Atma bandhus, nos. 28-57 of the Pitri bandhus, nos. 33-64 of the Matri bandhus would be excluded by *Brij Mohan's* case (*j*) and a few others by *Gajadhar Prasad's* case (*k*).

**55. Bandhus who are descendants of remoter ancestors.**—The bandhus for whom the order of succession is given in § 54, are all descendants of the great-grandfathers, the grandfathers and father of the propositus and of the propositus himself. It may become necessary to consider the position in regard to the descendants of ancestors higher than the great-grandfathers, *vide* chart on page 136A.

The first question that arises in respect of such bandhus is whether they fall under the heading Pitri bandhus and Matri bandhus or have to be classified into other classes. The importance of such a question may be illustrated thus:—Suppose the two rival claimants are (1) a descendant of mother's father's father and, therefore, admittedly a matri bandhu, and (2) a cognate descendant of father's father's father's father. If the latter must be regarded as a pitri bandhu he will be preferred to the former according to the decision in *Muthusami* v. *Muthukumarasami* (*l*). But it will be noticed that he is descended from an ancestor higher than the ancestor through whom the first claimant traces descent and he does not appear among the pitri bandhus mentioned in § 49. If he falls under a different class which has to be given a different name such as (pitri-pitri bandhus), he, being descended from a remoter ancestor and not being a pitri bandhu, must yield to his rival.

The question has never arisen before the Courts and may never arise. An instance of such a person being regarded as a bandhu, but without any rival claimant is that of the father's father's father's son's son's daughter's son (*m*). Several judges in India have expressed the opinion that it is not possible to divide all bandhus into the three classes mentioned in the Mitakshara [§ 46(4)]. The Mitakshara itself does not say that all bandhus fall into three classes. Like the individual bandhus the classes mentioned in it may be regarded as illustrative and not as exhaustive. The opposite view is stated in the second proposition of the Madras High Court in *Muttusami* v. *Muttukumarasami* (*n*) which runs thus: "(2) That, as stated in the text of Vridha Satatapa or Baudhayana, *they are of three classes* ....."

It is true that the four propositions laid down in that case were generally approved in appeal and in *Vedachela* v. *Subramania* (*o*) by the Judicial Committee. But in none of these cases was it necessary to deal with the question and too much should not be

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(*i*) (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.
(*j*) (1938) A.L.J. 670, ('38) A.A. 443.
(*k*) (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.
(*l*) (1896) 19 Mad. 405, 23 I.A. 83.
(*m*) *Manick Chand* v. *Jagat Settani* (1890) 17 Cal. 518.
(*n*) (1893) 16 Mad. 23, 30.
(*o*) (1922) 48 I.A. 349, 359, 44 Mad. 753, 64 I.C. 402, ('22) A.PC. 33.

attached to such general approval. It is submitted that bandhus descended from the higher ancestors should be classed into (1) pitri-pitri bandhus, (2) pitri-matri bandhus, (3) matri-pitri bandhus and (4) matri-matri bandhus and similarly for descendants of remoter ancestors (*p*). It is on the assumption that all bandhus fall into three classes that some of the reasoning of the Allahabad High Court in *Gajadhar Prasad* v. *Gauri Shankar* (*q*) is based.

**56. Female bandhus in Bombay and Madras.**—The bandhus mentioned in § 54 above are all males. The Mitakshara nowhere expressly mentions female bandhus. The nine instances there given are all instances of male bandhus. The Benares and Mithila schools follow the strict letter of the Mitakshara, and do not recognize females as bandhus. In Bombay and Madras, however, certain females are recognized as bandhus.

Every female other than the daughter in Madras, and other than the daughter, sister and father's sister, in Bombay who rank above bandhus, who, if she were a male would have been an heir, that is, who is related to the propcsitus by birth, within the limits of degrees for bandhus is regarded as a heritable bandhu. The following are instances:—

| IN BOMBAY. | IN MADRAS. |
|---|---|
| Brother's daughter (*r*). | Brother's daughter (*v*). |
| Sister's daughter (*s*). | Brother's son's daughter (*w*). |
| Paternal uncle's daughter (*t*). | Father's brother's daughter (*w*1). |
| Paternal grandfather's sister's son's daughter (*u*). | |

It has been held by a Full Bench of the Bombay High Court (*x*) overruling earlier decisions of the same Court that it is not the correct rule, that according to Mitakshara law as applied in the Bombay State, a male bandhu is to be preferred to a female bandhu even though the latter is nearer in degree. The first test to apply is to determine in which particular class a bandhu falls among the classes enumerated in Mitakshara, and preference should always be given to the class enumerated earlier over those mentioned subsequently. The next test to apply would be to find out as to which of the Bandhus is nearer in degree in a particular class. If a female bandhu is nearer in relation she should be preferred to a remote male Bandhu. If the rival claimants are equally related then only the principle of religious efficacy should be applied and in that case a male can be preferred to a female.

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(*p*) *Umashankar* v. *Mussamat Nageshwari* (1918) 3 Pat. L.J. 663, 48 I.C. 625, ('18) A.P. 1; *Rami Reddi* v. *Gangi Reddi* (1925) 48 Mad. 722, 87 I.C. 609, ('25) A.M. 807, 809, 810; *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I.C. 107, ('34) A.M. 611.

(*q*) (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.

(*r*) *Balkrishna* v. *Ramkrishna* (1921) 45 Bom. 353, 59 I.C. 771, ('21) A.B. 189.

(*s*) *Dattatraya* v *Gangabai* (1922) 46 Bom. 541.

(*t*) *Kenchava* v. *Girimallappa* (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209 (postponed to father's sister's son).

(*u*) *Bai Vijli* v. *Bai Prabhalakshmi* (1907) 9 Bom. L.R. 1129.

(*v*) *Venkatasubramaniam* v. *Thayarammah* (1898) 2 Mad. 263.

(*w*) *Jagannadhan* v. *Adilakshmi* (1940) Mad. 734, ('40) A.M. 545.

(*w*1) *Fakula Majhi* v. *Subhdra* ('69) A. Orissa 3 (case of Madras law. In Madras a father's brother's daughter succeeds as bandhu when the deceased has not left any other male heir: *Jagannadhan* v. *Adilaxmi* ('40) A.M. 545).

(*x*) *Kisan Dhondu* v. *Shevantabai* (1949) 52 Bom. L.R. 327 ('50) A.B. 254, overruling *Balkrishna* v. *Ramkrishna* (1920) 22 Bom. L.R. 1442; and *Girimallappa* v. *Kenchava* (1920) 45 Bom. 768.

In Madras a male bandhu is entitled to preference over a female bandhu even though the female bandhu is nearer in degree (*x*1).

Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, *the son's daughter, the daughter's daughter and the sister* inherit with gotraja sapindas, the son's daughter succeeding immediately after the father's father, the daughter's daughter next after her, and the sister next after the daughter's daughter: see § 43, nos. 13A, 13B and 13C. In Bombay, the sister had a higher place even before the Act and retains it. As to half-sister, see § 43, 13C (2).

The female relations mentioned above are regarded as bandhus on the ground that "any relative who is also a cognate may be treated as coming within the definition of bhinna gotra sapinda, and that the term 'sapinda,' as used in chap. ii, sec. vi, of the Mitakshara, includes females" (*y*).

In Madras such females come after all the male bandhus (*z*). For the order in Bombay see § 74. Amongst themselves they succeed in the order of propinquity.

**56A. Heirs of an illegitimate son.**—When the illegitimate son of a woman dies leaving his mother but no nearer heirs, she is entitled to succeed as heir in accordance with the general principles of Hindu Law (*a*). The illegitimate sons of a prostitute, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them, and also to their legitimate sons (*b*). So if *A* and *B* are son and daughter of a woman living in adultery and *A* dies leaving *B* but no legitimate heirs, *B* is entitled to succeed to *A* (*c*).

The decisions on the subject were reviewed in a recent case by the Madras High Court (*c*1).

In the Madras case (*d*) on which the present section is based Devadoss, J., said: "It is a misnomer to call the son of a dancing woman, whose paternity is unknown, an illegitimate son. The illegitimate son is one born out of wedlock, i.e., no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman law they are called *Nullius Filius*. Dancing women have their peculiar customs. Their status is recognized in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons."

The illegitimate son of a Sudra being an heir to his *father*, the father also is an heir to him provided, of course, the illegitimate son dies without leaving any issue, widow or mother (*e*).

**57. Preceptor, disciple and fellow-student.**—(1) In default of kindred, the property of a deceased Hindu, even though he be a Sudra, passes to his preceptor; if there be no preceptor, to his disciple; and if there be no disciple

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(*x*1) *Kaliammal* v *Muthu Pillai* ('66) A.M. 118.

(*y*) *Balamma* v. *Pullayya* (1895) 18 Mad. 168, 170.

(*z*) *Narasimma* v. *Managammal* (1890) 13 Mad. 10; *Rajah Venkata* v. *Rajah Surenani* (1908) 31 Mad. 321; *Lekshamana Iyer* v. *Ponnu Ammal* ('52) A. Trav.-Co. 317.

(*a*) *Jagarnath Gir* v. *Sher Bahadur Singh* (1935) 57 All. 85, 153 I.C. 1078, ('35) A.A. 329; certain observations in this case were commented on in *Sadu Ganaji* v. *Shankerrao* (1955) Nag. 467, ('55) A.N. 84.

(*b*) *Viswanatha* v. *Doraiswami* (1925) 48 Mad. 944, 91 I.C. 193, ('26) A.M. 289.

(*c*) *Dattatraya* v. *Matha Bala* (1934) 58 Bom. 119, 114 I.C. 821, ('34) A.B. 36.

(*c*1) *State of Madras* v. *Ramanatha Rao* (1960) Mad. 800; ('60) A.M. 436; [Matribandhus entitled to succeed.]

(*d*) (1925) 48 Mad. 944, 946, 91 I.C. 193, ('26) A.M. 289, *supra*.

(*e*) *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 42 I.C. 556, ('18) A.M. 1346 [F.B.].

to his fellow-student. In determining who is a preceptor, a disciple or a fellow-student, the Court will only consider the imparting of purely religious instruction (*f*).

(2) Entrance of a Hindu into a religious order generally operates as a civil death (*f*1). The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter. The other disciples of his Guru are regarded as his brothers, while the co-disciples of his Guru are looked upon as uncles and this way a spiritual family is established on the analogy of a natural family (*g*). Also see § 111 *post*.

Mitakshara, ch. 2 sec. 7. In the Madras case referred to above, it was held that the disciple of an ascetic Sudra, who left no kindred, was entitled to succeed to his estate so as to prevent its escheat to Government.

Under the Bengal School of law a *Dikshaguru* who is not the person who gives *upanayan* cannot be regarded as *Acharya* or preceptor and is not entitled to succeed to the property of his disciple in default of kindred (*h*).

In the undermentioned case the Andhra Pradesh High Court had to consider whether the avocation of *Sishya Sancharam* was an office of property and whether it was heritable and partible. It had also to consider whether earnings from this avocation constitute joint family property (*h*1).

**58. Hermits and members of religious orders.**—The heir to the property of a hermit (*Vanaprastha*) is his spiritual brother belonging to the same hermitage, to that of an ascetic (*Sanyasi*) a virtuous pupil, and to that of a student in theology (*Bramhachari*) his religious preceptor. These heirs are entitled to succeed *in preference to the kindred* of the deceased. This rule applies only to members of the twice-born classes. It does not apply to Sudras unless some usage or custom to that effect is proved (*i*).

Mitakshara, ch. 2, sec. 8; see § 111 below. The heirs mentioned in § 57 are not entitled to succeed except in *default* of kindred. The present section deals exclusively with succession to the property of members of religious orders who belong to the twice-born classes. Sanyasis are members of the twice-born classes (*j*). The heirs enumerated in this section are entitled to succeed *in priority* to the kindred of the deceased.

**59. Escheat.**—(1) On failure of all the heirs mentioned above, the Government takes by escheat (*k*). Where the Government claims by escheat, the onus lies on the Government to show that the last proprietor died without heirs (*l*).

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(*f*) *Sambasiva* v. *Secretary of State for India* (1921) 44 Mad. 704, 63 I.C. 659, ('21) A.M. 537.

(*f*1) For essentials of initiation into Sanyasa ashram see § 111 *post*, and cases there cited.

(*g*) *Sital Das* v. *Sant Ram* ('54) A.S.C. 606, 613.

(*h*) *Sadananda* v. *Harinam* ('50) A.C. 179.

(*h*1) *Tiruvenkatacharier* v. *Andalamma* ('69) A.A.P. 303.

(*i*) *Ramdas* v. *Baldevdas* (1915) 39 Bom. 168. 26 I.C. 607, ('14) A.B. 116 [Sanyasi]; *Dharamapuram* v. *Virapandiyam* (1899) 22 Mad. 302 [Sudra]: *Collector of Decca* v. *Jagat Chunder* (1901) 28 Cal. 608 [claim of preceptor's preceptor allowed as proved by custom]; *Harish Chandra* v. *Atir Mahmud* (1913) 40 Cal. 545, 18 I.C. 474 [Sudra]; *Somasundarum* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I.C. 546, ('18) A.M. 794 [Sudra]; *Sobhaddi* v. *Gobind* (1924) 46 All. 616, 80 I.C. 579, ('24) A.A. 742. However, see *Krishna Singh* v. *Mathura Ahir*, ('72) A. All. 273.

(*j*) (1915) 39 Bom. 168, 174, 26 I.C. 607, ('14) A.B. 116, supra. Also see *Sital Das* v. *Sant Ram supra*; *Gulabrao* v. *Nagorao* (1952) Nag. 591, ('52) A.N. 102 (Requirements of a person taking *sanyas*).

(*k*) *Collector of Masulipatam* v. *Cavaly Venkata* (1860) 8 M.I.A. 500. *Ram Chandra* v. *Man Singh* ('68) A.S.C. 954.

(*l*) *Girdhari Lall* v. *Bengal Government* (1868) 12 M.I.A. 448, 10 W.R. 31 (P.C.) *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 1110, 62 I.C. 109, ('21) A.B. 138; *United Provinces through Deputy Commissioner Hardoi* v. *Kanhaiyalal & Ors.* (1941) 16 Luck. 551, 192 I.C. 131, ('41) A.O. 337; *State of Madras* v. *Ramanatha Rao* ('60) A.M. 436, (1960) Mad. 800.

(2) An estate taken by escheat is subject to the trusts and charges, if any, previously affecting the estate (*m*), *e.g.*, maintenance of widows (*n*), and mortgages created by a widow for legal necessity (*o*), but not to unauthorized alienations by widows (*p*).

*Succession after Reunion*

**60. Order of Succession among reunited members.**—In Madras, it has been held that the share of a reunited member survives to the other members of the reunited family like the share of a member of a normal joint family (*q*).

In Calcutta the opinion has been expressed that the principle of survivorship applies to reunited coparceners (*r*).

The Madras High Court has expressed the opinion that a reunited son has a preferential right of inheritance to one who remains separate (*s*).

The following is the order of succession according to Viramitrodaya:

(1-3) Son, grandson and great-grandson;
(4) reunited whole brother;
(5) reunited half-brother and separated full-brother (*t*);
(6) reunited mother;
(7) reunited father;
(8) any other reunited coparcener;
(9) half-brother not reunited;
(10) mother not reunited;
(11) father not reunited;
(12) widow;
(13) daughter;
(14) daughter's son;
(15) sister.

Subject to the above, the succession goes to the sapindas, samanodakas and bandhus in the order and according to the rules set forth in §§ 43, 45 and 50 (*u*).

As to reunion, see §§ 342-344.

The order of succession, according to the Smriti Chandrika, is as follows: (1) son, grandson, great-grandson, (2) reunited full-brother, (3) separated full-brother, (4) reunited half-brother, (5) reunited father or paternal uncle, (6) separated half-brother, (7) father, (8) mother, (9) virtuous widow, (10) sister, (11) sapindas, and (12) samanodakas.

According to the Mayukha, the reunited member has in every case preference over the unreunited. But when there are separated full-brothers and reunited half-brothers, uncles and the like, the separated full-brother, etc., takes equally with the reunited half-brother, etc. After the brother, the mother takes, then the father, then the widow, then the sister, then the daughter, and after her the nearest sapinda.

See Ghose's Hindu law, 3rd ed., pp. 625-626.

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(*m*) (1860) 8 M.I.A. 500, 527, *supra*.
(*n*) *Golab Koonwar* v. *Collector of Benares* (1847) 4 M.I.A. 246, 258.
(*o*) *Cavaly Vencata* v. *Collector of Masulipatam* (1867) 11 M.I.A. 619.
(*p*) (1860) 8 M.I.A. 500, 527, *supra*.
(*q*) *Samudrala* v. *Samudrala* (1910) 33 Mad. 165, 3 I.C. 741.
(*r*) *Jasoda* v. *Sheo* (1890) 17 Cal. 33; *Sham* v. *Court* (1873) 20 W.R. 197.
(*s*) *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 382, 383, 2 I.C. 519.
(*t*) *Ramasami* v. *Venkatesam* (1893) 16 Mad. 440.
(*u*) Sarkar's Hindu Law, 7th ed., p. 587.

# CHAPTER V

# FEMALE HEIRS

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**61. Female heirs: Bengal school.**—According to the Bengal school no female could inherit to a male unless she is expressly named as an heir in the texts. The result is that the only females recognized as heirs in that school are (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother (*v*).

**61A. Female heirs: Mitakshara school.**—(1) Before the Hindu Law of Inheritance (Amendment) Act, 1929, the only females recognized as heirs in the Benares (*w*) and Mithila schools were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother. The exclusion of other females was founded on a text of Baudhayana which says: "Women are devoid of the senses, and incompetent to inherit" (*x*). Accordingly it has been held in Lahore that a sister's son's daughter is not an heir (*y*).

Neither the Madras nor the Bombay school follow the text of Baudhayana. These schools follow the text of Manu which says: "To the nearest sapinda the inheritance next belongs," and they interpret the word "sapinda" to include females also (*z*). On that interpretation the Madras school has held that the brother's daughter, sister's daughter, brother's son's daughter and father's sister are also heirs in the Madras State [§ 56]. The Bombay school has gone much further, and it includes in the list of female heirs not only the heirs recognized in the Benares, Mithila and Madras schools, but also widows of gotraja sapindas [§ 68]. The recognition of widows of gotraja sapindas as heirs in Bombay has been placed by the Privy Council on the ground of usage (*a*). But the widows of bandhus are not recognized as heirs anywhere; for instance, a sister's son's widow (*b*).

(2) Under the Hindu Law of Inheritance (Amendment) Act, 1929, which came into force on the 21st February 1929, the son's daughter, the daughter's daughter, and the sister (§ 43-13A to C) rank as heirs in *all* parts of India where the *Mitakshara law* prevails. Before the Act they ranked as heirs only in the Bombay [§ 56] and Madras [§ 56] States.

Before the Act, both the son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. Under the Act, however, they both inherit as gotraja sapindas [§ 43, nos. 13A and 13B]. As regards the sister, she succeeded in Bombay immediately after the paternal grandmother, and in Madras she succeeded as a bandhu. As regards her place in the order of inheritance in Bombay, the Act effects no change, and she will succeed immediately after the paternal grandmother as she did before the Act [s. 65]. In Madras, however, she will, since the Act, succeed immediately after the daughter's daughter [§ 43, no. 13C].

**62. Female heirs in Benares and Mithila.**—The only females recognized as heirs in the Benares and Mithila schools before the Hindu law of Inheri-

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(*v*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 37 [F.B.].

(*w*) *Jagan Nath* v. *Champa* (1906) 28 All. 307; *Srimati Krishna* v. *Bhaiya-Rajendra* (1927) 2 Luck. 43, 104 I.C. 155, ('27) A.O. 240; *Jang Bir* v. *Mst. Jamna* (1931) 12 Lah. 534, 135 I.C. 593, ('32) A.L. 37 [sister not an heir].

(*x*) *Lallubhoi* v. *Cassibai* (1880) 5 Bom. 110, 118, 7 I.A. 212, 231.

(*y*) *Rameshwar* v. *Mst. Ganpati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A.L. 652.

(*z*) *Balamma* v. *Pullayya* (1895) 18 Mad. 168, 170.

(*a*) (1880) 5 Bom. 110, 7 I.A. 212, 237, *supra*.

(*b*) *Rameshwar* v. *Mst. Ganapati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A.L. 652.

tance (Amendment) Act of 1929 were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother. No other female was recognized as an heir (*c*). Under the Act, the son's daughter, the daughter's daughter, and the sister also rank as heirs [§ 43, nos. 13A, 13B and 13C].

**63. Female heirs in Madras.**—The Madras school recognizes not only the widow, daughter, mother, father's mother, and father's father's mother as heirs, but also the females mentioned in sec. 56 above. This includes the son's daughter, daughter's daughter and sister who are now expressly named as heirs in the Hindu Law of Inheritance (Amendment) Act 2 of 1929, see § 61A above. The Madras school does not admit the widows of gotraja sapindas as heirs (*d*).

**64. Female heirs in Bombay.**—The Bombay school recognizes not only the widow, daughter, mother, father's mother, and father's father's mother as heirs, but also the following females:—

(1) *Sister*, whether of the whole or half-blood. The sister is considered a sapinda by virtue of her affinity to her brother. She is also considered a gotraja sapinda as having been born in her brother's *gotra* or family (*e*) [§ 65]. Half-sisters succeed as much as sisters of the whole blood [§ 66]. The sister is now expressly mentioned as an heir in the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [§ 43 (13C)].

The Mayukha expressly names the sister as an heir. The Mitakshara does not name the sister, but certain commentators of repute, such as Balambhatta and Nanda Pandita, say that in the term "brothers" whom the Mitakshara does name, sisters are included (*f*). She is also expressly mentioned as an heir in Nilkantha's Commentary.

The paternal uncle's daughter is not a gotraja sapinda (*g*), but a bandhu [§ 56].

(2) *Father's sister*, whether of the whole or half-blood.—See § 74.

(3) *Widows of predeceased gotraja sapindas*, that is, of sapindas and samanodakas (*h*), but not widows of bandhus or bhinna-gotraja sapindas (*i*). Thus the son, the father, the brother, the brother's son, the paternal uncle, the paternal uncle's son, are all gotraja sapindas of the deceased. Therefore, according to the Bombay decisions, the son's widow (*j*), the step-mother (father's widow) (*k*), the brother's widow (*l*), the brother's son's widow (*m*), the paternal uncle's widow (*n*), and the widow of the paternal uncle's son (*o*), are all *sagotra sapindas* and inherit necessarily before the bandhus. The above list is not exhaustive, but merely illustrative. See § 68.

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(*c*) *Tirath Ram* v. *Mst. Kahan Devi* (1920) 1 Lah. 588, 593-594, 60 I.C. 101, ('21) A.L. 149; *Mst. Sujan Devi* v. *Jagiri Mal* (1920) 1 Lah. 608, 59 I.C. 124, ('20) A.L. 514.

(*d*) *Balamma* v. *Pullaya* (1895) 18 Mad. 168 [widow of great-grandson of great-grandfather of the deceased not an heir]; *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I.C. 901, ('15) A.M. 18 [brother's widow not an heir].

(*e*) *Kesserbai* v. *Valab* (1880) 4 Bom. 188.

(*f*) *Kesserbai* v. *Valab* (1880) 4 Bom. 188, 197, 204.

(*g*) *Krishnabai* v. *Keshav* (1920) 22 Bom. L.R. 1162, 59 I.C. 511, ('20) A.B. 237.

(*h*) *Lallubhoi* v. *Cassibai* (1880) 5 Bom. 110, 7 I.A. 212; *Lakshmibai* v. *Jayram* (1869) 6 Bom. H.C. 152.

(*i*) *Vallabhdas* v. *Sakarbai* (1901) 25 Bom. 281.

(*j*) *Roopchand* v. *Poolchand* (1824) 2 Bom. 670.

(*k*) (1880) 4 Bom. 188, 208, *supra*.

(*l*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31.

(*m*) *Madhavram* v. *Dave* (1897) 21 Bom. 739.

(*n*) *Rachava* v. *Kalingapa* (1892) 16 Bom. 716; *Raghunath Shankar* v. *Laxmibai* (1935) 59 Bom. 417, 37 Bom. L.R. 150, 157 I.C. 658, ('35) A.B. 298.

(*o*) (1880) 5 Bom. 110, 7 I.A. 212, *supra*.

The widows of gotraja sapindas are recognized as heirs in the Bombay State only. They were not regarded as heirs elsewhere (*p*). Act XVIII of 1937 made the widow of a predeceased son and the widow of predeceased son's predeceased son heirs throughout India except under the Dayabhaga School.

A gotraja sapinda is one *born* in the *gotra* or family of the deceased. The expression *sagotra sapinda* means of the same *gotra* and includes females that enter the *gotra* of the deceased by marriage.

(4) *Female bandhus mentioned in section* 56 *above.*—These include the son's daughter and daughter's daughter, both of whom are expressly mentioned in the Hindu Law of Inheritance (Amendment) Act 2 of 1929. But they inherit with gotraja sapindas [§ 43, nos. 13A and 13B].

**65. Sister's place as an heir in the Bombay State.**—(1) A sister is an heir in the Bombay State [s. 64(1)], and she inherits immediately after the paternal grandmother both under the Mayukha and the Mitakshara as interpreted in Bombay (*q*). Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [§ 43 (13C)]. See § 72(12) and § 77(12).

Both under the Mayukha and the Mitakshara as interpreted in Bombay, a sister does not take before a full-brother's son (*r*). In cases governed by the Mayukha, she takes even before a half-brother (*s*), and half-brother's son (*t*), but not in cases governed by the Mitakshara (*u*). See §§ 72 and 77 below.

The sister takes before a paternal uncle (*v*), a paternal uncle's son (*w*), a paternal uncle's son's son (*x*), or a more remote paternal male relative (*y*). She also takes before a son's widow (*z*), a step-mother (*a*), a brother's widow (*b*), or paternal uncle's widow (*c*) all of whom are widows of gotraja sapindas [§ 68]. She also succeeds in preference to a paternal step-grandmother (*d*).

(2) Sisters take absolute estates in severalty, and not as joint tenants in Bombay (*e*).

**66. Half-sister as an heir in the Bombay State.**—A half-sister is an heir in the Bombay State and she inherits, in cases governed by the Mitakshara, immediately after the full-sister (*f*) and in cases governed by the Mayukha after the half-brother (*g*). Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [§ 43(13C)].

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(*p*) *Ananda Bibee* v. *Nownit Lal* (1883) 9 Cal. 315, 317-22; *Balamma* v. *Pullayya* (1895) 18 Mad. 168; *Thayammal* v. *Annamalai* (1896) 19 Mad. 35; *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I.C. 901, ('15) A.M. 18; *Soshil Chand* v. *Mangal Ram* ('54) A. Punj. 26, ('54) Punj. 449.

(*q*) West and Buhler, 4th ed., 109-110; *Venayeck* v. *Luxumeebaee* (1864) 9 M.I.A. 516 in App. from 1 Bom. H.C. 117 [a Mayukha case]; *Lallubhai* v. *Mankuvarbai* (1878) 2 Bom. 388, 421, 445-446; *Kesserbai* v. *Valab* (1880) 4 Bom. 188; *Vithaldas* v. *Jeshubai* (1880) 4 Bom. 219, 221; *Bhagwan* v. *Warubai* (1908) 32 Bom. 300.

(*r*) *Mulji* v. *Cursandas* (1900) 24 Bom. 563.

(*s*) *Sakharam* v. *Sitabai* (1879) 3 Bom. 353.

(*t*) (1908) 32 Bom. 300, *supra*; *Hari Annaji* v. *Vasudev* (1914) 38 Bom. 438, 441, 23 I.C. 944, ('14) A.B. 134.

(*u*) West and Buhler, 4th ed., 105-106; (1900) 24 Bom. 563, 573, 579, *supra*; (1914) 38 Bom. 438, 23 I.C. 944, ('14) A.B. 134, *supra*.

(*v*) See *Trikam* v. *Natha* (1912) 36 Bom. 120, 12 I.C. 359 [half-sister Mayukha].

(*w*) (1864) 9 M.I.A. 520, in App. from 1 Bom. H.C. 117, *supra*.

(*x*) *Biru* v. *Khandu* (1880) 4 Bom. 214.

(*y*) *Dhondu* v. *Gangabai* (1879) 3 Bom. 369.

(*z*) *Vithaldas* v. *Jeshubai* (1880) 4 Bom. 219, 221.

(*a*) *Lakshmi* v. *Dada* (1879) 4 Bom. 210.

(*b*) *Rudrapa* v. *Irava* (1904) 28 Bom. 82.

(*c*) (1880) 4 Bom. 188, *supra*.

(*d*) *Lingangowda* v. *Tulsawa* (1915) 17 Bom. L.R. 315, 28 I.C. 588, ('15) A.B. 48.

(*e*) *Rindabai* v. *Anacharya* (1891) 15 Bom. 206.

(*f*) West and Buhler, 2nd ed., p. 186; *Jana* v. *Rakhma* (1919) 43 Bom. 461, 52 I.C. 8, ('19) A.B. 12.

(*g*) (1880) 4 Bom. 188, 207-209, *supra*.

A half-sister takes before a step-mother (*h*), a paternal uncle (*i*), or a paternal uncle's widow (*j*).

**67. Father's sister as an heir in the Bombay State.**—See § 74.

**68. Widows of gotraja sapindas as heirs in the Bombay State.**—The succession of widows of gotraja sapindas [§ 64(3)] is governed by the following rules:—

(i) No widow of a gotraja sapinda can inherit until after "the compact series of heirs" [ending with the brother's son (*k*)], nor until after the sister and half-sister (*l*).

(ii) Subject to the above rule and provided that there is no existing male gotraja sapinda within the six degrees of the line to which her husband belonged (*m*), the widow of a gotraja sapinda stands in the same place as her husband, if living, would have occupied.

(iii) Where the contest lies between the widow of a gotraja sapinda representing a nearer line and a male gotraja sapinda representing a remoter line, the former inherits by preference over the latter (*n*).

(iv) Widows of gotraja sapindas may succeed to the estate of a male or to that of a female. In the former case, they take a widow's estate; in the latter, an absolute estate [§ 170(2), 171(2)].

(v) A widow who has remarried is not entitled to inherit as a gotraja sapinda in the family of her first husband (*o*). But unchastity at the time when the succession opens is not a disqualification to inherit as a gotraja sapinda (*p*).

The series of heirs beginning with the son and ending with the brother's son is called "the compact series of heirs." No widow of a gotraja sapinda can inherit before any of these heirs (*q*). Nor can she inherit before the sister or half-sister (*r*). A son is the nearest male gotraja sapinda of the deceased owner; therefore, the first in the series of widows of gotraja sapindas is the son's widow (*s*). Then comes the grandson's widow, and then the great-grandson's widow.

The male next after the great-grandson is the daughter's son. But he is not a gotraja sapinda, for he belongs to different *gotra* or family.

The next male is the father. The male gotraja sapindas of the deceased in his father's line are his (1), brother, (2) brother's son, (3) brother's son's son, (4) brother's son's son's son, (5) brother's son's son's son's son, and (6) brother's son's son's son's son's son. The father's line begin with the father and ends with the brother's son's son's son's son's son. The father being the first in his line, the step-mother (father's widow) is the first in the series of widows of gotraja sapindas in the father's line, and she takes before the brother's widow who is the second in the said series. But she is not entitled to inherit if there exists any lineal descendant of the father as far as the *sixth* degree, that is, if there be a

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(*h*) (1880) 4 Bom. 188, *supra*.
(*i*) (1912) 36 Bom. 120, 12 I.C. 359, *supra*.
(*j*) (1880) 4 Bom. 188, *supra*.
(*k*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31, 34 (note).
(*l*) *Vithaldas* v. *Jeshubai* (1880) 4 Bom. 219, 221. Note that the son's widow is the first in the series of widows of gotraja sapindas.
(*m*) *Lallubhoi* v. *Cassibai* (1880) 5 Bom. 110, 7 I.A. 212, in app. from 2 Bom. 388; *Rachava* v. *Kalingapa* (1892) 16 Bom. 716, 720; *Kashibai* v. *Moreshvar* (1911) 35 Bom. 389, 11 I.C. 560; *Basangavda* v. *Basangavda* (1915) 39 Bom. 87, 127 I.C. 167, ('14) A.B. 202; *Ambaidas* v. *Jijibhai* (1912) 14 Bom. L.R. 261, 14 I.C. 979 [a Mayukha case].
(*n*) (1892) 16 Bom. 716, 718, *supra*; (1915) 39 Bom. 87, 27 I.C. 167, ('14) A.B. 202, *supra*.
(*o*) *Pranjivan* v. *Bai Bhikhi* (1921) 45 Bom. 1247, 63 I.C. 947, ('21) A.B. 57.
(*p*) *Akoba Laxman* v. *Sai Genu* (1941) Bom. 438, 197 I.C. 157, ('41) A.B. 204.
(*q*) (1885) 9 Bom. 31, 34, (note), *supra*.
(*r*) (1880) 4 Bom. 219, 221, *supra*.
(*s*) (1880) 4 Bom. 219, 221, *supra*.

brother, a brother's son, a brother's son's son, a brother's son's son's son, a brother's son's son's son's son, or a brother's son's son's son's son's son. See cl. (ii) of this section.

Suppose now that the contest is between a brother's widow and a paternal uncle. The husband of the brother's widow, that is, the brother, belongs to the father's line and the paternal uncle belongs to the father's father's line, that is, a remoter line. The brother's widow is therefore entitled to succeed before the paternal uncle. See cl. (iii) of this section.

*Foundation of the right of widow of predeceased gotraja sapindas to inherit.*—The right of these females to inherit rests mainly on the ground of positive acceptance and usage (*t*).

*Illustration*

*A* dies leaving a widow, a widow of a predeceased brother, and a paternal uncle. On *A*'s death, his widow will succeed to the estate. The next heir, on the widow's death, is the widow of *A*'s brother, and not the paternal uncle of *A*, the reason being that the husband of *A*'s brother's widow (that is, *A*'s brother) belongs to *A*'s *father's* line, while *A*'s paternal uncle belongs to *A*'s *father's father's* line which is remoter line. On the death, however, of the brother's widow, the heir to *A*'s estate will be his paternal uncle. *A*'s widow takes a widow's estate in her husband's property. The brother's widow also takes a widow's estate [§ 170]. The paternal uncle takes the property absolutely and on his death it will pass to his own heirs.

**69. Widows of samanodakas as heirs in the Bombay State.**—The widows of predeceased samanodakas [§ 40] are held to be heirs in the Bombay State (*u*).

**70. Daughters of descendants, ascendants and collaterals as heirs in the Bombay State.**—The female descendants of the propositus and of his ancestors are bandhus in the Bombay State [§ 56].

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(*t*) *Lallubhoi* v. *Cassibai* (1880) 7 I.A. 212, 237, 5 Bom. 110, 124.

(*u*) *Lakshmibai* v. *Jayram* (1869) 6 Bom. H.C.A.C. 152.

CHAPTER VI

# ORDER OF SUCCESSION TO MALES IN THE BOMBAY STATE

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**71. Succession in the Bombay State.**—(1) The order of succession to males in the Bombay State is different from that in other parts of India where the Mitakshara law prevails. The difference arises from the fact that the Bombay school recognizes as heirs certain females who are not recognized as heirs in other parts of India [§§ 64-70].

(2) In the Bombay State itself there is a difference between the order of succession in cases governed by the Mayukha [§ 12(2)].

**72. Order of succession in cases governed by the Mitakshara.**—The following is the order of succession to males among sapindas in the Bomaby State in cases governed by the Mitakshara:—

1-6. Son, son's son (whose father is dead), and son's son's son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1937 the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognized as heirs. (See § 43).

See notes to § 43, nos. 1-3 and 4.

7. Daughter—

See § 43, no. 5, notes (i), (iv), (v), (vi) and (vii).

In the Bombay State, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a daughter in that State does not take a limited estate in her father's property, but takes the property absolutely. Thus if a Hindu governed by the Bombay school dies leaving two daughters, each daughter takes an *absolute* interest in a moiety of her father's estate, and holds it as her *separate* property, and on her death her share will pass to her own heirs as her stridhan (*v*) [§ 170].

8. Daughter's son—

See notes to § 43, no. 6.

9. Mother—

See notes to § 43, no. 7.

As to a step-mother see no. 27 (post.)

10. Father.

11. Brother—

(i) of the whole blood.

(ii) of the half-blood.

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(*v*) *Bhagirthibai* v. *Kahnujirav* (1887) 11 Bom. 285; *Gulappa* v. *Tayawa* (1907) 31 Bom. 453; *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445.

A brother of the full blood succeeds before a brother of the half-blood. See notes to § 43, no. 9; see also § 44.

12. Brother's son—(*w*)

(i) of the whole blood.

(ii) of the half-blood.

Sons of brothers of the whole blood succeed before sons of brothers of the half-blood. See notes to § 43, no. 10; see also § 44.

13. Grandmother (Father's mother)—

See note to no. 14 below.

14. Full sister—

Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [§ 43 (13C)]. See § 64(1) and § 65.

15. Half-sister—

See § 43, No. 13C § 64(1) and § 66.

*The three remote descendants of the deceased*

16. Great-great-grandson—

It is not settled whether nos. 16, 17 and 18 succeed before or after no. 19. In *Appaji* v. *Mohan Lal* (*x*), the question was raised, but not decided.

17. Great-great-great-grandson.

18. Great-great-great-great-grandson.

*Widows of 4 male lineal descendants of the deceased*

19. Great-grandson's *widow*.

20. Great-great-grandson's *widow*.

21. Great-great-great-grandson's *widow*.

22. Great-great-great-great-grandson's *widow*.

*The 4 remote descendants of the brother*

23. Brother's son's son.

He does not succeed before but succeeds after the son's widow (*a*) [no. 17].

24. Brother's son's son's son.

25. Brother's son's son's son's son.

26. Brother's son's son's son's son's son.

*The 4 remote descendants of the brother*

27. Step--*mother* (*y*).

28. Brother's *widow* (*z*).

29. Brother's son's *widow* (*a*).

30. Brother's son's son's *widow*.

31. Brother's son's son's son's *widow*.

32. Brother's son's son's son's son's *widow*.

33. Brother's son's son's son's son's son's *widow*.

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(*w*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31 (takes before brother's son's widow.)

(*x*) (1930) 54 Bom. 564, 611, 127 I.C. 385, ('30) A.B. 273 [F.B.]

(*y*) *Rakhmabai* v. *Tukaram* (1887) 11 Bom. 47 takes before half brother's widow; *Rusoabai* v. *Zoolekhabai* (1895) 19 Bom. 707 (takes before paternal uncle's son).

(*z*) *Basangavda* v. *Basangavda* (1915) 39 Bom. 87, 27 I.C. 167, ('14) A.B. 202 (takes before pat. uncle's son).

(*a*) *Madhavram* v. *Dave* (1897) 21 Bom. 739.

*Father's father and his 6 descendants*

34. Father's father.
34A. *Son's daughter.*
34B. *Daughter's daughter.*
34C. *Sister's son* (*b*).

} See § 43, nos. 13A, 13B and 13D.

35. Paternal uncle.
(1) of the whole blood. (2) of the half-blood.
36. Paternal uncle's son.
He takes before no. 42. [*Rachava* v. *Kalingapa* (1892) 16 Bom. 716.]
37. Paternal uncle's son's son.
He takes before no. 42, [*Kashibai* v. *Moreshwar* (1911) 35 Bom. 389.]
38. Paternal uncle's son's son's son.
39. Paternal uncle's son's son's son's son.
40. Paternal uncle's son's son's son's son's son.

*Widows of father's father and his 6 descendants*

41. Father's step-*mother.*
42. Paternal uncle's *widow.*
She takes before father's sister (*c*).
43. Paternal uncle's son's *widow.*
44. Paternal uncle's son's son's *widow.*
45. Paternal uncle's son's son's son's *widow.*
46. Paternal uncle's son's son's son's son's *widow.*
47. Paternal uncle's son's son's son's son's son's *widow.*

*The 3rd agnate female and the 3rd agnate male ancestor, and the latter's 6 descendants*

48. Father's father's mother.
49. Father's father's father.
50. Father's paternal uncle.
51. Father's paternal uncle's son.
52. Father's paternal uncle's son's son.
53. Father's paternal uncle's son's son's son.
54. Father's paternal uncle's son's son's son's son.
55. Father's paternal uncle's son's son's son's son's son.

*Widows of father's father's father and his 6 descendants*

56. Father's father's step-*mother.*
57. Father's paternal uncle's *widow.*
58. Father's paternal uncle's son's *widow.*
59. Father's paternal uncle's son's son's *widow.*
60. Father's paternal uncle's son's son's son's *widow.*
61. Father's paternal uncle's son's son's son's son's *widow.*
62. Father's paternal uncle's son's son's son's son's son's *widow.*

*The remaining sapindas and their widows*

63-70. The 4th agnate female and the 4th agnate male ancestor and the latter's 6 descendants, one after another (*d*).
71-77. Widows of gotraja sapindas nos. 64 to 70, one after another (*d*).

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(*b*) *Ambabai* v. *Keshav Bandochand* (1941) Bom. 230, 195 I.C. 172, ('41) A.B. 233.
(*c*) *Raghunath Shankar* v. *Laxmibai* (1935) 59 Bom. 417, 157 I.C. 658, 37 Bom. L.R. 150 ('35) A.B. 298.
(*d*) *Ambaidas* v. *Jijibhai* (1912) 14 Bom. L.R. 261, 14 I.C. 971.

**73. Order of succession among samanodakas.**—Failing sapindas and *their widows* (§ 72), *the inheritance goes to Samanodakas according to the rules* stated in § 45 above.

**74. Order of succession among bandhus.**—Failing samanodakas, the inheritance passes to bandhus according to the rules laid down in §§ 46 to 54 and 56 above. As regards the succession of bandhus, there is no difference between the Mitakshara and the Mayukha (*e*).

*Father's sister.*—According to § 56, the father's sister should be a bandhu, but according to the Mayukha, she is a gotraja sapinda; she comes in before bandhus, but after all the gotraja sapindas (*f*), for instance, a father's paternal uncle's son (*g*), a paternal uncle's widow (*h*). It is not clear whether, under the Mitakshara as interpreted in Bombay, she is a gotraja sapinda or a bandhu. But she is not more remote than a bandhu (*i*).

In *Saguna* v. *Sadashiv* (*i*) it was held that the father's half-sister, though a female, being a bandhu *ex parte paterna* is entitled to preference over the mother's brother, who though a male, is a bandhu *ex parte materna*.

This leads us to the question as to what are the principles to be applied in a contest between a male bandhu and a female bandhu. In *Balkrishna* v. *Ramkrishna* (*j*) it was held that a mother's sister's son should be preferred to a brother's daughter. This decision is in direct conflict with the previous decision which was not cited either in the arguments or in the judgment. In *Kenchava* v. *Girimallappa* (*k*) the Privy Council left the question open and held that the father's sister's son (a male bandhu *ex parte paterna*) is to be preferred to the father's brother's daughter (a female bandhu of the same degree).

In *Bai Vijli's* case (*l*), a mother's sister's son's son, who is an atma bandhu was preferred to a father's father's sister's son's daughter who is a pitri-bandhu.

**75. Strangers as heirs.**—See § § 57 and 58 above.

**76. Escheat.**—See § 59 above.

**77. Order of succession in cases governed by the Mayukha.**—The following is the order of succession to males in cases governed by the Mayukha (*m*):—

1-6. Same as § 72.

7. Father.

8. Mother—

See notes to § 72, no. 7, and notes to § 43, no. 7.

9. Full brothers along with sons of full brothers who are dead—

This rule does not go beyond brothers and brother's sons (*n*). Hence an uncle's son's son's son does not take equally with, but is postponed to, an uncle's son's son (*o*). As to the place of the half-brother, see no. 13 below. See Mayukha, ch. iv, sec. 8, v. 20.

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(*e*) *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631.

(*f*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C. 244, 261, 263.

(*g*) *Ganesh* v. *Waghu* (1903) 27 Bom. 610.

(*h*) *Raghunath Shankar* v. *Laxmi Bai* (1935) 59 Bom. 417, 37 Bom. L.R. 150, 157 I.C. 658, ('35) A.B. 298.

(*i*) *Saguna* v. *Sadashiv* (1902) 26 Bom. 710.

(*j*) (1920) 45 Bom. 353, 59 I.C. 771, ('21) A.B. 189.

(*k*) (1924) 51 I.A. 368, 376-377, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209.

(*l*) *Bai Vijli* v. *Bai Prabhalakshmi* (1907) 9 Bom. L.R. 1129.

(*m*) Mayukha, ch. iv. s. 8.

(*n*) *Chandika Bakhsh* v. *Muna Kunwar* (1902) 29 I.A. 70, 74, 24 All. 273, 280.

(*o*) *Haribhai* v. *Mathur* (1923) 47 Bom. 940, 77 I.C. 224, ('24) A.B. 140.

10. Full brother's son—

With the brother's son ends "the compact series of heirs." In default of brother's sons, the inheritance passes to gotraja sapindas, the first amongst them being the paternal grandmother [no. 11]. See Mayukha, ch. iv, sec. 8, v. 18.

11-12. Same as § 72.

13. Father's father and half-brother, in equal shares (*p*)—

This is obsolete (*q*). It is highly probable that the High Court of Bombay will in cases governed by the Mayukha adopt the same order of succession as that in cases governed by the Mitakshara, at least after no. 12. The order of succession after no. 12 will probably be (1) half-brother, (2) half-sister, (3) half-brother's son. The order of succession will thenceforth be the same as that in cases governed by the Mitakshara as interpreted in Bombay, that is, as in §§ 72-76. As to the father's sister, see § 74.

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(*p*) *Vithalrao* v. *Ramrao* (1900) 24 Bom. 317, 338.

(*q*) *Sakharam* v. *Sitabai* (1879) 3 Bom. 353, at p. 363; *Kesserbai* v. *Valab* (1880) 4 Bom. 188, 207-208.

## CHAPTER VII

# ORDER OF INHERITANCE TO MALES ACCORDING TO DAYABHAGA OR BENGAL SCHOOL

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**78. Heritable property.**—The property of a deceased Hindu governed by the Dayabhaga law passes by succession, including his share in undivided property (*r*).

The *Dayabhaga* of Jimutavahana is the leading treatise of the Bengal school. [See Introduction pp. 56-57, *supra*]. The present Chapter deals with the order of succession according to the Dayabhaga.

According to the Mitakshara law, the interest of a deceased coparcener passes on his death to other members of the coparcenary *by survivorship*. The Dayabhaga law does not recognise the right of survivorship as between coparceners.

**79. Spiritual benefit the governing doctrine.**—Succession according to the Bengal school is governed by the capacity for conferring spiritual benefit (*s*). Spiritual benefit, however, is not always the guiding principle of inheritance, and in cases not contemplated by the Dayabhaga, the doctrine of propinquity as propounded in the Mitakshara may be applied.

Vaishnavas (worshippers of Vishnu) do not observe shradha and offer no oblations to their ancestors. But this does not exclude them from inheritance, for the right to inherit is based on the *capacity* to offer *pindas*, and not on the actual offering of it (*t*).

It may be observed that in most cases spiritual efficacy and propinquity run on the same lines. The result is that the same persons who are heirs under the Dayabhaga law are also heirs under the Mitakshara law. But all persons who are heirs under the Mitakshara law are not heirs under the Dayabhaga law. The Dayabhaga excludes many cognates recognised as heirs by the Mitakshara. Cognates are persons related to the deceased through a female.

**80. Doctrine of spiritual benefit.**—The foundation of the doctrine of spiritual benefit is the *Parvana Sradha* ceremony.

In the course of the ceremony the performer presents three different kinds of offerings to his deceased ancestors, namely—(1) *pinda* or an entire *cake*, called an undivided oblation; (2) *pinda-lepas* or remnants of the *pinda* which cling to the hand while mixing the ingredients of which the *pindas* are composed, called a divided oblation; and (3) libations of water.

The *pinda* is offered to the three immediate paternal ancestors, that is, the father, grandfather and great-grandfather, and the three immediate maternal ancestors, that is, the maternal grandfather, the maternal great-grandfather and the maternal great-great-grandfather. The *pinda-lepas* are offered to the three paternal ancestors next above those to whom the *pinda* is offered. The libations of water are offered to the seven paternal ancestors next above those to whom *pinda-lepas* are offered. He who offers a *pinda* and he to whom a *pinda* is offered are the sapindas of each other. He who offers *pinda-lepas* and he to whom they are offered are the sakulyas of each other. He who offers libations of water and he to whom they are offered are the samanodakas of each other.

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(*r*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

(*s*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15 [F.B.]; *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 394, I.A. Sup. Vol. 47, 64; *Digumber* v. *Moti Lal* (1883) 9 Cal. 563 [F.B.]. Also see *Akshay Chandra* v. *Hari Das* (1908) 35 Cal. 721, 726; *Toolsee Dass* v. *Luckhymoney* (1900) 4 C.W.N. 743; *Shambo Chandra* v. *Kartick Chunder* (1927) 54 Cal. 171, 174, 97 I.C. 845, ('27) A.C. 11; *Nelinaksha* v. *Rajanikant* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

(*t*) *Akshay Chandra* v. *Hari Das*, *supra*.

But this does not exhaust the list of sapindas, sakulyas and samanodakas. For a deceased Hindu does not merely benefit by oblations which are offered to him; he also *participates* in the benefit of oblations offered to the paternal ancestors to whom he himself was bound to offer them while he was alive (*u*). The result is that persons connected by oblations presented to common ancestors become the sapindas, sakulyas and samanodakas of one another according to the nature of the oblation presented to them. This accounts for a large number of other relations who are recognized as sapindas, sakulyas and samanodakas.

*Pindas* are of three kinds in the following order of superiority (*v*):—

1. Those given *directly* to the deceased himself.
2. Those given to his three paternal ancestors *in which he participates.*
3. Those which he was bound to give to his three maternal ancestors, but *in which he does not participate.*

In each of these three descriptions of *pindas*, those presented by agnate descendants of a common ancestor are preferred to those presented by cognate descendants of such ancestor.

"Although the deceased has no right of participation in the oblations presented to his *maternal* ancestors, still, inasmuch as the three immediate maternal ancestors received oblations from him, and the agnate and cognate descendants of each offered *pindas* which the deceased was bound to give, there is thus created a heritable bond between him and his maternal kinsmen" (*w*).

**81. Three classes of heirs.**—The three kinds of offerings referred to in the preceding section give rise to three classes of heirs, according to the Dayabhaga law, namely, (1) sapindas, (2) sakulyas, and (3) samanodakas.

The sapindas succeed before the sakulyas, and the sakulyas succeed before the samanodakas (*x*).

The reason for this preference is that *pindas* (undivided oblations) are considered to be of higher spiritual value than *pinda-lepas* (divided oblations) and *pinda-lepas* are considered to be of higher spiritual value than oblations of water.

**82. Sapindas.**—A Hindu governed by the Dayabhaga law is the sapinda--

(1) of those to whom he is bound to offer a *pinda* while he is alive;

In this group are included his three immediate paternal ancestors, being his father, grandfather, great-grandfather, and his three immediate maternal ancestors, being his maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather—altogether 6 relations.

(2) of those who, on his death, are bound to offer a *pinda* to him;

In this group are included those persons to whom he stands in the relation of father, grandfather, and great-grandfather, namely, his son, grandson and great-grandson, and those persons to whom he stands in the relation of maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather, namely, his daughter's son, son's daughter's son and grandson's daughter's son--altogether 6 relations.

(3) of those who are bound to offer a *pinda* to the ancestors to whom he is bound to offer a *pinda*, those ancestors being his three immediate paternal ancestors and his three immediate maternal ancestors;

and all of them are his sapindas (*a*).

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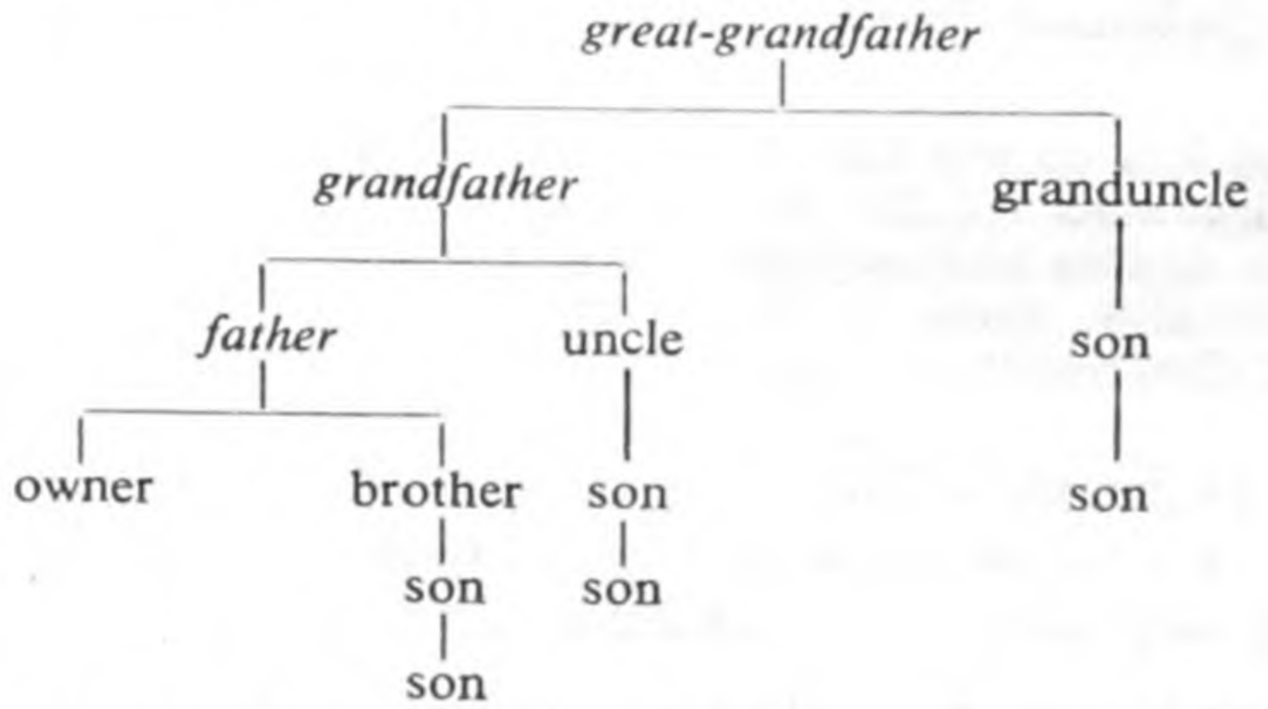
(*u*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 37 [F.B.].
(*v*) *Sarvadhikari*, 2nd ed., pp. 701, 705.
(*w*) Sarvadhikari, 2nd ed., p. 704.
(*x*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 38 [F.B.]; *Digumber Roy* v. *Moti Lall* (1883) 9 Cal. 563 [F.B.].
(*a*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 39 [F.B.].

The 3rd set of sapindas may be divided into four groups as follows:—

*Firstly,* the brother, brother's son, brother's son's son; paternal uncle, paternal uncle's son, paternal uncle's grandson; paternal granduncle, paternal granduncle's son, and paternal granduncle's grandson—altogether 9 relations.

The brother is bound to offer 3 *pindas,* one to each of the three paternal ancestors of the deceased, they being also his paternal ancestors. The brother's son is bound to offer 2 pindas, one to his grandfather, that is, the owner's father, and the other to his great-grandfather, that is, the owner's grandfather. The uncle and uncle's son are bound each to off 2 *pindas,* one to each of the two paternal ancestors of the deceased, namely, his grandfather and great-grandfather, who are also their grandfather and great-grandfather. The remaining five relations are bound each to offer 1 *pinda,* the brother's son's son to the owner's father, the uncle's son's son to the owner's grandfather, and the granduncle, his son and grandson each 1 *pinda* to the owner's great-grandfather. This is a case where some or all of the three *paternal* ancestors of the deceased are also the *paternal* ancestors of the 9 relations mentioned above as will be seen from the following diagram:—




*Secondly,* sister's son, father's sister's son, grandfather's sister's son; brother's daughter's son, brother's son's daughter's son; paternal uncle's daughter's son, paternal granduncle's daughter's son; paternal uncle's son's daughter's son, paternal granduncle's son's daughter's son—altogether 9 relations.

*Note.*—The sister's son offers 3 *pindas,* one to each of the three paternal ancestors of the deceased, they being his own *maternal* ancestors. The father's sister's son and the paternal uncle's daughter's son offer each 2 *pindas,* one to each of the two paternal ancestors of the deceased, namely his grandfather and great-grandfather, they being their *maternal* ancestors. The brother's daughter's son offers 2 *pindas,* one to the father and the other to the grandfather of the deceased, they being his *maternal* ancestors. The remaining five relations each offer 1 *pinda* to one or other of the three paternal ancestors of the deceased that ancestor being their *maternal* ancestor. This is a case where some or all of the *paternal* ancestors of the deceased are the *maternal* ancestors of the 9 relations mentioned above. These are bandhus *ex parte paterna* of the Mitakshara school.

*Thirdly,* maternal uncle, maternal uncle's son, maternal uncle's grandson; maternal granduncle, maternal granduncle's son, maternal granduncle's grandson; maternal great-granduncle, maternal great-granduncle's son, maternal great-granduncle's grandson—altogether 9 relations.

*Note.*—The maternal uncle offers 3 *pindas,* one to each of the three *maternal* ancestors of the deceased, they being his own *paternal* ancestors. The maternal uncle's son, the maternal granduncle, and the maternal granduncle's son, each offer 2 *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being their *paternal* ancestors. The remaining five relations each offer one *pinda* to one or other of the three *maternal* ancestors of the deceased, that ancestor being their *paternal* ancestor. This is a case where some or all of the *maternal* ancestors of the deceased are the *paternal* ancestors of the 9 relations mentioned above. These are bandhus *ex parte materna* of the Mitakshara school.

*Fourthly,* maternal aunt's son, maternal grandaunt's son and maternal great-grand-aunt's son; maternal uncle's daughter's son; maternal uncle's son's daughter's son; maternal granduncle's daughter's son, maternal granduncle's son's daughter's son; maternal great-granduncle's daughter's son, maternal great-granduncle's son's daughter's son—altogether 9 relations.

*Note.*—The maternal aunt's son offers 3 *pindas*, one to each of the three *maternal* ancestors of the deceased, they being also his maternal ancestors. The maternal grand-aunt's son, the maternal uncle's daughter's son, and the maternal granduncle's daughter's son each offer 2 *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being also their maternal ancestors. The remaining five relations each offer one *pinda* to one or other of the three maternal ancestors of the deceased, that ancestor being also their maternal ancestor. This is a case where some or all of the three *maternal* ancestors of the deceased are also the *maternal* ancestors of the 9 relations mentioned above. These relations also are bandhus *ex parte materna* of the Mitakshara school.

It will thus be seen that there are in all 48 male sapindas. To these are to be added the 5 female sapindas mentioned in the next section. The total number of sapindas is thus 53.

Since sapindas succeed before sakulyas, and since the sapindas enumerated above comprise also several relations called bandhus in the Mitakshara, it is clear that bandhus also succeed before sakulyas. According to the Mitakshara law, bandhus do not succeed until after samanodakas. This is the main point of distinction between succession according to the Dayabhaga law and succession according to the Mitakshara law. In other respects it will be found that the order of succession according to the Dayabhaga law, though arrived at by the application of rules based upon the doctrine of spiritual benefit, is more or less the same as in the Mitakshara law. See § 95.

**83. Female sapindas.**—There are five female sapindas according to the Dayabhaga law, namely the widow, the daughter, the mother, the father's mother and the father's father's mother. No other female is recognized as an heir by the Bengal school.

The step-mother is not an heir. Nor is a paternal step-grandmother (*b*).

There are no female heirs in the class either of sakulyas or samanodakas.

The wife is the sapinda of her husband for in the absence of male issue, she performs the funeral obsequies. The mother, the father's mother, and father's father's mother are sapindas, for they share in the *pindas* or cakes offered to their respective husbands. The daughter is a sapinda, for though she herself does not offer any *pinda*, her son does so. See sec. 61 above.

**84. Sakulyas.**—A Hindu governed by the Dayabhaga law is the sakulya (1) of those to whom he is bound to offer *pinda-lepa* while he is alive, (2) of those who on his death are bound to offer *pinda-lepa* to him, and (3) of those who are bound to offer *pinda-lepa* to those whom he offers the *pinda-lepa*, and all of them are his sakulyas.

The sakulyas are all males. They are—

*First*, the 4th, 5th and 6th paternal male ancestors of the owner, being $F^4$, $F^5$ and $F^6$, in the Table at p. 107:

*Secondly*, his 4th, 5th and 6th male descendants in the male line, that is $S^4$, $S^5$ and $S^6$ in the said Table: and

*Thirdly*, the six male descendants in the male line of the 4th, 5th and 6th paternal male ancestors, and the 4th, 5th and 6th male descendants in the male line of his father, grandfather, and great-grandfather, that is, $x^1$ to $x^3$ in the line of $F^4$, $F^5$ and $F^6$ and $x^4$ to $x^6$ in the lines $F^7$ to $F^8$, in all 27 relations.

The total number of sakulyas is thus 3+3+27=33.

The Mitakshara does not recognise sakulyas as a distinct class; they are merged in the group of gotraja sapindas.

The sakulyas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent. None of them is a cognate, that is, a person related to the deceased through a female. But the sapindas of the Bengal school, as we have seen, are some of them agnates and some of them cognates. The samanodakas also, as we shall presently see, are all agnates.

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(*b*) *Bimal Chandra* v. *Mahadeb* ('57) A.C. 684.

According to Dr. Sarvadhikari (*c*), the following 9 *cognate* relations are also sakulyas, names:—

1—3. The daughter's son of $F^4$, his son, and his son's son.
4—6. The daughter's son of $F^5$, his son, and his son's son.
7—9. The daughter's son of $F^6$, his son, and son's son.

**85. Samanodakas.**—A Hindu governed by the Dayabhaga law is the samanodaka (1) of those to whom he is bound to offer libations of water, (2) of those who on his death are bound to offer libations of water to him, and (3) of those who are bound to offer libations of water to those whom he offers the libations.

and all of them are his samanodakas.

The samanodakas like sakulyas are all males. They include all agnatic relations from the 8th to the 14th degree, and are 147 in number. See notes to § 40; "Samanodakas."

**86. Principles governing precedence among sapindas.**—The order of succession among sapindas is governed by the following principles:—

(1) Those who offer a *pinda* to the deceased are preferred to those who accept it from the deceased.

Thus the son, grandson and great-grandson offer oblations to the deceased, and the father, grandfather and great-grandfather receive oblations from the deceased; therefore, the son, grandson, and great-grandson succeed before the father, grandfather, etc. The son, grandson and great-grandson all inherit as *one* heir, for the oblations offered by them are of equal spiritual value.

(2) Those who offer oblations to both paternal and maternal ancestors are preferred to those who offer oblations only to the paternal ancestors.

Therefore relations of the whole blood are preferred to those of the half-blood. A full-brother offers oblations both to the paternal and maternal ancestors of the deceased, they being his own paternal and maternal ancestors. But a half-brother offers oblations only to the paternal ancestors of the deceased, and not to the maternal ancestors of the deceased, his mother and the deceased's mother being different persons.

(3) Those who offer a *pinda* to the paternal ancestors of the deceased are preferred to those who offer it to his maternal ancestors.

(4) Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those who offer them to nearer ancestors are preferred to those who offer them to more distant ancestors (*d*).

Note that a person who offers one oblation to the father of the deceased owner is preferred to another who offers two oblations to the grandfather and great-grandfather. Hence the grandnephew ranks before the paternal uncle (*e*).

**87. Principles governing precedence among sakulyas and Samanodakas.**—The order of succession among sakulyas and samanodakas is governed by principles similar to those which apply to sapindas (*f*).

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(*c*) 2nd ed., p. 718.
(*d*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15 [F.B.]; *Gobind* v. *Mohesh* (1874) 15 Beng. L.R. 35; *Pran Nath* v. *Surrut Chundra* (1882) 8 Cal. 460; *Huri Das* v. *Bama Churn* (1888) 15 Cal. 780; *Braja Lal* v. *Piban* (1899) 26 Cal. 285.
(*e*) (1882) 8 Cal. 460, *supra*.
(*f*) (1870) 5 Beng. L.R. 15, 39 [F.B.], *supra*.

**88. Order of succession among sapindas.**—The sapindas of the Bengal school are divided into two classes, namely, (1) sapindas *ex parte paterna,* and (2) sapindas *ex parte materna.* Nos. 1 to 32, except the five females, namely, Nos. 4, 5, 8, 14 and 20, are sapindas *ex parte paterna.* Nos. 33 to 53 are sapindas *ex parte materna.* Sapindas *ex parte materna* do not succeed until after sapindas *ex parte paterna.* The five females Nos. 4, 5, 8, 14 and 20 succeed by virtue of special texts.

The sapindas succeed in the following order:—

1-3. Son, grandson and great-grandson.

See *Makhan Lall* v. *Sushama Rani* ('53) A.C. 164, 57 C.W.N. 81.
*Chota Nagpur Banking Association* v. *Ramapati* ('64) A.P. 321.

4. Widow (*g*).

See notes to § 43. Also see Hindu Women's Right to Property Act, 1937.

5. Daughter (*g*1).

*Priority amongst daughters.*—The unmarried daughter succeeds first; then the married daughter who has or is likely to have male issue. Daughters who are barren or are widows without male issue, or are mothers of daughters only are excluded from inheritance (*h*), though their re-marriage is permitted in the caste to which they belong and though they may be of childbearing age (*i*). Thus it has been held that a married daughter having a son (*j*), and even a daughter's son (*k*) exclude a childless widowed daughter. But, where, during the lifetime of the father the son-in-law was willing and competent to adopt and has actually adopted after the father's death, the daughter is entitled to inherit (*l*).

*Unchastity.*—An unchaste daughter in Bengal is not entitled to inherit to her father. But once the estate has vested in her, it cannot be divested by subsequent unchastity (*m*).

As to other matters, see notes to § 43, "Daughter."

6. Daughter's son.

The *daughter's son's son* is not an heir under the Dayabhaga school of Hindu law (*n*). The reason given in the Dayabhaga is that he is not the giver of a funeral oblation; the oblation ceases with the daughter's son: Dayabhaga XI, 2, 2. See notes to § 43, "Daughter's son."

7. Father.

8. mother.

An unchaste mother in Bengal is not entitled to inherit to her son. But once the estate has vested in her, it cannot be divested by subsequent unchastity (*o*).

| | | |
|---|---|---|
| 9. Brother | .. | (i) of the whole blood.<br>(ii) of the half-blood. |
| 10. Brother's son | .. | (i) of the whole blood.<br>(ii) of the half-blood. |
| 11. Brother's son's son | .. | (i) of the whole blood.<br>(ii) of the half-blood. |

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(*g*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

(*g*1) *Sankar Dome* v. *Kalidasi Dasi* ('70) A.C. 461.

(*h*) *Benode* v *Purdhan* (1865) 2 W.R.C.R. 176; *Radha* v. *Rajah Ram* (1866) 6 W.R. 147; *Sheodutta* v. *Akali Bhumijani* ('53) A.P. 374.

(*i*) *Binodini* v. *Susthee* (1921) 48 Cal. 300, 57 I.C. 740, ('21) A.C. 295; *Srimati Pramila* v. *Chandra Shekhar* (1921) 43 All. 450, 60 I.C. 777, ('21) A.A. 122.

(*j*) 48 Cal. 300, 57 I.C. 740, ('21) A.C. 295, *supra.*

(*k*) 43 All. 450, 60 I.C. 777, ('21) A.A. 122, *supra.*

(*l*) *Umakanta Bhattacharjee* v. *Bedbati Debi* (1942) I Cal. 299, ('42) A.C. 265.

(*m*) *Ramananda* v. *Rajkishori* (1895) 22 Cal. 347; *Sundari* v. *Pitambari* (1905) 32 Cal. 871.

(*n*) *Nepaldas* v. *Probhas Chandra* (1925) 30 C.W.N. 357, 90 I.C. 499, ('26) A.C. 460.

(*o*) *Ramnath* v. *Durga* (1879) 4 Cal. 550.

12. Sister's son (*p*).
13. Paternal grandfather.
14. Paternal grandmother.
15. Paternal uncle.
16. Paternal uncle's son.
17. Paternal uncle's son's son.
18. Father's sister's son.
19. Paternal great-grandfather.
20. Paternal great-grandmother.
21. Paternal granduncle.
22. Paternal granduncle's son.
23. Paternal granduncle's son's son.
24. Father's father's sister's son.

Then come, consistently with the opinion expressed in the undermentioned cases (*q*) the following 8 cognate relations, namely,—

25. Son's daughter's son.
26. Son's son's daughter's son.
27. Brother's daughter's son (*r*).
28. Brother's son's daughter's son (*s*).
29. Paternal uncle's daughter's son (*t*).
30. Paternal uncle's son's daughter's son.
31. Paternal granduncle's daughter's son.
32. Paternal granduncle's son's daughter's son.

Dr. Sarvadhikari (*u*) places Nos. 25 and 26 immediately after No. 6, Nos. 27 and 28 immediately after No. 12, Nos. 29 and 30 immediately after No. 18, and Nos. 31 and 32 immediately after No. 24.

Next come the maternal relations of the deceased.

33. Maternal grandfather.
34. Maternal uncle (*v*).
35. Maternal uncle's son (*w*).
36. Maternal uncle's son's son.
37. Mother's sister's son.
38. Maternal great-grandfather, (39) his son, (40) his grandson, (41) his great-grandson, and (42) his daughter's son.
43. Maternal great-great-grandfather, (44) his son, (45) his grandson, (46) his great-grandson, and (47) his daughter's son.

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(*p*) A sister's stepson is not an heir as there is no blood relationship, *Lalit Mohan* v. *Province of West Bengal* (1955) 60 Cal. W.N. 359.

(*q*) *Gobind Prosad* v. *Mohesh Chunder* (1875) 15 Beng. L.R. 35. See also *Hari Das* v. *Bama Churn* (1888) 15 Cal. 780, 789-794; *Pran Nath* v. *Surrut Chundra* (1882) 8 Cal. 460, 463-464.

(*r*) *Digumber* v. *Moti Lal* (1883) 9 Cal. 563 [F.B.].

(*s*) (1882) 8 Cal. 460, *supra*.

(*t*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15 [F.B.]; *Braja Lal* v. *Jiban* (1899) 26 Cal. 285.

(*u*) 2nd ed., page 709.

(*v*) *Padmakumari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I.A. 229.

(*w*) *Rani Srimuty Dibeah* v. *Koond Luta* (1847) 4 M.I.A. 292.

The maternal great-great-grandfather's *daughter's son's son* is not an heir under the Dayabhaga law (*x*). He is an heir under the Mitakshara law: see § 54, no. 94.

48-49. Son's daughter's son and son's son's daughter's son of the maternal grandfather; (50-51) son's daughter's son and son's son's daughter's son of the maternal great-grandfather; and (52-53) son's daughter's son and son's son's daughter's son of the maternal great-great grandfather.

Dr. Sarvadhikari (*y*) places Nos. 48 and 49 immediately after No. 37, Nos. 50 and 51 immediately after No. 42, and Nos. 52 and 53 immediately after No. 47.

Note that Nos. 12, 18, 24, 25 to 32, and 33 to 53 are bandhus according to the Mitakshara school, and they do not succeed until after the samanodakas of that school.

**89. Order of succession among Sakulyas.**—Failing all sapindas the inheritance according to the Dayabhaga system passes to sakulyas, according to the order to be deduced from the rules laid down in § 86 above.

**90. Order of succession among Samanodakas.**—Failing all sapindas and sakulyas the inheritance passes to samanodakas, according to the order to be deduced from the rules in § 86 above.

**91. Preceptor, disciple and fellow-student.**—On failure of all the heirs of the deceased his preceptor, pupil and fellow student are in their order entitled to take the estate. If there be none of these the inheritance passes, according to the Dayabhaga, to person bearing the same *gotra* or family name.

See § 85 and notes thereto.

See § 57 and notes thereto. As to succession to hermits and members of a religious order, see § 58 above and Dayabhaga, ch. 11, sec. 6, paras. 35-36.

**92. Escheat.**—On failure of all these heirs, the Government takes by escheat (*z*).

See § 59.

**93. Female heirs: Bengal school.**—The only females recognised as heirs in the Bengal school are the (1) widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother (*a*).

*Succession after Reunion*

**94. Order of succession among reunited members.**—It would seem that according to the Dayabhaga the order of succession to the estate of a reunited member is the same as that to the estate of an undivided member, with this exception that as between claimants of equal degree one who is reunited is to be preferred to one who is not reunited, so that a reunited brother would be preferred to a brother who was not reunited, and a reunited uncle would be preferred to an uncle who was not reunited. The preference arising from reunion is not confined to the reunited members themselves, but extends also to their descendants, so that even the *son* of a reunited brother would be preferred to the son of a separated brother (*b*).

The only persons who can reurite according to the Bengal school are, (1) the father and son; (2) brothers; (3) uncle and nephew.

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(*x*) *Shambo Chandra* v. *Kartick Chunder* (1927) 54 Cal. 171, 97 I.C. 845, ('27) A.C. 11.

(*y*) 2nd ed., p. 710.

(*z*) *Collector of Masulipatam* v. *Cavaly Vencata* (1860) 8 M.I.A. 500.

(*a*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 36-37 [F.B.].

(*b*) *Akshay* v. *Hari* (1908) 35 Cal. 721; *Abhai Churn* v. *Mangal Jana* (1892) 19 Cal. 634.

# CHAPTER VIII

# POINTS OF DIFFERENCE BETWEEN MITAKSHARA AND DAYABHAGA SUCCESSION

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**95. Points of distinction between the Mitakshara and the Dayabhaga systems of inheritance.**—The following are the main points of distinction between the Mitakshara and the Dayabhaga systems of inheritance:—

(1) The Bengal school divides heirs into three classes, namely, (1) sapindas, (2) sakulyas, and (3) samanodakas. The sapindas of the Bengal school are the sapindas of the Mitakshara school within 4 degrees only *plus* bandhus of the Mitakshara school, but not all the bandhus. The sakulyas of the Bengal school are the sapindas of the Mitakshara school from the 5th to the 7th degree. The samanodakas of the Bengal school are the same as those of the Mitakshara school, that is, agnatic relations from the 8th to the 14th degree.

(2) Generally speaking, under the Mitakshara law, no bandhu or cognate can inherit while there is any gotraja sapinda or samanodaka in existence. Under the Dayabhaga Law, cognates come in with the agnates, and they inherit before sakulyas and samanodakas.

(3) Cognatic heirs under the Dayabhaga law are limited in number compared with those under the Mitakshara law. Every person who is a cognatic heir under the Dayabhaga law is also a cognatic heir under the Mitakshara law, but there are some relations who are cognatic heirs under the Mitakshara law, but are not recognized as such under the Dayabhaga law. The doctrine of spiritual efficacy, which is the governing principles of succession under the Dayabhaga law, accounts for the exclusion of the latter.

(4) "Sapinda" according to the Mitakshara, means a person connected through the same *pinda* or body; according to the Dayabhaga, it means a person connected through the same *pinda* or funeral cake presented to the manes of ancestors at the *Parvana Sraddha* ceremony. See § 80 above.

## CHAPTER IX

# EXCLUSION FROM INHERITANCE AND PARTITION

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

**96. Unchastity.**—A widow who is unchaste at the time of her husband's death is not entitled to inherit to him, but once the husband's estate has vested in her—which could only be if she was chaste at the time of her husband's death—it cannot be divested by her subsequent unchastity (*c*). Similarly where the widow of a joint owner is given a widow's estate on her husband's death under a family arrangement, such an estate is not divested by her subsequent unchastity in the absence of any provision to that effect (*d*). Reference may also be made to the Hindu Women's Rights to Property Act, 1937, and Notes at p. 111 *supra*.

There is a difference of opinion between the Mitakshara and Dayabhaga schools as to whether the unchastity of any other female heir excludes her from inheritance.

According to the Mitakshara law, the only female liable to exclusion from inheritance by reason of unchastity is the widow (*e*).

See § 43, "widow," note No. 2.

According to the Dayabhaga law, the condition of chastity applies not only to the widow, but also to other female heirs, such as daughter and mother, to the same extent as it does to a widow (*f*). [§ 88, notes to nos. 5 and 8.]

Unchastity excludes a female from inheriting to a male, but not to a female. It is, therefore, not a bar to inheriting stridhana, even according to the Dayabhaga law (*g*).

**97. Change of religion and loss of caste.**—Change of religion and loss of caste which at one time were grounds of forfeiture of property and of exclusion from inheritance ceased to be so after the passing of the Caste Disabilities Removal Act, 1850 (*h*).

The Act applies only to protect the actual person who either renounces his religion, or has been excluded from the communion of any religion, or has been deprived of caste. Consequently, where the property of a Mahomedan converted from Hinduism has passed according to Mahomedan law to his descendants, Hindu collaterals cannot claim by virtue of the Act to succeed under Hindu law (*i*).

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(*c*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 7 I.A. 115; *Sellam* v. *Chinnammal* (1901) 24 Mad. 441; *Gangadhar* v. *Yellu* (1912) 36 Bom. 138, 12 I.C. 714; *Jadho Nagu Bai* v. *Jadho Gangu Bai* ('38) A.A.P. 19. Also see cases under No. 4 "widow"—'*unchastity*' at p. 111, *supra*.

(*d*) *Lakhmi Chand* v. *Anandi* (1935) 62 I.C. 250, 57 All. 672, 37 Bom. L.R. 849, 157 I.C. 869, ('35) A.P.C. 180.

(*e*) *Adeyapa* v. *Rudrava* (1880) 4 Bom. 104; *Tara* v. *Krishna* (1907) 31 Bom. 495, 510; *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100; *Dal Singh* v. *Dini* (1910) 32 All. 155, 5 I.C. 320; *Baldeo* v. *Mathura* (1911) 33 All. 702, 11 I.C. 43 [mother]; *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 132, 78 I.C. 749, ('24) A.P. 420 [daughter].

(*f*) *Ramananda* v. *Rajkishori* (1895) 22 Cal. 347 [daughter]; *Sundari* v. *Pitambari* (1905) 32 Cal. 871 [daughter]; *Ramnath* v. *Durga* (1879) 4 Cal. 550 [mother]. In *Charu Priya* v. *Roma Kanta* AIR (1964) Assam 106, the Assam High Court has held that even according to the Dayabhaga School, the condition of chastity applies only to the widow and not to any other female. This view is contrary to the view taken by the Calcutta High Court in the above mentioned cases.

(*g*) *Nogendra* v. *Benoy* (1903) 30 Cal. 521; *Angammal* v. *Venkata* (1903) 26 Mad. 509.

(*h*) *Khunni Lal* v. *Gobind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477, reversing s. c. in 29 All. 487; (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420 *supra*. See also *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171.

(*i*) *Mitar Sen Singh* v. *Magbul Hasan Khan* (1930) 57 I.A. 313, 52 Cal. L.J. 551, 128 I.C. 268, ('30)

Once a person has changed his religion and his personal law, that law will govern the rights of succession in his children (*j*).

*Illustrations*

(a) *A* and his son *B* are members of a joint Hindu family. *A* becomes a convert to Mahomedanism. *A* does not by his conversion forfeit his interest in the joint family property. The only effect of the conversion is that it operates as a separation of the family, and one-half of the property vests immediately in *A*, and the other half in *B*; *Khunni Lal* v. *Gobind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477; *Gobind* v. *Abdul* (1903) 25 All. 546, 573.

(b) A married Hindu becomes a convert to Mahomedanism, and marries a Mahomedan wife and has children by her. The persons entitled to his estate on his death are his Mahomedan wife and children, and not his Hindu wife: *Chedambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179.

(c) *A* and *B* are two Hindu brothers separate in estate. *B* becomes a convert to Mahomedanism. After *B*'s conversion a son *C* is born to him who also is a Mahomedan. *B* dies leaving *C*. Afterwards *A* dies leaving a widow. On *A*'s death his widow succeeds to his property. After the widow's death, *C* claims *A*'s property as his nephew. *C* is not entitled to succeed to the property.

It may here be noted that the provisions of Bengal Regulations VII of 1832 were to the same effect as those of Act XXI of 1850.

**98. Physical and mental defects: Disqualified heirs.**—(1) Under the texts as interpreted by the Courts the following defects, deformities and diseases exclude an heir from inheritance:—

(a) *Blindness* (*k*), *deafness, and dumbness* (*l*), provided the defect is both congenital and incurable.

(b) *Want of any limb or organ,* if congenital. This includes the case of a person who is lame (*m*) or has no nose or tongue. It also includes the case of congenital impotence.

(c) *Lunacy.* This need not be congenital or incurable to exclude the heir from inheritance. It is enough if it exists at the time when the succession opens (*n*).

(d) *Idiocy,* provided it is complete and absolute (*o*). Idiocy is, of course, congenital.

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A.PC. 251; affirming (1928) 3 Luck. 154, 107 I.C. 890, ('28) A.O. 138, and disapproving *Bhagwant Singh* v. *Kallu* (1889) 11 All. 100; *Vaithilinga* v. *Ayyathorai* (1917) 40 Mad. 118, 37 I.C. 753, ('18) A.M. 430 [Conversion to Christianity]; *Chidambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179; *Rupa* v. *Sardar Mirza* (1920) 1 Lah. 376, 55 I.C. 410, ('20) A.L. 276, is no longer good law.

(*j*) (1930) 57 I.A. 313, 52 Cal. L.J. 551, 128 I.C. 26, ('30) A.PC. 251, *supra.*

(*k*) *Mohesh Chunder* v. *Chunder Mohun* (1875) 14 Beng. L.R. 273 [Dayabhaga case]; *Murarji* v. *Parvatibai* (1876) 1 Bom. 177; *Umabai* v. *Bhavu* (1876) 1 Bom. 557; *Gunesh war* v. *Durga Prashad* (1917) 44 I.A. 229, 45 Cal. 17, 42 I.C. 849, ''17) A.PC. 146; *Pudiava* v. *Pavanasa* (1922) 45 Mad. 949, 69 I.C. 313, ('23) A.M. 215 [F.B.]; *Fakirnath* v. *Krushnachandra Nath* ('54) A. Orissa 176.

(*l*) *Vallabhram* v. *Bai Hariganga* (1867) 4 Bor H.Ç.A.C. 135; *Savitribai* v. *Bhaubat* (1927) 51 Bom. 50, 100 I.C. 586, ('27) A.B. 103. See also *Bharmappa* v. *Ujjangauda* (1922) 46 Bom. 455, 65 I.C. 216, ('22) A.B. 173; *Anukul Chandra* v. *Surendra* (1939) 1 Cal. 592.

(*m*) *Venkata* v. *Purushottam* (1903) 26 Mad. 133.

(*n*) *Muthammal* v. *Subramaniaswami Devasthanam* (1960) 2 S.C.R. 729; *Baboo Bodhanarain* v. *Omrao* (1870) 13 M.I.A. 520; *Koer Goolab Singh* v. *Kurun Singh* (1871) 14 M.I.A. 176; *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Wooma Pershad* v. *Grish Chunder* (1884) 10 Cal. 639; *Ram Singh* v. *Bhani* (1916) 38 All. 117, 32 I.C. 127, ('16) A.A. 47; *Muthusami* v. *Meenammal* (1920) 43 Mad. 464, 55 I.C. 576, ('20) A.M. 652; *Bapuji* v. *Dattu* (1923) 47 Bom. 707, 73 I.C. 279, ('23) A.B. 425.

(*o*) *Tirumamagal* v. *Ramasvami* (1863) 1 Mad. H.C. 214; *Surti* v. *Narain Das* (1890) 12 All. 530; *Ran Bijai* v. *Jagatpal* (1891) 18 Cal. 111 [P.C.].

(e) *Leprosy*, when it is of such a virulent type that it is incurable and renders him unfit for social intercourse. It need not be congenital (*p*).

(*f*) *Other incurable diseases* (*q*).

(2) Under the Hindu Inheritance (Removal of Disabilities) Act, 1928, no person, other than a person *who is and has been from birth a lunatic or idiot*, is excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect. The Act came into force on the 20th September 1928. It is not retrospective.

The Act does not apply to any person governed by the Dayabhaga School of Hindu Law.

The Act is set out in Appendix II below. Under the Act the only defects which disqualify an heir from inheritance or from a share on partition are congenital lunacy and congenital idiocy.

**99. Murder.**—A murderer, even if not disqualified under Hindu law from succeeding to the estate of the person murdered, is so disqualified upon the principles of justice, equity and good conscience. Further, no title to the estate of the person murdered can be claimed through the murderer. He should be treated as non-existent when the succession opens on the death of his victim; he cannot be regarded as a fresh stock of descent (*r*).

*P* dies leaving his mother *C*, a son *H* and a daughter *K* of his father's brother, and his father's sister's son *G*. On *P*'s death his mother *C* succeeds to his property for the ordinary Hindu widow's estate. *H* is the next reversioner. *H* murders *C* and is sentenced to transportation for life. Who is entitled to succeed to the estate of *P*? Not *H*, because he is the murderer. Is *H*'s sister *K* entitled to succeed? No, because she could only claim through *H*, the murderer. *H* should be regarded as non-existent at the date of *C*'s death, so that the next heir to *P*'s estate is his father's sister's son *G*. *G* is therefore entitled to succeed to *P*'s estate: *Kenchava* v. *Girimallappa* (*s*).

A murderer cannot be regarded as a fresh stock of descent. He must be regarded as non-existent qua the estate of the murdered person, that is to say no title to the estate of the murdered person can be claimed through the murderer (*t*). The test of disqualification is whether the title is traced through the murderer (*u*). The result is that not only is the murderer excluded from inheritance, but also his son or his sister (*v*), or any other person claiming heirship through him. In Bombay, the wife of a murderer is not disentitled from succeeding to the estate of the murdered man. The reason is that she does *not* derive title *through* her husband, but succeeds *in her own right* as a gotraja sapinda (*w*). The Bombay High Court has also held that there could be no exclusion from inheritance or right to partition if there is no question of the murderer or his son taking advantage of the murder (*x*).

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(*p*) *Ramabai* v. *Harnabai* (1924) 51 I.A. 177, 48 Bom. 363, 80 I.C. 193, ('24) A.PC. 125; *Ananta* v. *Ramabai* (1876) 1 Bom. 554; *Rangayya* v. *Thanikachalla* (1896) 19 Mad. 74; *Koyarohana* v. *Subbaraya* (1915) 38 Mad. 250, 19 I.C. 690, ('16) A.M. 470; *Karali* v. *Ashutosh* (1923) 50 Cal. 604, 75 I.C. 474, ('23) A.C. 331. See also *Man Singh* v. *Gaini* (1918) 40 All 77, 43 I.C. 62, ('18) A.A. 377.

(*q*) See (1915) 38 Mad. 250, 19 I.C. 690, ('16) A.M. 470, *supra*.

(*r*) *Kenchava* v. *Girimallappa* (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209; affg. 45 Bom. 768, 61 I.C. 294, ('21) A.B. 270 [pat. aunt]; *Vedanayaga* v. *Vedammal* (1904) 27 Mad. 591 [mother]; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100 [mother]; *Shah Khanam* v. *Kalandhar Khan* (1900) Punj. Rec. no. 74 [half mother]; *Mst. Jind Kuar* v. *Indar Singh* (1922) 3 Lah. 103, 67 I.C. 526, ('22) A.L. 293.

(*s*) (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209.

(*t*) *Mata Badal* v. *Bijay Bahadur* ('56) A.A. 707.

(*u*) *Mata Badal* v. *Bijay Bahadur supra*; *Nakchhed Singh* v. *Bijai Bahadur* ('53) A.A. 759, (1953) A.L.J. 609.

(*v*) (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209.

(*w*) *Gangu* v. *Chandrabhagabai* (1908) 32 Bom. 275.

(*x*) *Adiveppa* v. *Veer Bhadrappa* (1947) Bom. 518.

**100. Disability as excluding females.**—The disabilities which exclude a male from inheritance also exclude a female from inheritance (*y*).

**101. Effect of disability.**—Where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person were dead (*z*). The disqualified person transmits no interest to his heir (*a*).

*Illustrations*

(a) *A* dies leaving an insane son and a daughter. The daughter will take the inheritance as if the son were dead.

(b) *A* dies leaving two brothers *B* and *C*. *C* is insane and has a son *D*. *B* alone will inherit, for *D* is the nephew of the deceased, and a nephew cannot inherit while a brother is in existence.

**102. Disqualification only personal.**—The disability is purely personal, and does not extend to the legitimate issue of the disqualified heir (*b*). Nor does it extend, in cases governed by the Bombay school of Hindu law, to his wife or widow (*c*). But adopted sons of disqualified heirs are not entitled to this heritable right (*d*).

*Illustrations*

(a) *A* dies leaving a son *B* who is insane from birth, and a grandson by *B*. The grandson will succeed to *A* as *A*'s heir. [*Note* that the grandson succeeds as the heir of his grandfather *A*. He succeeds by his own merits, in other words, in his own right and does not step into his father's place.]

(b) *A* dies leaving a son *B* who is an idiot, a grandson who is the adopted son of *B*, and a daughter. The daughter will inherit *A*'s estate. A son adopted by a *disqualified* heir is not entitled to succession.

(c) A Hindu governed by the Bombay school of Hindu law dies leaving as his only heir a brother who is disqualified from inheriting and the brother's wife. The brother's wife inherits to the deceased, though the brother is disqualified. [See §§ 64 and 68 above.]

**103. Disability arising after succession.**—Property which has once vested in a person by inheritance is not divested by a subsequently supervening disability (*e*).

**104. Removal of disability after succession has opened.**—Where the disability is removed subsequent to the opening of the inheritance, the right to inheritance revives, but not so as to divest the estate already vested in another person (*f*).

*Illustrations*

(a) *A* dies leaving a son who is insane and a widow. On *A*'s death the widow succeeds to the estate as his heir. The insanity is cured during the widow's life. The estate being vested in the widow, the son is not entitled to it during her lifetime. After the widow's death, however, the son as the nearest heir of *A*, is entitled to succeed to the estate, so that if *A* has left a brother also, the son, and not the brother will succeed.

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(*y*) *Bakubai* v. *Manchhabai* (1864) 2 Bom. H.C. 5.

(*z*) *Baboo Bodhnarain* v. *Omrao* (1870) 13 M.I.A. 520.

(*a*) *Musst. Budha Kuer* v. *Musst. Sohodra Kuer* (1931) 11 Pat. 35, 132 I.C. 866, ('31) A.P. 367.

(*b*) Mit. II, 10.

(*c*) *Gangu* v. *Chandrabhagabai* (1908) 32 Bom. 275.

(*d*) Mit. II, 10, 11.

(*e*) *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Sakhu* v. *Puttamma* (1891) 14 Mad. 289, 294; *Abilakh* v. *Bhekhi* (1895) 22 Cal. 864.

(*f*) Mitakshara chap. ii, sec. 7; *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.].

(b) *A* dies leaving a son *X* who is insane and a brother *B*. On *A*'s death *B* succeeds to the estate. The lunacy is cured during *B*'s lifetime. *X* cannot recover the estate from *B* for it is vested in *B*. Also on *B*'s death the estate will pass to *B*'s heirs, and not to *X*, for *B* took as *full owner*, so that if *B* dies leaving a son, it will pass to his son. But if *B* leaves no other heir than *X* (his brother's son), *X* will succeed to the estate not as the heir of *A*, but as the heir of *B*. The result is that where the estate of the father has passed to a *full* owner, a son whose disability has been removed cannot claim it as his *father's* heir, and he loses all right to it as *such*. It is different, however, where the estate has passed to a widow or other limited heir who takes only a widow's interest as in ill (a).

**105. After-born son of disqualified heir.**—Where, after the succession has opened, a son is born to a disqualified heir, the son is not entitled to inherit so as to divest the estate already vested in another (*g*).

*Illustration*

*A* dies leaving a son *B* who is insane, a widow, and a nephew. On *A*'s death, the widow inherits the estate. The widow then dies, and the nephew succeeds to the estate as *A*'s heir. *A* son, *C*, is then born to *B*, and he claims the estate from the nephew. He is not entitled to the estate, for it became vested in the nephew on the death of the widow.

## EXCLUSION FROM PARTITION

**106. Disability and partition.**—A disability which excludes a person from inheritance also excludes him from a share of the joint family property on partition (*h*). Where a member of a joint family had no congenital disqualification and therefore had acquired by birth an interest in the joint family property, a later supervening disqualification, while it might debar him from claiming a partition, would not prevent him from acquiring the whole property by survivorship (*i*). A full Bench in Madras has held that even when the disqualification is congenital, the same result follows (*j*). There may be such a severance of the joint status as would put an end to the right of succession by survivorship (*k*). But if the other coparceners separate their shares and disrupt the joint family the lunatic member may become separate owner of his share (*l*). See § 98 above.

**107. Lunacy and partition.**—(1) The High Court of Calcutta (*m*) has held that a member of a joint family who was *not born* a lunatic, but is a lunatic *at the time of partition*, is not entitled to claim his share by partition. This is also the opinion of the High Court of Allahabad (*n*).

The Federal Court of India examined the law on the point and held that although a person who is insane at the time when partition takes place cannot claim a share in the joint family properties, yet the texts of Hindu Law make it clear that his rights remain in abeyance and are revived on the malady being cured. A coparcener on his supervening insanity may not exercise his will to effect a severance of the status; but that does not prevent the other coparceners from disrupting the coparcenary if they so choose, and these

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(*g*) *Kalidas* v. *Krishna* (1869) 2 Beng. L.R. [F.B.] 103; *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Pawadewa* v. *Venkatesh* (1908) 32 Bom. 455.

(*h*) *Ram Sahye* v. *Lalla Lalljee* (1882) 8 Cal. 149; *Ram Soonder* v. *Ram Sahye* (1882) 8 Cal. 919.

(*i*) *Muthusami* v. *Meenammal* (1920) 43 Mad. 464, 55 I.C. 576; *Mt. Dilraj Kuari* v. *Rikheswar Ram Dube* (1934) 13 Pat. 712, 151 I.C. 419, ('34) A.P. 373 (lunacy); *Moolchand* v. *Chahta Devi* (1937) All. 825, 170 I.C. 833, ('27) A.A. 605 [F.B.] (leprosy).

(*j*) *Kesava* v. *Govindan*, 1946 Mad. 452 (F.B.).

(*k*) *Venkateswara* v. *Mankayammal* (1935) 69 Mad. L.J. 410, ('35) A.M. 775.

(*l*) *Bhagwati Saran Singh* v. *Parmeshwari Nandan Singh* (1942) All. 518, 202 I.C. 227, ('42) A.A. 267, affirmed in *Ratneshwari* v. *Bhagawati* (1949) 11 F.C.R. 715.

(*m*) (1882) 8 Cal. 149, *supra*: (1882) 8 Cal. 919, *supra*.

(*n*) *Bhagwati Saran Singh* v. *Parmeshwari*, *supra*.

rights can be exercised even if the family consist only of one sane and one insane member (*o*).

(2) Under the Hindu Inheritance (Removal of Disabilities) Act, 1928, such a person, not having been a lunatic from birth, is entitled to a share. It has been held that by virtue of the operation of this Act a suit by a next friend of a coparcener of unsound mind to enforce partition is maintainable (*o*1).

**108. Removal of disability reopens partition.**—A coparcener who is excluded from a share on partition by reason of a disability in entitled, on removal of the disability, to the same rights as a son born after partition (*p*). [§ 310].

**109. A disqualified coparcener having sons.**—Where a son is born to a disqualified coparcener after the death of the ancestor, he is not, according to the Bombay decisions (*q*), entitled to take a share by divesting the coparcener in whom the ancestor's share vested on his death. The High Court of Madras has arrived at a contrary conclusion (*r*). Following the principle of this decision the same High Court has held that an idiot (even where the idiocy is congenital) who marries and has children is a coparcener with his father (though he cannot claim a share by partition) and that a will executed by the father during the lifetime of the son is invalid (*s*). The Supreme Court has now confirmed the latter view (*ss*).

*A*, his son *B*, and his brother *C*, are members of a Mitakshara joint family. *B* is insane. *A* dies, and on his death his undivided coparcenary interest passes to his brother *C* by survivorship. After *A*'s death, a son is born to *B*. *B*'s son sues *C* to recover the half share of his grandfather *A* in the joint family property. He is entitled to the share.

Under the Mitakshara law as applied in Madras prior to the coming into operation of the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Supreme Court held that a disqualified heir who was congenitally a deaf-mute became by birth a coparcener with his father and on death of his father without other male issue the ancestral property vested in him as the sole surviving coparcener (*ss*).

## MISCELLANEOUS

**110. Maintenance of disqualified heirs.**—Where a person is excluded from inheritance on account of a disability, he and his wife and children are entitled to maintenance out of the property which he would have inherited but for the disability and where he is excluded from a share on partition, he and his wife and his children are entitled to have a provision made for their maintenance out of the joint family property (*t*).

**111. Adoption of religious order.**—Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death,

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(*o*) *Ratneshwari Nandan* v. *Bhagawati* (1949) 11 F.C.R. 715, ('50) A.F.C. 142.

(*o*1) *Vedavyas Rao* v. *Narayana Rao* ('62) A. Mys. 18. Reference may also be made to *Parameswaram* v. *Parameswaram* ('61) A.M. 345.

(*p*) Mitakshara, chap. ii, s. 10, paras 6-7.

(*q*) *Bapuji* v. *Pandurang* (1882) 6 Bom. 616; see also *Pawadewa* v. *Venkatesh* (1908) 32 Bom. 455.

(*r*) *Krishna* v. *Sami* (1886) 9 Mad. 64 [F.B.].

(*s*) *Amrithammal & Ors.* v. *Vallimayil Ammal* (1942) Mad. 807, 203 I.C. 648, ('42) A.M. 693.

(*ss*) *Kamalammal* v. *Venkatalakshmi* ('65) A.S.C. 1349.

(*t*) *Ram Sahye* v. *Lalla Lalice* (1882) 8 Cal. 149; *Ram Soonder* v. *Ram Sahye* (1882) 8 Cal. 919, Mitakshara, chap. ii, s. 10.

and it excludes him altogether from inheritance and from a share on partition (*u*).

All property which belongs to such a person at the time of renunciation passes immediately on his renunciation to his heirs, but property acquired by him subsequent to the renunciation passes to his spiritual heirs [§ 58]. A person does not become a *sanyasi* by merely declaring himself a sanyasi or by wearing clothes ordinarily worn by sanyasi. He must perform the ceremonies necessary for entering the class of sanyasis: without such ceremonies he cannot become dead to the world (*v*).

*Sudras.*—The Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras, unless a usage to that effect is established. The reason is that a Sudra cannot enter the order of *Yati* or *Sanyasi* (*w*).

(*u*) *Teeluck* v. *Shama* (1964) 1 W.R. 209.

(*v*) *Baldeo Prasad* v. *Arya Priti Nidhi Sabha* (1930) 52 All. 789, 124 I.C. 761, ('30) A.A. 643; *Kondal Row* v. *Swamulavaru* (1917) 33 Mad. L.J. 63, 40 I.C. 535, ('18) A.M. 402; *Ramdhan* v. *Dalmir* (1909) 14 C.W.N. 191, 2 I.C. 383; *Satyanarayana* v. *H.R.E. Board* ('57) A. Andh. Pra. 824; *Rammakrishan Rao* v. *Srinivasarao* ('60) A.A.P. 449. *Madhusudhan* v. *Gobind* ('65) A. Orissa 54.

(*w*) *Harish Chandra* v. *Atir Mahmud* (1913) 40 Cal. 545, 18 I.C. 474; *Somasundaram* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I.C. 546, ('18) A.M. 794; *Krishna Singh* v. *Mathura Ahir* ('72) A. All. 273,

# CHAPTER X

# WOMEN'S PROPERTY: PART I—STRIDHANA

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

1. *Stridhana according to the Smritis, the Commentaries, and Judicial Decisions* (§§ 112-123).
2. *Peculiar features of stridhana* (§ 124).
3. *Enumeration of stridhana* (§§ 125-140).
4. *Rights of a woman over her stridhana* (§§ 141-144).
5. *Succession to stridhana* (§§ 145-157).
6. *Rules common to all the schools* (§§ 158-165).

*Note.*—The subject of stridhana is by far the most difficult branch of Hindu law. The difficulty of the subject may be gauged from what Jimutavahana says in the Dayabhaga after finishing his discourse on stridhana: "Thus has been explained *the most difficult subject* of succession to a childless woman."

Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, now confers full and heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that Act with the result that by retroactive operation of that section she holds the property in her possession as full owner and not as a limited owner.

## I.—STRIDHANA ACCORDING TO THE SMRITIS, THE COMMENTARIES AND JUDICIAL DECISIONS.

**112. Different meanings of stridhana.**—The word "stridhana" is derived from *stri*, woman, and *dhana*, property. It means, literally, woman's property. It is used, however, in different senses in different schools. In order to understand the precise meaning of stridhana according to the various schools, it is necessary to know what kinds of properties were recognised as stridhana in the *Smritis*, that is to say, by the *Rishis* or sages of antiquity (§ 8).

We shall, therefore, take the reader as briefly as possible through the definitions, or rather descriptions of stridhana, as given by some of those sages, beginning with Manu and ending with Yajnavalkya (§ 113). Next we shall state the definition of stridhana as given in the Mitakshara. We shall then see how Vijnaneswara, the author of the Mitakshara, seized on one particular word in Yajnavalkya's definition of stridhana, (the word, or rather the suppletive term, *ádya*, which means 'and the *rest*' or '*et cetera*', and used it as a handle for extending the scope of stridhana so as to include in it several descriptions of property which were not recognized as stridhana before (§ 115). We shall next proceed to consider to what extent the definition of stridhana as given in the Mitakshara has been adopted in the four Mitakshara sub-schools (§§ 116-119). Therefore, we shall deal with the Bengal or Dayabhaga school, and note how Jimutavahana, the founder of that school, boldly rejected the Mitakshara definition of stridhana, and formulated a definition of his own (§ 120). Lastly, we shall note how the Judicial Committee has, notwithstanding repeated warnings given by it that the Courts of India should take the Hindu law not from the Smritis, but from the commentaries (§ 9), brushed aside the whole of Vijnaneswara's expansion of the word *ádya* (§ 122). After this preliminary inquiry, we shall proceed to deal with the subject of stridhana in the light of decided cases.

**113. Stridhana according to the Smritis, that is, the sacred writings of Rishis or sages of antiquity.**—Manu enumerates six kinds of stridhana:

1. Gifts made before the nuptial fire, explained by Katyayana to mean gifts made at the time of marriage before the fire which is the *witness* of the nuptial [*adhyagni*].

2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband [*adhyavahanika*].
3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law [*pritidatta*], and those made at the time of her making obeisance at the feet of elders [*padavandanika*].
4. Gifts made by father.
5. Gifts made by the mother.
6. Gifts made by a brother (*Manu*, ix, 194).

All the commentators are agreed that the above is not an exhaustive enumeration of stridhana.

To the above list *Vishnu* adds—

1. Gifts made by a husband to his wife on supersession, that is, on the occasion of his taking another wife [*adhivedanika*].
2. Gifts, subsequent, that is, says Katyayana, those made *after* marriage by her husband's relations or her parent's relations [*anwadheyaka*].
3. *Sulka*, or marriage-fee, a term which is used in different senses in different schools [see §§ 147, 150, 152, 153 and 154].
4. Gifts from sons and relations.

Vishnu does not make any specific mention of gifts made at the bridal procession.

Katyayana mentions the same six kinds of stridhana as Manu, and he defines the first three enumerated by Manu, and "gifts subsequent" and "sulka" mentioned by Vishnu. Those definitions have already been given above except that of *sulka*. It is of importance to note that Katyayana's definition of *adhyagni*, gifts before the nuptial fire, and that of *adhyavahanika*, gifts at the bridal procession are wide enough to include gifts from *strangers*. These definitions have been accepted by all the schools including the Dayabhaga school, with the result that they all recognize as stridhana gifts from strangers when they are made *before the nuptial fire or at the bridal procession*. But Katyayana expressly excludes from the category of stridhana gifts made by strangers during *coverture*, as also property acquired by a woman during *coverture* by mechanical arts. Thus he says:—

"The wealth which is *earned by mechanical arts*, or which is received through affection *from a stranger*, is subject to her husband's dominion. The *rest* is pronounced to be stridhana." [*Katyayana*, cited in the Dayabhaga, chap. 4, sec. 1, para 19.]

Gifts from strangers referred to in the above text are, of courses, exclusive of gifts made before the nuptial fire and at the bridal procession. Such gifts are undoubtedly stridhana.

The words, "subject to her husband's dominion", indicate that the text cited above is evidently not applicable to gains of art or to gifts from strangers either *during maidenhood or during widowhood*. The said words refer to acquisitions and gifts from strangers *during coverture*. Therefore acquisitions and gifts from strangers during maidenhood or widowhood would constitute stridhana.

It is not necessary to notice here the definitions of stridhana given by *Narada*, *Apastamba*, *Vyasa*, and *Devala* except that Devala refers to "food and vesture" [§ 119] as constituting a woman's stridhana [Colebrooke's Digest, Book V, pp. 471, 478].

It may be observed before passing further that almost all the Smriti writers mention ornaments given by a husband to his wife as her stridhana.

*Yajnavalkya* defines stridhana thus:—"What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on her husband's marriage to another wife, *and the rest* (*ádya*) is denominated stridhana. So, that which is given by kindred, as well as her marriage-fee (*sulka*) and anything bestowed after marriage." [Note *particularly* the word "*ádya*" in the above definition.]

Though there are about eighty different *Rishis* (sages) or writers of *Smritis* (institutes), the texts of the belownamed eight *rishis* are the only ones to which reference is made by the Commentators in their disquisitions on the definition of stridhana. Those eight sages are: (1) Manu, (2) Narada, (3) Vishnu, (4) Katyayana, (5) Apastamba, (6) Vyasa, (7) Devala and (8) Yajnavalkya.

Summarizing the *Smriti* texts, we may say that *it is only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and that the only sorts of gifts from strangers which came under that denomination are presents before the nuptial fire and those made at the bridal procession. But neither gifts obtained from strangers at any other time, nor her acquisitions by labour and skill, constitute her stridhana* (*x*). This is stridhana in its *technical* sense. The Mayukha calls it *technical* stridhana; it comprises only those kinds of property which are *expressly* called stridhana by the old sages or Smriti writers.

**114. Stridhana according to the Commentators (§§ 115-120).** It is well established that whatever may be the law intended to be laid down by the Smriti writers, that law must be sought for in the writings of the Commentators. In determining what is stridhana according to a particular school, the Court has to look to what the Commentators, who are authorities in that particular school, have said on the subject (*y*). It is not open to a Judge to put his own interpretation on the Smriti texts. If the texts have received a particular interpretation in a particular school, and that interpretation has been accepted as the law of that school, he must take it as the law of that school and administer it as such (*z*) [§ 9]. To this extent then the Smritis have been pushed into the background.

**115. Stridhana according to the Mitakshara.**—The following is the definition of stridhana as given by Vijnaneswara in the Mitakshara:—

"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire; and a gift on a second marriage or gratuity on account of supersession; and, as indicated by the word *ádya* (and rest), property obtained by—

(1) inheritance;
(2) purchase;
(3) partition;
(4) seizure, e.g., adverse possession (*a*);
(5) finding;

and this is stridhana according to Manu and the rest."

It will thus be seen that the first portion of the above definition is a reproduction of the definition of stridhana as given by Yajnavalkya. The second part of the above definition is the *expansion* by Vijnaneswara of the word *ádya* which occurs in Yajnavalkya's definition of stridhana, so as to include in stridhana five distinct kinds of property which were not recognized as stridhana by the early sages. Neither Manu nor the other sages ever recognized those kinds of property as stridhana. Manu recognized only *six* kinds of stridhana, but this Vijnaneswara explains by saying that all that was meant by Manu's text is that the number cannot be less than six, not that it cannot be more than six. And, further, he expressly says that *the term stridhana conforms in its import with its etymology, and is not technical.* The result is that according *to the Mitakshara, property of any*

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(*x*) See Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., p. 327.

(*y*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 102.

(*z*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 436.

(*a*) *Subramaniam* v. *Arunachelam* (1905) 28 Mad. 1, 7.

*description belonging to a woman is stridhana.* It may be a gift from relations or a gift from *strangers* (*b*). It may be property acquired by inheritance, or property obtained on partition. It may be her earnings (*b*) or it may be property acquired by her *from any other source* [*Mitakshara,* chap. 2, sec. 11, paras 2-4].

Referring to the above definition, the High Court of Madras said: "It is scarcely necessary to say that Vijnaneswara's statement that stridhana is not to be understood in a technical sense was not mere philological observation. By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property" (*c*).

[It may just as well be noted here that since the decision of the Privy Council in 1912 (§ 122), the whole of Vijnaneswara's "expansion" has been discarded.]

**116. Stridhana according to the Bombay School.**—We next turn to the four divisions of the Mitakshara school (§ 12). It will be seen that some of them adopt the Mitakshara definition while others do not.

The Mayukha, which is held in high esteem in the town of Bombay, in Gujerat and in the North Konkan, would seem to adopt the definition of stridhana as given in the Mitakshara [§ 115].

For the purposes of *succession,* the Mayukha divides stridhana into two classes, namely, (1) technical, and (2) non-technical. Technical stridhana refers to the kinds of property *expressly* recognised as stridhana by the old sages [§ 113], that is to say, (1) gifts from *relations* made at any time, and (2) gifts from strangers if made before the nuptial fire or at the bridal procession. Non-technical stridhana comprises every other kind of property belonging to a woman. This is a classification peculiar only to the Mayukha [*Mayukha,* chapter iv, sec. 10, paras. 1-2 and 26]. It is not followed in any other part of the Bombay State where the Mitakshara alone is the governing authority.

**117. Stridhana according to the Benares School.**—The Viramitrodaya, a commentary held in high esteem in the Benares school, *adopts and supports* the definition of stridhana given in the Mitakshara.

**118. Stridhana according to the Madras School.**—The principal treatises of the Madras school are the Smriti Chandrika and the Parashara Madhaviya. These treatises do not give any definition of stridhana. Nor do they adopt the definition of stridhana given in the Mitakshara. The Smriti Chandrika enumerates certain kinds of property as stridhana, being the kinds of property recognised as stridhana by the Smriti writers. The Parashara Madhaviya puts its own interpretation on the suppletive term *ádya* in the text of Yajnavalkya, and says that it refers to property purchased by a woman with gifts made to her at the bridal procession, etc.

Besides the two works mentioned above, there are other works which are of more or less authority in the Madras school namely the Sarasvati Vilasa and the Vyavaharanirnaya. These four treatises, however, do not agree with each other on all points, least of all on questions relating to stridhana. This has led the High Court of Madras to hold that in determining the question whether a particular kind of property is stridhana or not, the Court should follow the comprehensive definition of stridhana given in the Mitakshara and hold that it is stridhana, unless it is shown that the said treatises are *unanimous* in

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(*b*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-105.

(*c*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-104.

holding that it is not stridhana (*d*). It has accordingly been held by that Court following the definition of stridhana given in the Mitakshara, that *money* given absolutely to a woman for her maintenance, and purchases made with such money, constitute her stridhana and descend to her heirs (*e*). Similarly, it has been held that gifts from strangers, though made during coverture, constitute her stridhana, there being no consensus of opinion among the said treatises that such gifts are not to be regarded as stridhana (*f*). As to a wife's earning, the same Court has expressed a strong opinion that they are her stridhana and descendible to her heirs (*g*). A similar opinion has been expressed as to property acquired by a woman by "seizure", that is, adverse possession, and that acquired by finding (*h*). Property *inherited* by a woman, however, stands on a different footing, for as to that it has been settled by a long line of decisions that it is not stridhana according to the Madras school. As to property obtained by a woman on *partition,* no question can arise in the Madras school as to whether or not it is stridhana, for the practice of allotting shares to a woman on partition has become obsolete in the Madras State (*i*). This completes the list of the additional sorts of stridhana specifically enumerated in the Mitakshara [§ 115]. In fact, the tendency of the Madras High Court is to follow the Mitakshara in determining whether a particular kind of property is stridhana or not. Even as to rules of succession to stridhana, that Court has followed the Mitakshara where the said four commentaries are silent (*j*) or do not all agree with each other (*k*). Referring to the definition of stridhana given in the Mitakshara that Court said: "It is scarcely necessary to say that Vijnaneswara's statement that stridhana is not to be understood in a technical sense was not mere philological observation. . . . A departure from the law, laid down by such a high authority, must not be made *unless supported by adequate grounds*" (*l*). And as to the rules of succession to stridhana, the same Court said: "While the other commentators, in their attempt to reconcile the various Smritis, complicate the matter by prescribing different lines of devolution—those too not complete—according to the class of stridhana to which the particular property belongs, the Mitakshara lays down rules which are easy of application, complete in themselves and on the whole equitable" (*m*).

The position, then, as regards the Madras school, so far as the Madras decisions go, is this that the Mitakshara definition of stridhana is to be applied in every case, unless the commentaries prevalent in that school unanimously exclude the kind of property in question from the category of stridhana. Since the decision, however, of the Privy Council, in 1912 (§ 122), the whole of Vijnaneswara's "expansion" [§ 115] has been discarded, and such of the Madras decisions which recognized as stridhana any description of property comprised in the "expansion" cannot now be accepted as good law.

**119. Stridhana according to the Mithila School.**—The Vivada Chintamani is the leading authority of the Mithila school. This work also does not give any definition of stridhana, but it enumerates eleven kinds of property, namely:

(1-6) the six kinds as enumerated by Manu and defined by Katyayana [§ 113 ];

(7-9) gifts made on supersession, gifts subsequent, and *sulka* [§ 113];

(10) ornaments; and

(11) "food and vesture" mentioned by Devala and interpreted to mean "funds appropriated to a woman's support" [§ 113].

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(*d*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-104.

(*e*) *Subramanian* v. *Arunachelam* (1903) 28 Mad. 1.

(*f*) 21 Mad. 100, *supra.*

(*g*) 21 Mad. 100, 103, *supra.*

(*h*) 28 Mad. 1, 7, *supra.*

(*i*) *Subramanian* v. *Arunachelam* (1903) 28 Mad. 1, 8.

(*j*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 104.

(*k*) *Raju* v. *Ammani* (1906) 29 Mad. 358; *Muthappudayan* v. *Ammani* (1898) 21 Mad. 58.

(*l*) 21 Mad. 100, 103-104, *supra.*

(*m*) 21 Mad. 100, 104, 105, *supra.*

Gifts from strangers made before the nuptial fire and at the bridal procession are also recognized as stridhana. The author then concludes his enumeration by saying: "These are the several kinds of stridhana." It will thus be seen that the Vivada Chintamani confines stridhana within the definition of the Smriti writers and excludes property acquired by inheritance and the other kinds of property mentioned as stridhana in the Mitakshara (*n*). [*Vivada Chintamani*, P. C. Tagore's Translations, pp. 256-263.]

**120. Stridhana according to the Dayabhaga or Bengal School.**—The Dayabhaga of Jimutavahana is the leading authority of the Bengal school. To understand the definition of stridhana as given in the Dayabhaga it is important to note the following two propositions which have been accepted by all the Mitakshara sub-schools:—

(a) *every* kind of stridhana belonging to a woman passes on her death to *her* heirs;

(b) but *every* kind of stridhana cannot be disposed of by a woman at her pleasure.

The only kinds of stridhana which she can dispose of at her pleasure and without her husband's consent are *gifts from relations*. She cannot dispose of any other kind of stridhana such as gifts from *strangers*, or property acquired by her *by mechanical arts*, without her husband's consent [§ 143].

This is based upon certain texts of Katyayana and Narada. The texts run as follows:

(1) "What a woman, either after marriage or before it, either in the mansion of her husband or of her father, received from her lord or her parents, is called *saudayika* (gift from affectionate kindred); and such a gift having by them been presented through kindness, that the woman possessing it may live well, is declared by law to be her absolute property. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consist of lands and houses. Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alienate the legal property of a woman"—*Katyayana* [Colebrooke's Digest, Book V, p. 475].

(2) "The wealth which is earned by *mechanical arts*, or which is received through affection *from a stranger*, is subject to *her husband's dominion*. The rest is pronounced to be stridhana" [*Katyayana*, cited in the Dayabhaga, chap. 4 sec. 1, para 19]

(3) "Property given to her by her *husband* through pure affection she may enjoy at her pleasure *after his death*, or may give it away, *except land or houses*"—*Narada* [Colebrooke's Digest, Book V, p. 477].

Jimutavahana first examines the various definitions, or rather descriptions, of stridhana given in the old Smriti texts [§ 113]. He alters the text of Yajnavalkya by substituting the expletive *eva* for *ádya* so as to confine the term stridhana 'to the kinds of property *specifically* enumerated by *Yajnavalkya*' [§ 113]. He rejects the definition of stridhana given in the Mitakshara, and defines stridhana in these words:—

*"That alone is stridhana which she (a woman) has power to give, sell, or use independently of her husband's control."*

Jimutavahana, however, does not say what kinds of property can be disposed of by a woman without her husband's consent but immediately after defining stridhana, he cites the texts of Katyayana and Narada quoted above. In the light of those texts, and from what more he says in the chapter on stridhana it may be said—

(1) *affirmatively*, that all gifts from *relations constitute* stridhana, except a gift of *immoveable* property made by the *husband;* and that gifts from strangers also constitute stridhana if made before the nuptial fire or at the bridal procession;

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(*n*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A 487, 511.

(2) *negatively,* that the following properties are not stridhana, namely—

(i) property *inherited* by a woman;

(ii) property obtained by her *on partition;*

(iii) gifts from *strangers,* except those made before the nuptial fire or at the bridal procession; and

(iv) property acquired by her *by mechanical arts* (*o*) [*Dayabhaga,* chap. 4, sec. 1].

**121. Distinction between Mitakshara stridhana and Dayabhaga stridhana.**—In *Sheo Shankar* v. *Debi Sahai* (*p*), their Lordships of the Privy Council referring to the term stridhana said: "The Bengal school of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of woman's property enumerated in the primitive sacred texts. The author of the Mitakshara and some other authors (that is of the Viramitrodaya and the Mayukha) seem to apply the term broadly to every kind of property which a woman can possess, *from whatever source it may be derived.*"

**122. The Privy Council and Mitakshara Stridhana.**—(1) *Property inherited by a woman.*—A woman may inherit the ordinary property of a male, that is of her husband, father, son, etc. She may also inherit the stridhana of a female, that is of her mother, mother's mother, or daughter. Both these kinds of inherited property are stridhana according to the Mitakshara [§ 115], but the Privy Council has held as to both these kinds of property that they are not stridhana. In one set of cases before that tribunal, the question was whether property inherited by a widow from her husband, that is property inherited by a woman *from a male,* was her stridhana. Their Lordships held that it was not, and that on her death it passed not to her heirs, but to the next heir of her husband (*q*). In the other set of cases the question was whether stridhana inherited by a daughter from her mother, that is property inherited by a woman *from a female,* was her stridhana. Their Lordships held that it was not, and that it did not descend to her (daughter's) stridhana heirs, but to the next heir of the mother (*r*).

The cases referred to above were cases from the Benares school. The law as now settled in the Madras, Mithila and Bengal schools is the same, that is to say that property inherited by a woman, whether from a male or from a female, does not constitute her stridhana in any case [§§ 168-169]. According to the Bombay school, however, it becomes her stridhana in all cases, except where the property is inherited by a widow, mother, or other female who enters the *gotra* (family) of the deceased by marriage [§§ 170-171]. This rule is firmly established in Bombay by a long current of decisions and it remains unaffected by the decisions of the Privy Council referred to above (*s*). [See § 130.]

(2) *Share obtained by a widow on partition.*—As to the share obtained by a widow on partition of the joint family property, it has been held by the

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(*o*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315, 319-320.

(*p*) (1903) 25 All. 468, 30 I.A. 202, 205-206.

(*q*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487; *Mst. Thakur Deyhee* v. *Rai Baluk Ram* (1866) 11 M.I.A. 140.

(*r*) *Sheo Shankar* v. *Debi Sahai* (1903) 25 All. 468, 30 I.A. 202, as explained in *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 9-12; *Ram Kali* v. *Gopal Dei* (1926) 48 All. 648, 652-653, 96 I.C. 757, ('26) A.A. 557, and *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 236, 237, 107 I.C. 244, ('28) A.A. 52; *Sheo Pertab* v. *The Allahabad Bank* (1903) 25 All. 476, 30 I.A. 209; *Gaya Din* v. *Badri Singh* (1943) All. 230.

(*s*) See (1903) 25 All. 468, 474, 30 I.A. 202, *supra; Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 223, 48 Cal. 30, 57 I.C. 545, ('21) A.PC. 59; *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 236-237; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690, 708 [F.B.]; *Kasserbai* v. *Hunsraj* (1906) 30 Bom. 431, 452.

Privy Council in *Debi Mangal Prasad* v. *Mahadeo Prasad* (*t*), that it is not her stridhana even under the Mitakshara law. The actual point decided in that case was that there was no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition (*u*). It does not therefore pass on her death to her stridhana heirs, but reverts on her death to the next heirs of her husband in the absence of an express agreement amongst the co-sharers to the contrary.

It will be noted that property acquired by a woman by *inheritance* and that acquired by her on *partition* are two of the five additional sorts of stridhana comprised in Vijnaneswara's "expansion" of *ádya* [§ 115]. As to both these it has been held by the Privy Council that they do not constitute her stridhana in such sense that on her death it passes to her stridhana heirs. The true view would now appear to be that the whole of Vijnaneswara's expansion has been discarded.

**123. The schools and stridhana.**—A summary of §§ 113 to 122 is given below:—

(1) The Smriti writers confine stridhana to gifts from relations made at any time and to gifts from strangers made before the nuptial fire and at the bridal procession. This is called *technical* stridhana [§ 113], and it is stridhana according to all the schools.

(2) Property acquired by a female during *maidenhood* or *widowhood*, though it be acquired by gift from strangers or by mechanical arts, constitutes her stridhana according to all the schools [§§ 127-132].

(3) Though according to the Mitakshara every kind of property howsoever acquired by a woman would appear to be her stridhana, the effect of the decisions of the Privy Council referred to in § 122 is to curtail the definition of stridhana as propounded by Vijnaneswara by excluding from it in effect the five additional sorts of stridhana enumerated by him [§ 115].

(4) The law of the Benares school is that stated in sub-sec. (3) [§§ 117 and 122].

(5) Every description of property which is stridhana according to the Mitakshara as interpreted by the Privy Council would seem to be stridhana according to the Bombay school. That school also recognizes as stridhana every kind of property *inherited* by a woman, except where the woman inheriting the property is a widow, mother, or other female who entered the *gotra* of the deceased owner by marriage [§ 130]. See §§ 116 and 122.

(6) Having regard to the Madras decisions set forth in § 118, it would seem that every description of property which is stridhana according to the Mitakshara as interpreted by the Privy Council, is stridhana according to the Madras school.

(7) The Mithila school confines stridhana within the definitions of the Smriti writers; it does not recognize non-technical stridhana [§ 119].

(8) According to the Dayabhaga or Bengal school, that alone is stridhana which a woman has power to dispose of without the consent of her husband [§ 120].

(9) Property which comes within any of the descriptions of stridhana is not the less stridhana, because it happens to be a kind of property which was not known to the Hindu law when the Commentaries were written. "We are not prepared," said the High Court of Calcutta in a Dayabhaga case, "to hold that the rules of Hindu law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject-matter of transactions at the time when the rules were first formulated." Thus a gift by a father to his daughter is stridhana according to all the schools: and it is not the less stridhana, because the gift is of a *maurasi mokarari* lease, a sort of interest in property unknown to the Hindu law when the Dayabhaga was written (*v*).

(10) It will be seen from what is stated above, that the stridhana of the Bombay school is more extensive than the stridhana of every other school, for the Bombay school, while recognizing as stridhana every kind of property which is stridhana according to the other schools, recognizes in certain cases inherited property also as stridhana, which no other school does.

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(*t*) (1912) 34 All. 234, 39 I.A. 121, 14 I.C. 1000.

(*u*) *Kamla Devi* v *Bachulal* ('57) A.S.C. 434, 440.

(*v*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315, 319.

To say of a property possessed by a woman that it is her stridhana is the same thing as saying that she is the *full owner* thereof. To say that the stridhana of the Dayabhaga school is less comprehensive than that of the Bombay school, is equivalent to saying that the Dayabhaga school does not recognize the *full ownership* of women in as many kinds of property as the Bombay school; but though this is so, females governed by the Dayabhaga school possess an advantage which females subject to the Mitakshara law do not. For while according to the Mitakshara law, the interest of a coparcener in ancestral property passes on his death to his coparceners by *survivorship*, according to the Dayabhaga law, it passes to his heir by *succession*. The result is that according to the Mitakshara law, a widow, daughter, mother, etc., can never succeed to ancestral property so long as a single coparcener is in existence; while according to the Dayabhaga law, their succession is not impeded by the existence of any coparcener. Thus if two brothers *A* and *B* are joint, and *A* dies leaving a widow, or a daughter, or a mother, according to the Mitakshara law, *A*'s interest in the joint property will pass on his death not to his widow, or daughter, or mother, but to *B* by survivorship, while according to the Dayabhaga law, it will pass to his widow, daughter or mother as the case may be, though, it may be noted, none of them takes as a *full owner* [§§ 177-180].

## II.—SPECIAL FEATURES OF STRIDHANA

**124. Peculiar features of Stridhana.**—A Hindu female may acquire property from various sources. She may acquire it by gift, or by inheritance, or on partition. She may also acquire it by her own labour and skill. But all property acquired by her is not stridhana. Whether a particular kind of property is stridhana or not, depends on—

(1) the *source* from which the property was acquired.

(2) her *status* at the time of acquisition, that is whether she acquired it during maindenhood, coverture, or widowhood; and lastly,

(3) the *school* to which she belongs.

What is stridhana, and what is not, according to the different schools, we have already stated in section 123 and the earlier sections. We shall elucidate this subject still further by treating it from a practical point of view, that is, by enumerating all possible descriptions of property that may be lawfully acquired by a Hindu female, and dealing with each one of these descriptions separately in separate sections, and stating which of them are stridhana and which are not according to the different schools [§§ 125 to 135]. In the meantime it may be asked, what is the practical importance of the distinction between proporty which is stridhana and property which is not stridhana? The answer is that the distinction is important in two ways: *first*, as regards *succession* and, *secondly*, as regards the *power* of *alienation*.

Stridhana of every description belonging to a woman passes on her death to her heirs [§§ 145-157]. It is not so with regard to women's property which is not stridhana.

Stridhana belonging to a woman is property of which she is the absolute owner, and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood [§§ 141 to 144]. But a woman is *not the absolute owner* of property which is not her stridhana, nor can she dispose of it at her pleasure even during widowhood. She is merely a *qualified* owner of such property; in other words she takes only a *limited* interest in the property, the nature and extent of which depend on the character of the property.

## III.—ENUMERATION OF STRIDHANA.

**125. Sources of woman's property.**—A Hindu female may acquire property from diverse source. Several descriptions of property that may be lawfully acquired by a Hindu female are:

(1) Gifts and bequests from relations [§ 126].
(2) Gifts and bequests from strangers [§ 127].
(3) Property obtained on partition [§ 128].
(4) Property given in lieu of maintenance [§ 129].
(5) Property acquired by inheritance [§ 130].
(6) Property acquired by mechanical arts [§ 131].
(7) Property obtained by compromise [§ 132].
(8) Property acquired by adverse possession [§ 133].
(9) Property purchased with stridhana or with savings of income of stridhana [§ 134].
(10) Property acquired from sources other than those mentioned above [§ 135].

Bequests stand on the same footing as gifts (*w*).

**126. Gifts and bequests from relations.**—Property given or bequeathed (*x*) to a Hindu female, whether during maidenhood, coverture, or widowhood, by her parents and their relations, or by her husband and his relations (*y*), is stridhana according to all the schools, except that the Dayabhaga does not recognize *immoveable property* given or bequeathed by a *husband* to his wife as stridhana (*z*) [§ 120].

*Gifts from relations.*—Gifts from relations constitute "technical" stridhana [§ 113]. These gifts bear various names according to the occasion on which they are made. Those names are—

(1) *adhyagni,* that is, gifts made before the nuptial fire;
(2) *adhyavahanika,* that is, gifts made at the bridal procession;
(3) *padavandanika,* that is, a gift made to a woman when she makes obeisance at the feet of elders;
(4) *anwadheyaka,* that is, gift made *after* marriage;
(5) *adhivedanika,* that is, gifts made on supersession;
(6) *sulka,* that is, gratuity or marriage-fee;
(7) *pritidatta,* that is, gifts of affection made by the father-in-law or mother-in-law;
(8) *bhartridatta,* that is, gifts from the husband.

The above terms are explained in § 113.
See § 401, "Gifts and bequests to widows, daughters, and other females."

**127. Gifts and bequests from strangers.**—A gift may be received by a Hindu female from a stranger, that is, from one who is not a relation, (1) during maidenhood, or (2) at the time of marriage, or (3) during coverture, or (4) during widowhood.

(1) Property given or bequeathed to a Hindu female by strangers *during maidenhood* is her stridhana according to all the schools (*a*).

The principal text which excludes gifts from strangers from the category of stridhana is that of *Katyayana.* It runs thus:—

"The wealth which is earned by *mechanical arts,* or which is received through affection *from a stranger,* is *subject to her husband's dominion.* The rest is pronounced to be stridhana."

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(*w*) *Judoo Nath* v. *Bussunt Coomar* (1873) 19 W.R. 264.

(*x*) (1873) 19 W.R. 264, *supra* (bequest from father); *Damodar* v. *Parmanandas* (1883) 7 Bom. 155 (bequest from husband); *Basanta Kumari* v. *Kamikshya* (1906) 33 Cal. 23, 32 I.A. 181 (bequest from brother); *Atul* v. *Sanyasi* (1905) 32 Cal. 1051 (bequest from son).

(*y*) See *Sambasiva* v. *Venkataswara* (1908) 31 Mad. 179. Also see § 226.

(*z*) See Dayabhaga, ch. 4, sec. 1 paras. 18 and 21. See also *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286, 287.

(*a*) See Dayabhaga, chap. 4 sec. 1, para. 20 and *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286.

The words "subject to her *husband's* dominion," in the above text show that the text does *not* apply to acquisitions or gifts from strangers *during maidenhood or during widowhood.* The words refer to acquisitions and gifts from strangers *during coverture only* (*a*).

(2) Property given by strangers to a Hindu female *before the nuptial fire* or *at the bridal procession* is stridhana according to all schools. Such property, like property given by relations, constitutes "technical" stridhana [§ 113].

(3) Property given or bequeathed by strangers to a Hindu female *during coverture* is stridhana according to the Bombay, Benares, and Madras (*b*) schools [§§ 116-118], but not according to the Mithila and Dayabhaga schools [§§ 119-120].

Even according to the Dayabhaga, such property becomes her stridhana after her husband's death, as appears from the fact that the Dayabhaga recognizes the ownership of the *wife* in such property even during coverture, though it says it is not her stridhana because it is subject to her husband's control. It is difficult to say whether, according to the Mithila school, such property becomes stridhana after the death of the husband.

*Dayabhaga school.*—The Dayabhaga first cites the text of Katyayana relating to gifts from strangers and acquisitions by mechanical arts quoted above, and then says: "He (the husband) has a right to take it, even though no distress exists. Hence *though the property is hers,* it does not constitute stridhana because she has no independent power over it": Dayabhaga, chap. 4, sec. 1, para. 20.

The meaning of the above text is that though the *ownership* of the property is in the wife, it is not her stridhana for, according to the Dayabhaga definition of stridhana, that alone is stridhana which a woman can dispose of *independently* of her husband's consent. On this point Jagannatha say:—

"But according to Jumutavahana, Raghunandana, and the rest, *the wife is the sole owner* of wealth acquired by her *even during coverture;* yet she has not independent power over it so long *as her husband lives.* It must therefore be understood, that the legal heirs of stridhana succeed also to this wealth, even if the wife dies in the lifetime of the husband." Colebrooke's Digest, Book V, 515, commentary, Vol. II, p. 628.

*Mithila school.*—It is difficult to say whether according to the Mithila school a gift from a stranger received during coverture becomes the stridhana of the wife on her husband's death. The trend of modern decisions is to follow the Mitakshara unless the special commentaries of the school in question *expressly* declare that a particular kind of property is not stridhana.

(4) Property given (*c*) or bequeathed (*d*) to a Hindu female *during widowhood* is her stridhana. Where a father made a gift of certain properties to his widowed daughter for life with remainder to his heirs, the rents and profits accruing from such properties, including all accumulations thereof are her stridhana, though the corpus is not (*e*).

See notes to sub-section (1).

**128. Share on partition.**—(1) According to the Dayabhaga school, where a share is allotted to a mother or father's mother on partition of joint family property, it is given to her by way of provision for her *maintenance* for which

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(*a*) See Dayabhaga, chap. 4, sec. 1, para. 20. and *Venkata* v. *Venkata*, supra.

(*b*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, a case of service inam enfranchised by Government in favour of a married woman *during* coverture.

(*c*) *Brij Indar* v. *Janki Koer* (1877) 5 I.A. 1, 1 Cal. L.R. 318 [property acquired *by a widow* under a sannad from Government, which conferred upon her a full proprietary and transferable right in the property is her stridhana. It was a Mitakshara case, but the Dayabhaga has been freely cited in the judgment of the Privy Council].

(*d*) *Bai Narmada* v. *Bhagwantrai* (1881) 12 Bom. 505.

(*e*) *Mohini Mohan Basu* v. *Rashbihari Ghose* (1937) 2 Cal. 97, 169 I.C. 519, ('37) A.C. 229.

the family property is bound. It is not, therefore, her stridhana, and it does not pass on her death to the stridhana heirs, but reverts to the sons or grandsons out of whose portion it was taken out (*f*).

(2) Even in cases governed by Mitakshara, the Privy Council have held in *Debi Mangal Prasad* v. *Mahadeo Prasad* (*g*) that a share allotted to a mother on partition is not her stridhana, but stands on the same footing as property inherited by her from her husband (*h*), and that on her death it passes not to her stridhana heirs, but to the sons or grandsons.

(3) According to the Mithila school, the share allotted to a woman on partition is not stridhana (*i*). The reason is that it is not one of the eleven kinds of stridhana enumerated in the Vivada Chintamani [§ 119].

(4) As regards the Madras school, the practice of allotting a share to females on partition has become obsolete. No question can, therefore, arise in that school as to whether such share is stridhana or not [§ 118].

The question whether the share allotted to a mother on partition is stridhana or not according to the Benares school was left open by their Lordships of the Privy Council in *Bhugwandeen* v. *Myna Baee* (*j*), the very case in which they held that property *inherited* by a woman was not stridhana according to the Mitakshara. In *Debi Mangal Prasad's* case, the Allahabad High Court, after a review of all the authorities on the subject, held that it was stridhana, but the Privy Council held that it stood on the same footing as property *inherited* by a woman and that it was not stridhana [sub-sec. (2)].

Where a deed of partition confers in terms an absolute estate upon the mother in the share allotted to her, she takes the share as her stridhana (*k*). In *Debi Mangal Prasad's* case the Privy Council said: "Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her stridhana, so as to constitute a provision for her stridhana heirs; but in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed." In a later case, where a share was given by the step-sons to their step-mother and the agreement provided that she was to be responsible for a definite share of the debts, their Lordships of the Privy Council held that the step-mother took an absolute interest in the share allotted to her (*l*)

**129. Property given in lieu of maintenance.**—Money paid to a Hindu female periodically for her maintenance (*vritti*), and the arrears of such maintenance, or a lump sum of money given to her in lieu of maintenance, constitute stridhana according to all the schools (*m*). So too does immoveable property transferred to a woman by way of absolute gift in lieu of maintenance (*n*).

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(*f*) *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292; *Hridoy Kant* v. *Behari Lal* (1906) 11 C.W.N. 239; *Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 16 I.A. 115; *Sashi Bhusan* v. *Hari Narayan* (1921) 48 Cal. 1059, 1065, 1066, 66 I.C. 705, ('21) A.C. 202; *Hira Lal Mandal* v. *Sankar Lal Mandal* (1938) 2 Cal. 250.

(*g*) (1912) 34 All. 234, 39 I.A. 121, 14 I.C. 1000, Reversing 32 All. 253, 5 I.C. 208; *Munni Lal* v. *Phula* (1928) 50 All. 22, 105 I.C. 322, ('27) A.A. 679.

(*h*) *Bhagwantrao* v. *Punjaram* (1938) Nag. 255 174 I.C. 201 ('38) A.N. 1; *Sital Prasad* v. *Sri Ram* (1944) Luck. 450.

(*i*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 45, 44 I.C. 146, ('18) A.P. 91 (Share allotted to grandmother).

(*j*) (1876) 11 M.I.A. 487, 514.

(*k*) *Bolye Chund* v. *Khetterpaul* (1873) 11 Beng. L.R. 459.

(*l*) *Sahab Rai* v. *Shafiq Ahmad* (1927) 31 C.W.N. 972, 101 I.C. 426, ('27) A.PC. 101.

(*m*) *Doorga* v. *Teju* (1866) W.R. Mis. 53 (gift of money by son to mother for maintenance); *Court of Wards* v. *Mohessur* (1871) 16 W.R. 76 (Dayabhaga case); *Nellaikumaru* v. *Marakathammal* (1876) 1 Mad. 166; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1: *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758; *Gunpat Rao* v. *Ram Chunder* (1889) 11 All. 296. See particularly 28 Mad. 1. *supra*, at pp. 7 and 8; *Janardhan* v. *Sonalai* (1942) Nag. 16, 198 I.C. 293, ('42) A.N. 30.

(*n*) *Debi Mangal Prasad* v. *Mahadeo Prasad* 1912) 34 All. 234, 39 I.A. 121, 131, 14 I.C. 000.

It does not make any difference whether the maintenance is awarded during coverture (*o*) or during widowhood. Nor does it make any difference that it is awarded under an agreement between the parties or by a decree of the Court (*p*). The transfer of property given absolutely in lieu of maintenance is not void under sec. 6 of the Transfer of Property Act (*q*).

Arrears of maintenance constitute stridhana, though the maintenance is payable by the *husband* under a decree obtained by the wife against him. If the wife dies in the lifetime of the husband, such stridhana passes to her stridhana heirs, so that if she has a daughter, she will inherit it and she can claim it from the woman's husband, even if he happens to be her own father.

As to the law of the Mithila school, see § 119.

**130. Property acquired by inheritance.**—(1) A woman may inherit the ordinary property of a male such as her husband, father, son and the rest. She may also inherit the stridhana of a female such as her mother, daughter, and the rest.

(2) According to the Dayabhaga school, as well as the Benares, Mithila, and Madras schools, property inherited by a woman whether from a male or from a female, does not become her stridhana. She takes only a *limited* interest in the property [§§ 177-180], and on her death the property passes not to her heirs, but to the next heir of the person from whom she inherited it [§§ 168-169].

If the property is inherited from a male, it will pass to his sapindas, sakulyas and samanodakas, if the parties are governed by the Dayabhaga law [§§ 88-90], and to his sapindas, samanodakas and bandhus if the parties are governed by the Mitakshara law [§§ 43 to 50]. And if the property is inherited from a female, it will pass to the next stridhana heirs of such female [§§ 145-157].

*Illustration*

A Hindu dies leaving a widow and a brother. The widow will inherit his property as his heir. She takes only a *limited* interest in the property, that is, she can enjoy only the income of the property. She cannot alienate the property except in the cases mentioned in §§ 178-179. On her death, the property will pass not to her stridhana heirs, but to the next heir of her husband, that is, his brother. The same rule applies where a female inherits property from her father, son, son's son, or son's son's son, that is, where she inherits it as daughter, mother, grandmother, or great-grandmother respectively. As to property inherited *from a female* see the illustration to § 169 below.

(3) According to the Bombay school, property inherited by a woman *from a female* becomes her stridhana in all cases. She can dispose of it by act *inter vivos* [that is, by sale, mortgage, gift, etc.] or by will, and on her death intestate the property passes to her stridhana heirs (§ 171).

As regards property inherited by a female *from a male*, the Bombay school divides female heirs into two classes, namely—

(a) those who are introduced into the *gotra* or family of the deceased owner by marriage, such as the deceased's wife, mother, father's mother, etc.; and

(b) other female heirs, being females born in the family, such as the daughter, sister, brother's daughter, sister's daughter, etc.

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(*o*) (1893) 17 Bom. 758, *supra*.
(*p*) (1893) 17 Bom. 758, and (1905) 28 Mad. 1, *supra*.
(*q*) *Dhup Nath* v. *Ram Charitra* (1932) 54 All. 366, 138 I.C. 556, ('32) A.A. 366.

Property inherited by a female who belongs to class (a) does not become her stridhana. She takes only a limited interest in such property, and on her death it passes to the next heir of the male from whom she inherited it.

Property inherited by a female who belongs to class (b) becomes her stridhana in all cases. She can dispose of it by an act *inter vivos* or by will, and on her death it passes to her own stridhana heirs (§ 170).

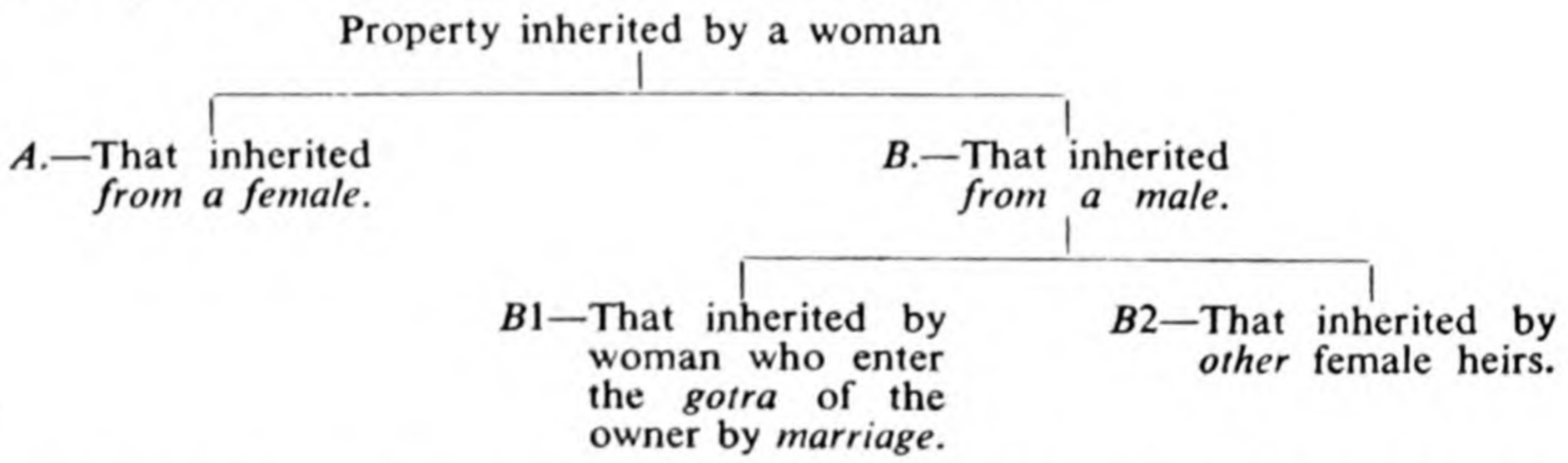
The result is, as regards property acquired by inheritance, that according to the Dayabhaga, Benares, Mithila, and Madras schools, it does not become stridhana in any case, while according to the Bombay school, it becomes stridhana in all cases except where it is inherited by the deceased's widow, mother, or other female relation who entered his *gotra* (family) by marriage.

The illustrations to §§ 170 and 171 may be read.

*Females who enter the gotra of a Hindu by marriage.*—These are his wife, his father's wife (*i.e.*, his mother), his father's father's wife (*i.e.*, his grandmother), his father's father's father's wife (*i.e.*, his great-grandmother), and the wives of *other ascendants;* also the wives of *collaterals*, a class of heirs recognized in the Bombay school only, namely his brother's wife, his nephew's wife, his uncle's wife, his cousin's wife etc. [§ 68]. In snort the females who enter the *gotra* of a Hindu by *marriage* are his own wife, and the wives of all his sapindas and samanodakas. All these take a limited interest in the property inherited by them from a male sapinda or samanodoka, and on their death the property passes not to their stridhana heirs, for it is not their stridhana but to the next heir of the male from whom they inherit it.

*Females born in the family.*—Turning now to the other female heirs in the Bombay State, that is, females other than those who enter the *gotra* of a person by marriage, it will be seen that they are either females *born* in his gotra or the daughters of such females. Thus a daughter, sister (father's daughter), niece (brother's daughter), are "daughters *born* in the *gotra*": while a daughter's daughter, sister's daughter, etc., are the daughters of "daughters born in the *gotra*." Property inherited by these female heirs from any male member of the *gotra* in which they are born, becomes their stridhana. Thus a daughter inheriting to a father, a sister inheriting to a brother, a niece inheriting to an uncle, all take the property absolutely as their stridhana. They can dispose of it in any way they like and on their death it passes to their own stridhana heirs.

What is stated above may be explained by a diagram thus:—




According to the Bombay school, *A* and *B*2 are stridhana; *B*1 is not stridhana. According to the other schools no inherited property can be stridhana at all.

**131. Property acquired by mechanical arts.**—A Hindu female may acquire property by mechanical arts or otherwise by her own exertions during maidenhood, or she may do so during coverture, or during widowhood.

(1) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during maidenhood or widowhood is stridhana according to all the schools. The reason is, that the text of Katyayana which excludes such property from the category of stridhana applies only to property acquired during coverture [§ 127, sub-§ (1), notes].

(2) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during coverture is stridhana according to the Bombay, Benares, and Madras (*r*) schools [§§ 116-118], but not according to the Mithila and Dayabhaga schools [§§ 119-120].

But if the woman survives her husband, then, it seems that according to the Dayabhaga law such property becomes her stridhana, for the Dayabhaga distinctly recognizes the *wife's* ownership in the property even during coverture. It is difficult to say whether it becomes stridhana according to the Mithila law.

The notes to § 127, sub-§§ (1) and (3) may be read. Mechanical arts include spinning, painting, etc.

**132. Property obtained by compromise.**—As to properties obtained by a woman under a compromise or a family arrangement, there is no presumption that she takes only a life estate. What estate she takes depends on the terms of the deed and other circumstances (*s*). Accordingly, where one of two brothers living jointly died and his share was claimed by right of survivorship by the other brother, while the widow claimed it as his heir and the matter was referred to arbitration and under the award certain property was allotted to her, it was held by the Privy Council that she took an absolute estate in the property allotted to her on the ground that there were no words in the award to narrow her interest (*t*). Property obtained by a woman under a compromise in consideration of her giving up her rights in relation to her stridhana is stridhana according to all the schools (*u*). Property obtained by a widow under a compromise with her adopted son, is her absolute property (*v*). Where a daughter, not an heir by custom, obtains property from a reversioner by a compromise, it is her stridhana (*w*).

**133. Property obtained by adverse possession.**—Property acquired by a Hindu female, whether during coverture (*x*) or widowhood (*y*), by adverse possession, becomes her stridhana according to all the schools. See § 211 below.

A Hindu female executes a deed of gift of her *stridhana* in favour of her daughter, but the deed is not registered. The daughter enters into possession of the property In such a case if the mother dies after the daughter's possession has become adverse, the daughter is entitled to the property *as her stridhana*, the same having been acquired by adverse possession, and on her death it will pass to her heirs. But if the mother dies before twelve years' adverse possession has been completed leaving the daughter as her heir, and the daughter continues in possession, her possession after her mother's death is the possession of an heir, and she takes a *limited* interest in it, and at her death the property will pass not to her heirs, but to the next stridhana heirs of the mother (*z*) See § 169.

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(*r*) See *Salemma* v. *Lutchmana* (1896) 21 Mad. 100, at p. 105; *Muthu Ramakrishna* v. *Marimuthu* (1915) 38 Mad. 1036, 24 I.C. 363, ('14) A.M. 128 [property acquired by husband and wife by joint trade].

(*s*) *Pandit Adya Shankar Tewari* v. *Mst. Chandrawati* (1935) 10 Luck. 35, 150 I.C. 519, ('34) A.O. 265.

(*t*) *Nathu Lal* v. *Babu Ram* (1936) 63 I.A. 155, 38 Bom. L.R. 462, 151 I.C. 33, ('36) A.PC. 103.

(*u*) *Sowdaminee Dossee* v. *Administrator-General of Bengal* (1893) 20 Cal. 433, 438-439, 443, 20 I.A. 12. See also *Sambasiva* v. *Venkataswara* (1908) 31 Mad. 179.

(*v*) *Parshottam* v. *Keshavlal* (1932) 56 Bom. 164, 137 I.C. 561, ('32) A.B. 213.

(*w*) *Rai Rajeshwar* v. *Har Kishen* (1933) 8 Luck. 538, 150 I.C. 346, ('38) A.O. 170

(*x*) *Mohim Chunder* v. *Kashi Kant* (1897) 2 C.W.N. 161, 162.

(*y*) *Sham Koer* v. *Dah Koer* (1902) 29 Cal. 664, 29 I.A. 132; *Kanhai Ram* v. *Amri* (1910) 32 All. 189, 5 I.C. 207; *Mohim Chunder* v. *Kashi Kant* (1897) 2 C.W.N. 161; *Bheron Singh* v. *Ramchandra Bai* ('57) A. Madh. Bha. 138.

(*z*) *Dhurjati* v. *Ram Bharos* (1930) 52 All. 222, 121 I.C. 701, ('30) A.A. 109. *Atchanna* v. *Appanna* ('67) A.A.P. 147.

**134. Property purchased with stridhana.**—Property purchased by a woman with her stridhana, and the savings of the income of stridhana, constitute stridhana according to all the schools (*a*).

It does not make any difference that the property purchased is *immovable* property [§ 177]. Nor does it make any difference that it was purchased by her in the exercise of a right of pre-emption, though she could not have claimed the right had she not been in possession of her husband's property which adjoined the property purchased by her. If it was purchased with her stridhana, it is her property (*b*). The mere fact that she could not have acquired the property had she not been in possession of her husband's estate does not make it part of her husband's estate (*c*). Where the main estate was in the hands of a receiver appointed under a decree and the widow was only receiving a pension, purchases of properties made by the widow out of her savings would be her stridhana and would pass to her stridhana heirs (*d*).

If a woman obtains property *in exchange* for property which is her stridhana or advances money which forms her stridhana on a mortgage, or takes an assignment of leasehold property with her stridhana, all such property constitutes her stridhana.

**135. Property acquired from other sources.**—We have enumerated in §§ 126 to 134 the principal sources from which property may be acquired by a Hindu female. Whether property acquired by her from any other source constitutes her stridhana or not, is to be determined with reference to the provisions of § 123 above.

We have already stated in § 124 that stridhana has two peculiarities attached to it, namely, (1) that the woman has absolute power of disposal over it except in certain cases during coverture, and (2) that it follows a special order of succession. We shall deal with the first of these in §§ 141 to 144, and with the second in §§ 145 to 164. In fact, the question whether a particular kind of property is stridhana or not becomes important only when the question arises as to her *power to dispose of it* or as to the *line of succession* thereto.

**136. Stridhana by custom.**—The widow of a separated Hindu who dies without leaving male issue may, by custom, inherit his estate as stridhana (*e*).

In the case referred to above the parties were Jains governed by the Mitakshara law.

**137. Maiden's property.**—It is clear from what has been stated in the foregoing sections that except property inherited by her all property of a maiden, however acquired, whether by way of gift or bequest from relations or from strangers, or by mechanical arts or otherwise by her own exertions, constitutes her stridhana. But in the Bombay school, even property inherited by her is her stridhana, for a maiden does not come within the category of females who enter the gotra of the owner by marriage [§ 130, sub-§ (4)].

See notes to § 127, sub-§ (1).

The word *rikhta* (property) is perhaps more appropriate to be applied to the property of a maiden than the word *stridhana*.

**138. Property acquired during widowhood.**—It follows from what has been stated in the preceding sections, that all property of a widow acquired

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(*a*) *Luchman* v. *Kalli Churn* (1873) 19 W.R. 292 [P.C.]: *Venkata* v. *Venkata* (1880) 2 Mad. 333 [P.C.] affirming *Venkata* v. *Venkata* (1877) 1 Mad. 281; *Nellaikumaru* v. *Marakathammal* (1876) 1 Mad. 166; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

(*b*) *Sri Ram* v. *Jagdamba* (1921) 43 All. 374, 61 I.C. 3, ('21) A.A. 11 [F.B.].

(*c*) *Mahna Singh* v. *Thaman Singh* (1931) 11 Lah. 393, 128 I.C. 293, ('30) A.L. 1010.

(*d*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, ('26) A.M. 84.

(*e*) *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 107 I.C. 244, ('28) A.A. 52.

by her during widowhood (whether by way of gift or bequest from relations or from strangers, or by mechanical arts, or by way of maintenance, or by adverse possession, or under a compromise), constitutes her stridhana except—

(i) according to the Bombay school, property inherited by her as a widow, mother, grandmother, etc.; and, according to other schools, *all* property inherited by her in any capacity [§ 130]; and

(ii) property obtained by her on partition [§ 128].

See § 127 and notes thereto, and also §§ 129, 131, 132 and 133.

**139. Unchastity.**—Unchastity does not disqualify a woman from inheriting stridhana property (*f*).

**140. Presumption as to property found in widow's possession.**—Where a widow is found in possession of property of the acquisition of which no account is given, then the mere fact that her husband died possessed of considerable property raises no presumption that the property found in her possession was originally that of her husband (*g*). Nor is there any presumption that the money with which a widow in possession of her husband's estate makes a purchase of property came out of the savings from her husband's estate (*h*). Generally where a woman has been in possession of property, there is no presumption that she had only a limited estate in it (*i*).

## IV.—RIGHTS OF A WOMAN OVER HER STRIDHANA

**141. Texts bearing on the subject.**—The whole law relating to the rights of women over their stridhana has been evolved from the following four texts, of which the first three are the texts of Katyayana, and the last is the text of Narada:

(1) "What a woman, either after marriage or before it, either in the mansion of her husband or of her father, *receives from her lord or her parents* is called *saudayika,* that is, a gift from affectionate kindred; and such a gift having by them been presented through kindness, that the woman possessing it may live well, is declared by law to be her absolute property. *The absolute exclusive dominion of women over such a gift is* perpetually celebrated; and they have *power to sell or give it away as they please,* even though it consists of lands and houses. Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alienate the legal property of a woman."—*Katyayana* [Colebrooke's Digest, Book V, p. 475].

(2) "The wealth which is earned *by mechanical arts* or which is received through affection *from a stranger* is *subject* to her husband's dominion."—*Katyayana* [cited in the Dayabhaga, chap. 4, sec. 1, para. 19].

(3) "What a woman has received as a *gift from her husband* she may dispose of at pleasure *after his death,* if it be *movable;* but as long as he lives, let her preserve it with frugality or she may commit it to his family."—*Katyayana* [Colebrooke's Digest, Book V, p. 477].

(4) "Property *given to her by her husband* through pure affection she may enjoy at her pleasure after his death, or may give it away *except land or houses.*"—*Narada* [Colebrooke's Digest, Book V, p. 476].

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(*f*) *Mst. Ganga* v. *Ghasita* (1875) 1 All. 46; *Nogendra* v. *Benoy Krishna* (1903) 30 Cal. 521; *Angammal* v. *Venkata* (1903) 26 Mad. 509.

(*g*) *Diwan Ram Bijai* v. *Indrapal* (1899) 26 Cal. 871, 26 I.A. 226; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I.C. 109 ('21) A.B. 138; *Narayana* v. *Krishna* (1885) 8 Mad. 214; *Chowdrani* v. *Tariny Kanth* (1882) 8 Cal. 545.

(*h*) *Baikunth Nath* v. *Jai Kishun* (1929) 51 All. 341, 113 I.C. 266, ('29) A.A. 449.

(*i*) *Balo* v. *Parbati* (1940) All. 371, 190 I.C. 634, ('40) A.A. 385.

It follows from the above texts—

(i) that *during maidenhood,* a Hindu female can dispose of her stridhana of every description at her pleasure;

(ii) that *during coverture,* she can dispose of only that kind of stridhana which is called saudayika, that is, gifts from relations except those made by the husband;

(iii) that *during widowhood,* she can dispose of her stridhana of every description at her pleasure including movable property given by the husband, but not immovable property given by him.

When we turn to judicial decisions on the subject, we find that the distinction between *saudayika,* that is gifts from *relations,* and *non-saudayika* is still maintained, but the distinction between *saudayika* given by the husband and that given by other relations no longer stands. Instead we have now a simple rule for all kinds of *saudayika* based upon the distinction between an absolute grant and a limited grant. In order to determine whether *saudayika,* that is property given to a female by her *relations,* can be disposed of by her at her pleasure, the rule now adopted by our Courts is to ascertain whether the gift passes an absolute estate or a limited estate. If the gift passes an absolute estate, she can dispose of the property at her pleasure *whether the gift be from her husband or other relations.* But if the gift passes a limited estate only in the property, *e.g.,* a life-estate, she cannot alienate the property though she may alienate her life-estate. Thus if *A* gives property to his daughter for life, and the remainder to his nephew on the death of his daughter, the daughter takes only a life-estate. She cannot therefore alienate the *corpus* of the property, though she may alienate her life interest. We now proceed to state the rules on the subject, so far as they are settled by judicial decisions.

**142. Rights over stridhana during maidenhood.**—There is no limitation to the power of a Hindu female to dispose of her stridhana during maidenhood, whatever be the character of the stridhana, qualification attaching except the disqualification to her by reason of minority.

So long as a Hindu maiden is a minor, she cannot alienate her property except through her guardian, nor can she dispose of it by will.

Note that the texts cited in § 141 refer only to the case of a *married* woman.

**143. Rights over stridhana during coverture—Saudayika and non-saudayika.**—The power of a woman to dispose of her stridhana during coverture depends on the character of the stridhana. For this purpose stridhana is divided into two classes, namely, (1) *saudayika,* and (2) other kinds of stridhana. *Saudayika* means, literally, a gift made through affection. It is a term applied to gifts made to a woman at, before, or after marriage, by her parents and their relations, or by her husband and his relations; in other words it means gifts from *relations* as distinguished from gifts from *strangers* (*j*). It also includes *bequests* from relations (*k*).

*Saudayika alienable at pleasure.*—A woman has absolute power of disposal over her *saudayika* stridhana even during coverture. She may dispose of it by sale, gift, will, or in any other way she pleases, without the consent of her husband (*l*). Her husband has no control over it. He cannot bind her by any dealings with it (*m*). But he can "take" it in case of distress, as in a famine, or during illness or imprisonment. This right to

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(*j*) *Muthukaruppa* v. *Sellathammal* (1916) 39 Mad. 298, 26 I.C. 785, ('15) A.M. 475; *Bhau* v. *Raghunath* (1906) 30 Bom. 229; *Rajamma* v. *Varadarajulu* ('57) A.M. 198.

(*k*) *Damodar* v. *Parmanandas* (1883) 7 Bom. 155 [bequest from husband]; *Judoo Nath* v. *Bussunt Coomar* (1873) 11 Beng. L.R. 286, 295 [bequest from father].

(*l*) *Venkata* v. *Venkata* (1880) 2 Mad. 333 [P.C.] [affirming *Venkata* v. *Venkata* (1877) 1 Mad. 281] [gifts of moveables from husband]; *Munia* v. *Puran* (1883) 5 All. 310 [immoveable property acquired from brother]; *Bhau* v. *Raghunath* (1906) 30 Bom. 229; *Sham Shivendar* v. *Janki Koer* (1909) 36 Cal. 311, 36 I.A. 1; *Emperor* v. *Sat Narain* (1931) 53 All. 437, 130 I.C. 693, ('31) A.A. 265; *Venkaraddi* v. *Hanmantgowda* (1933) 57 Bom. 85, 141 I.C. 682, ('32) A.B. 559; *Rajamma* v. *Varadarajulu* ('57) A.M. 198; *Hanmant* v. *Rango* ('61) A. Mys. 206 [decree for arrears of maintenance].

(*m*) *Mohima Chunder* v. *Durga Monee* (1875) 23 W.R. 184 [P.C.]

take the wife's property is personal to him, and if he does not choose to take it, it cannot be taken by his creditors in execution of a decree against him (*n*). The word "take" in the text of Yajnavalkya does not mean "physical taking," but means "taking and using." Hence if the husband takes his wife's property in circumstances such as the above, but does not actually use it or dispose of it in his lifetime, his creditors are not entitled to it after his death (*o*).

Property inherited by a married daughter from her parents is her "Saudayika" stridhana, and she can dispose it of in any way she likes even during coverture, and no consent of her husband is necessary to validate any act of alienation (*p*). The contrary view taken in *Bhau* v. *Raghunath* (*q*) is no longer good law.

*Stridhana other than saudayika.*—Saudayika stridhana, we have seen, can be disposed of by a woman at her pleasure and without the consent of her husband. As regards stridhana other than *saudayika,* at times referred to as *non-saudayika* stridhana, *e.g.*, gifts from strangers, property acquired by mechanical arts, etc., the rule is that she has no power to dispose of it during coverture without the consent of her husband (*q*). It is subject to her husband's dominion, and he is entitled to use it at his pleasure even if there be no distress. In a case where, though the wife was not living with the husband for 20 or 25 years, she was living in a separate room in a temple and the husband lived in the same temple it was held that she was under coverture and the rule was applied (*r*). The rule was, however, not applied where the husband and wife had drifted apart and the wife was not under the control of the husband (*r*1). The *non-saudayika* stridhana referred to above is subject only to her husband's control and not to the control of any other person. After the husband's death, her power to dispose of it becomes absolute, and she may dispose of it by act *inter vivos* or by will.

When it is said that stridhana other than *saudayika* (gifts from relations), cannot be disposed of by a woman without her husband's consent, it is meant that *in her lifetime* she cannot sell it, or make a gift of it, or bequeath it by her will, or otherwise deal with it without her husband's consent. *On her death* whether she dies before (*s*) or after her husband, it passes to her stridhana heirs.

**144. Rights over stridhana during widowhood.**—A Hindu female has during widowhood absolute power of disposal over every kind of stridhana, whether acquired, before or after her husband's death (*t*).

## V.—SUCCESSION TO STRIDHANA

**145. Succession to maiden's property.**—Succession to a woman's stridhana varies according as she was married or unmarried, and according as she was married in an approved or in an unapproved form. It also varies according to the source from which the stridhana came. The rules of descent, again, are different in different schools. But the schools do not differ as to succession to the property of a maiden (*u*). A maiden's property, according to all the schools, passes in the following order:—

(1) uterine brother;
(2) mother;
(3) father;

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(*n*) *Tukaram* v. *Gunaji* (1871) 8 Bom. H.C.A.C. 129.

(*o*) *Nammalwar* v. *Thayarammal* (1927) 50 Mad. 941, 105 I.C. 793, ('27) A.M. 1031.

(*p*) *Gajanan* v. *Pandurang* (1950) Bom. 386, 52 Bom. L.R. 238, (1950) A.B. 178 (F.B.). [This was the view taken by Sen J. in *Dhondrappa* v. *Kasabai* (1948) Nag. 936].

(*q*) (1906) 30 Bom. 229. See *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 105.

(*r*) *Sarubai Balakdas* v. *Narayandas Bairagi* (1943) Bom. 314, 209 I.C. 620, ('43) A.B. 224.

(*r*1) *Shantabai* v. *Ramchandra* ('60) A.B. 408, (1959) Bom. 1120, 61 Bom. L.R. 627; *Bhagwanlal* v. *Divali* ('25) A.B. 445.

(*s*) *Salamma* v. *Lutchmana* (1898) 21 Mad. 100; Banerjee's "Hindu Law of Marriage and Stridhana", 5th ed., pp. 382-383 [as to gifts from strangers and property acquired by mechanical arts].

(*t*) *Brij Indar* v. *Janki Koer* (1877) 1 Cal. L.R. 318, 325, 5 I.A. 1, 15; *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286.

(*u*) *Annagouda* v. *Court of Wards* (1952) S.C.R. 208, 54 Bom. L.R. 395, ('52) A.SC. 60.

(4) father's heirs in order of propinquity (*v*); e.g., the full sisters of maiden's father were preferred to the half sisters (*w*);

(5) kinsmen of the deceased herself, that is, her mother's heirs in order of propinquity (*v*).

*Death of girl after betrothal and presents received from bridegroom.*—Where a girl dies after betrothal, all presents received from the bridegroom are to be returned to him, after deducting all expenses incurred by the bride or her parent or guardian. Similarly presents received by the bridegroom must be returned (*x*).

The order of succession down to no. 3 (father) is based upon a text of Baudhyayana which is followed by all the schools. The line of descent is not carried any further in that text. The Viramitrodaya of the Benares school, after citing the said text adds: "On failure of the mother and the father, it goes to *their nearest relations.*" This has been interpreted by the High Court of Bombay to mean that it goes, first, to the father's sapindas, and then to the kinsmen of the deceased herself, that is, to the mother's sapindas. Thus where a maiden died leaving her *father's* mother's sister and her *mother's* mother, it was held by the High Court of Bombay that the former being a sapinda of the father, was entitled to succeed in preference to the latter who was a sapinda of the mother (*y*). It has similarly been held by the High Court of Madras that a step-mother (*father's* wife) is entitled to succeed in preference to a *mother's* sister (*z*).

*Father's heirs in order of propinquity.*—In the Bombay State a father's *sister* is entitled to succeed to a maiden's stridhana in preference to the father's male gotraja sapindas five or six degrees removed (*a*); see § 56 and § 74. But in Madras a sister is a bandhu [§ 56]; hence in that State, the father's male gotraja sapindas, *e.g.*, his paternal uncle's son, would be preferred to his sister (*b*).

Under the Mitakshara law as applied by the High Court of Calcutta, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's stridhana in preference to a father's brother's son (*c*).

It has been held by the Privy Council (*d*) that as under the Mitakshara law the stridhana property of a maiden dying without leaving uterine brothers or parents goes to her father's heirs in the order laid down for succession to the property of a male, a Sagotra Sapinda of the father within seven degrees is to be preferred to a nearer Bhinnagotra Sapinda.

**146. Succession to shulka.**—(1) The term shulka is differently interpreted in different schools [see §§ 147, 150, 152, 153 and 154]. According to the Benares, Bombay, Madras and Mithila schools, *shulka* passes in the following order:—

1. uterine brother;
2. mother;

   in default of these, it is conceived that it passes to—

3. father;
4. father's heirs, that is, his sapindas, samanodakas and bandhus.

(2) According to the Dayabhaga, *shulka* passes in the following order:—

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(*v*) *Annagouda* v. *Court of Wards* (1952) S.C.R. 208 (paternal uncle's son in preference to sister's sons); *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 413; *Shamarao* v. *Raghunandan* (1939) Bom. 228, ('39) A.B. 194.

(*w*) *Shakuntalabai* v. *The Court of Wards* (1942) Nag. 629, 199 I.C. 379, ('42) A.N. 57.

(*x*) *Kunwar Rajendra Bahadur Singh* v. *Kunwar Roshan Singh*, I.L.R. (1952) 2 All. 681.

(*y*) (1908) 32 Bom. 409, *supra*.

(*z*) *Kamala* v. *Bhagirathi* (1915) 38 Mad. 45, 16 I.C. 939, ('16) A.M. 925.

(*a*) *Tukaram* v. *Narayan* (1912) 36 Bom. 339, 14 I.C. 438 [F.B.].

(*b*) *Sundaram* v. *Ramasamia* (1920) 43 Mad. 32, 52 I.C. 821, ('20) A.M. 728.

(*c*) *Dwarka Nath* v. *Sarat Chandra* (1912) 39 Cal. 319, 11 I.C. 872.

(*d*) *Chhaterpati* v. *Lachmidhar*, 25 Pat. 649 (P.C.), (1946) A.PC. 189, 51 C.W.N. 121, 73 I.A. 231.

1. whole brother;
2. mother;
3. father;
4. husband.

## A.—SUCCESSION TO STRIDHANA ACCORDING TO THE MITAKSHARA

**147. Succession to stridhana according to the Mitakshara.**—For the purposes of succession, the Mitakshara divides stridhana [§ 115] into two classes, namely—

(1) *shulka*, which is defined as a gratuity for which a girl is given in marriage; and

(2) other kinds of stridhana.

(1) *Shulka.*—*Shulka* devolves in the order mentioned in § 146, sub-§ (1).

(2) *Other kinds of stridhana.*—Stridhana other than *shulka* passes in the following order:—

1. unmarried daughter;

She takes before married daughter. The rule applies to Jains in the absence of a special custom (*e*).

2. married daughter who is unprovided for (*f*);
3. married daughter who is provided for (*g*);
4. daughter's daughter (*h*);
5. daughter's son (*h*);
6. son (*i*);
7. son's son (*j*).

If there be none of these, in other words, if the woman dies without leaving any issue, her stridhana, if she was married in an approved form (*k*), goes to her husband (*l*), and, after him, to the husband's heirs in order of their succession to him (*m*) [see note (1) below]; on failure of the husband's heirs, it goes to her blood relations in preference to the Government (*n*).

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(*e*) *Jaiwanti* v. *Anandi Devi* (1938) All. 196, 173 I.C. 356, ('38) A.A. 62.

(*f*) *Srimati Wooma Daee* v. *Gokoolanund* (1878) 3 Cal. 587, 5 I.A. 40; *Kammathi* v. *Padmavathi* ('52) A. Tra.-Co. 501. Also see cases cited under § 43, No. 5, note (*t*) at p. 113, *supra*. Also see *Sarala Bala* v. *Banamali* ('64) A. Orissa 140.

(*g*) See *Totawa* v. *Basawa* (1899) 23 Bom. 229.

(*h*) *Matru Mal* v. *Mehri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1 [daughter's daughter takes before daughter's son]; *Amarjit* v. *Algu* (1929) 51 All. 478, 113 I.C. 765, ('29) A.A. 71.

(*i*) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300 [two or more sons take as tenants in common].

(*j*) *Sham Bihari Lal* v. *Ram Kali* (1923) 45 All. 715, 75 I.C. 495, ('24) A.A. 15 [daughter's daughter is a nearer heir than son's son]; *Ram Kali* v. *Gopal Dei* (1952) 48 All. 648, 96 I.C. 757, ('26) A.A. 557 [ditto]; *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 107 I.C. 244, ('28) A.A. 52 [ditto].

(*k*) *Gurdial* v. *Bhagwan Devi* (1927) 8 Lah. 366, 101 I.C. 850, ('27) A.L. 441.

(*l*) *Bhimacharya* v. *Ramacharya* (1909) 33 Bom. 452, 3 I.C. 750 [husband takes before his son by another wife].

(*m*) *Bai Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 451, 33 I.A. 176; *Javitri* v. *Gendan Singh* (1927) 49 All. 779, 102 I.C. 167, ('27) A.A. 767; *Jodha* v. *Darbari Lal* (1927) 2 Luck. 612, 104 I.C. 193, ('27) A.O. 339; *Srimati Krishna* v. *Bhaiya Rajendra* (1927) 2 Luck. 43, 89-90, 104 I.C. 155, ('27) A.O. 240.

(*n*) *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I.C. 901, ('15) A.M. 18; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I.C. 109. ('21) A.B. 138.

But if she was married in an unapproved form (*o*) it goes to her mother, then to her father, and then to the father's heirs (*p*) [see note (2)], and then to the husband's heirs in preference to the Government (*q*).

In a recent decision the Supreme Court referred to § 147 (2) above and expressed the view that the daughters of a predeceased son of a Hindu woman married in approved form is not entitled to succeed to her stridhan other than *shulka* in preference to the son of the brother of her deceased husband (*q*1).

There was conflict of decisions on whether in determining the heirs of the father or the husband for the purpose of ascertaining the stridhana heirs of a woman reference is to be made to the provisions of the Hindu Law of Inheritance Act (Act II of 1929) or the heirs are to be ascertained in accordance with the ordinary rules of Hindu law. The High Courts of Lahore (*r*), Allahabad (*s*) and Bombay (*t*) held that the determination should be according to the Hindu Law of Inheritance Act if the succession opened out after the Act was passed. The Madras High Court (*u*) held that the Hindu Law of Inheritance Act was applicable only to the property of males. The High Courts of Nagpur and Patna also took the Madras view (*v*). This view has now been confirmed by the Supreme Court (*w*).

*Inherited property.*—Property inherited by a female can be stridhana only in the Bombay school, and that too in the cases specified in § 130, sub-§ (3). How does this kind of stridhana devolve in Bombay? The answer is that if the case is governed by the Mitakshara, it devolves in the order given in sub-§ (2) above, and if it is governed by the Mayukha, it devolves in the order given in § 151, clause II. See §§ 170-171.

1. *Husband and his heirs.*—Where the marriage is in an approved form, the stridhana goes, in default of issue, to the husband and his heirs, that is to say, it descends in the same way *as if it had belonged to the husband himself.* The husband's heirs are not enumerated in the Mitakshara. They may, however, be ascertained from § 43 above. Following the lines of the order there given, the successive heirs to a woman's stridhana, after the husband would be (*x*):

1. his (husband's) son by another wife (*y*), *i.e.*, the deceased woman's step-son;

*Note.*—The illegitimate son is not entitled to succeed to the stridhana of his father's wife (*z*);

2. his grandson by another wife (*a*);
3. his great-grandson by another wife;
4. his other wives (*b*);
5. his daughter by another wife, *i.e.*, the deceased woman's step-daughter (*c*);

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(*o*) *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 412, 413.

(*p*) *Raju* v. *Ammani* (1906) 29 Mad. 358 [sister as *father's* daughter takes before sister's son]; *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 3 I.C. 765; *Govind* v. *Savitri* (1919) 43 Bom. 173, 47 I.C. 883, ('18) A.B. 93 [sister before paternal uncle].

(*q*) *Chandulal Asharam* v. *Bai Kashi* (1939) Bom. 97.

(*q*1) *Shamlal* v. *Amar Nath* ('70) A.S.C. 1643.

(*r*) *Mt. Charjo* v. *Dina Nath* ('37) A.L. 196.

(*s*) *Indrapal* v. *Mst. Humangi* (1949) All. 816.

(*t*) *Shamrao* v. *Raghunandan* (1939) Bom. 228.

(*u*) *Mahalakshmamma* v. *Surya Narayana* (1947) Mad. 23; *Kuppuswami* v. *Manickasari* (1950) A.M. 196.

(*v*) *Shakuntalabai* v. *Court of Ward* (1942) Nag. 629; *Taluk Raj* v. *Bacha*, 26 Pat. 150.

(*w*) *Annagouda* v. *The Court of Wards* (1952) S.C.R. 208.

(*x*) *Krishnaswami Chettiar* v. *S. S. Chettiar* I.L.R. (1956) Mad. 324, ('55) A.M. 702, 704, 705 (The doctrine of representation has no application to stridhana succession).

(*y*) (1909) 33 Bom. 452, 3 I.C. 750, *supra* (step son takes after the husband).

(*z*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928, ('26) A.M. 84.

(*a*) *Gojabai* v. *Shrimant Shahajirao* (1893) 17 Bom. 114.

(*b*) *Krishnai* v. *Shripati* (1906) 30 Bom. 333 affirming co-widow's right to succeed; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I.A. 176 (co-widow takes before husband's brother and his nephew).

(*c*) *Nanja* v. *Sivabagyathachi* (1913) 36 Mad. 116, 12 I.C. 128 (co-wife's daughter before father's brother's son).

6. the son of his daughter by another wife, that is, step-daughter's son;
7. his mother;
8. his father;

} but in cases governed by the Mayukha } 7. father; 8. mother;

9. his brother (*d*); but in cases governed by the Mayukha, the full brother succeeds along with sons of full brothers who are dead, see § 77 and notes to No. 9 at p. 150 *supra*.
10. his brother's son;

then his other sapindas, then his samanodakas, and then his bandhus (*e*).

According to the Bombay school, the widows of gotraja sapindas would also be heirs [§ 68].

2. *Father and his heirs.*—When the marriage is in an unapproved form, the stridhana goes, in default of issue, not to the husband and his heirs, but to the mother, father, and *father's heirs*, as in the case of stridhana belonging to a maiden [§ 145]. The reason is that a woman married in an unapproved form is deemed to continue to belong to her *father's* family, because in such a marriage there is *no giving away* of the bride by the father to the bridegroom (*f*). The successive heirs after the father would be the deceased woman's brother, brother's son, step-mother (*g*), sister, sister's son, grandmother, paternal uncle, and her father's other sapindas, samanodakas and bandhus.

3. *Presumption as to form of marriage.*—When the question arises as to whether a marriage was in an approved or in an unapproved form, the presumption is that it was in an approved form, unless the contrary is proved (*h*).

4. *Preference of female issue to male issue.*—As regards succession to stridhana it should be noted that according to the Mitakshara it goes to the *female* issue of the deceased woman in preference to the *male* issue; see sub-§ (2).

5. *Issue born of a woman by adulterous intercourse.*—It has been seen that where a woman dies leaving a husband and a son, the son is entitled to succeed to her stridhana in preference to the husband. The reason is that the *issue* of a woman is entitled to succeed to her stridhana before the husband. But *issue* means issue born in lawful wedlock. Therefore, if a woman dies leaving a husband and a son born of her by adulterous intercourse the husband is entitled to succeed to her stridhana in preference to the son (*i*). See § 163.

6. *Married and unmarried daughter's daughter.*—There is no distinction between married and unmarried daughter's daughters as there is in the case of daughters (*j*).

## B.—SUCCESSION TO STRIDHANA—BENARES SCHOOL

**148. Succession to stridhana—Benares school.**—Succession to stridhana according to the Benares school is governed entirely by the law as expounded in the Mitakshara and set forth in § 147 above.

## C.—SUCCESSION TO STRIDHANA—BOMBAY SCHOOL

**149. Succession to stridhana—Bombay school.**—The Mayukha is of paramount authority in the island of Bombay, Gujarat and the Northern Konkan. In other parts of Bombay State the authority of the Mitakshara is supreme [§ 12]. The result is that in cases governed by the Mitakshara succession to stridhana is governed by the rules laid down in the Mitakshara [§ 147], while in cases governed by the Mayukha, it is governed by the rules laid down in the Mayukha and set forth in the next two sections.

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(*d*) *Parmappa* v. *Shiddappa* (1906) 30 Bom. 607 (full brother takes before half-brother). See note (*b*) above.

(*e*) *Ganeshi Lal* v. *Ajudhia Prasad* (1906) 28 All. 345 (husband's sister's son takes before the deceased woman's sister's son).

(*f*) *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 413.

(*g*) *Dubhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(*h*) *Jagannath* v. *Runjit Singh* (1898) 25 Cal. 354; *Bijay Lal* v. *Bhubaneswar* ('63) A.C. 18; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I.C. 541; *Chuni Lal* v. *Surajram* (1909) 33 Bom. 433, 3 I.C. 765; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I.C. 459 [even among Sudras belonging to a respectable family].

(*i*) (1910) 34 Bom. 553, 7 I.C. 459, *supra*.

(*j*) *Ram Kali* v. *Gopal Dei* (1926) 48 All. 648, 96 I.C. 757, ('26) A.A. 557.

**150. Classification of stridhana—Mayukha Law.**—For the purposes of succession the Mayukha divides stridhana into two classes, namely:—

(i) technical or proper; and

(ii) non-technical or improper.

(i) Technical stridhana is confined to gifts and bequests from relations made at any time, and gifts from strangers made before the nuptial fire or at the bridal procession [§ 113]. It is sub-divided, for the purposes of succession, into four classes, namely:—

(1) *shulka*, which is defined as property given as the equivalent of household utensils, of beasts of burden, of milch cattle, or ornaments;

(2) *yautaka*, that is gifts made to a woman *at the time* of her marriage, whilst seated with her husband on one seat, the word being derived from *yuta*, that is, 'joined together';

(3) *bhartridatta*, that is property given or bequeathed to a woman by her *husband;* and *anwadeyaka*, that is property given or bequeathed to a woman *subsequent* to her marriage by her relations or by her husband's relations (*l*); and

(4) other kinds of technical stridhana [§§ 116 and 126].

(ii) Non-technical stridhana includes property *inherited* by a woman (*m*) in cases where she takes such property as stridhana [§ 130], the earnings of a woman, the maintenance (if any) fixed for her (*n*), property given or bequeathed to her by *strangers* (*o*) excepting that given before the nuptial fire and at the bridal procession and other kinds of property not included in technical stridhana.

**151. Succession to stridhana—Mayukha Law.**—The Mayukha prescribes different lines of descent for the four classes of technical stridhana [§ 150], and a further different line of descent for non-technical stridhana, in all five different lines.

I. *Succession to technical stridhana*—

(1) *Shulka* [§ 150(1)] devolves in the order mentioned in § 146, sub-§ (1).

(2) *Yautaka* [§ 150(2)] goes to unmarried daughters (*p*).

But what if there be no unmarried daughters? Is it to go at once to the relations named in cl. III below? It is suggested by an eminent writer that it should go in default of unmarried daughters, to married daughters and their issue as under the Mitakshara [see § 147], and, if there be none of these, then to the relations specified in cl. III of this section. See Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., p. 402.

(3) *Bhartridatta* [gift or bequest from husband], and *Anwadheyaka* [gift from relations *subsequent* to marriage], pass in the following order (*q*):—

(1) sons and unmarried daughters, taking together in equal shares (*r*); failing unmarried daughters,

(2) sons and married daughters, taking together in equal shares; failing sons and daughters,

(3) daughters' issue, that is, daughters' daughters and daughters' sons [§ 160]; next,

(4) son's sons [§ 160];

(5) failing these, the persons mentioned in cl. III below.

(4) *Other kinds of technical stridhana* (§§ 116 and 126) pass in the following order:—

(1) unmarried daughters;

(2) married daughters who are unprovided for;

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(*l*) *See Gopal Chandra* v. *Ram Chandra* (1901) 28 Cal. 311; *Ram Gopal* v. *Narain* (1906) 33 Cal. 315; *Basanta* v. *Kamikshya* (1906) 33 Cal. 23, 32 I.A. 181. All these are Dayabhaga cases.

(*m*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C. 244.

(*n*) *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758.

(*o*) *Bai Narmada* v. *Bhagwantrai* (1888) 12 Bom. 505.

(*p*) *Ashabai* v. *Haji Tyeb* (1885) 9 Bom. 115, 126.

(*q*) 9 Bom. 115, 126, *supra.*

(*r*) *Dayaldas* v. *Savitri Bai* (1910) 34 Bom. 385, 6 I.C. 533.

(3) married daughters who are provided for;
(4) daughters' issue, that is, daughters' daughters and daughter's sons [§ 160];
(5) sons;
(6) sons' sons [§ 160];
(7) failing these, the persons mentioned in cl. III below.

II. *Succession to non-technical stridhana*—

Non-technical stridhana, that is, stridhana other than the four kinds of stridhana mentioned above [§ 150], passes in the following order (*s*):—

(1) sons;
(2) sons' sons [§ 160];
(3) sons' sons' sons;
(4) daughters;
(5) daughters' sons [§ 160];
(6) daughters' daughters [§ 160];
(7) failing these, the persons mentioned in cl. III below.

Property *inherited* by a female can be stridhana only in the Bombay school, and that too only in the cases specified in § 130, sub-§ 3. Such property, in cases governed by the Mayukha, devolves as non-technical stridhana (*t*).

III. *Succession to stridhana where no issue.*—Where a woman dies without leaving any issue, her stridhana of every description (except *sulka*) goes, if her marriage took place in an approved form to her husband, and failing him, to her heirs in her husband's family, who, however, are no other than her husband's heirs [mentioned in note (1) to § 147 above]. But if the marriage took place in an unapproved form, it goes to her mother, then to her father, and then to her father's heirs (*u*) [§ 147, note (2)].

*Non-technical stridhana.*—The Mitakshara prescribes only one line of succession for all kinds of stridhana except *sulka*. The Mayukha draws a distinction between technical and non-technical stridhana. As to *bhartridatta* and *anwadheyaka*, it is to be observed that according to the Mayukha it goes to the *male* and *female* issue together; while non-technical stridhana goes, first to the *male* issue, and then to the *female* issue. The Mitakshara draws no such distinction. According to that authority non-technical stridhana, like technical, goes first to the *female* issue (*v*). In a Bombay case (*w*), under the Mitakshara, where a woman, married in an approved form, succeeded to her mother's Stridhana property and then died without leaving any descendants or any heir in her husband's family but leaving a brother and a sister it was held that (1) the property should go to her father's heirs and (2) that the brother and sister took equally. The first part of the decision is correct, but it is submitted that the second part is not and the learned Judge ought to have held that the brother took in preference to the sister.

*Where the woman dies childless.*—It will be observed on comparing § 147(2) with cl. iii of this section that when a woman dies childless, and the marriage was in an approved form, her Stridhana according to the Mitakshara goes to *her husband's heirs* while under the Mayukha it goes to *her heirs in her husband's family*. Notwithstanding this seeming dissimilarity between the language of the Mitakshara and the Mayukha, the heirs both under the Mitakshara and the Mayukha are the same (*x*). The reason is that a woman's heirs in her husband's family are *no other than her husband's heirs*. These are enumerated in note (1) to § 147 above.

How is it that a woman's heirs in her husband's family are the same as her husband's heirs? The reason is that it is a leading doctrine of the Mitakshara school that a wife becomes on marriage the sapinda of the husband, and her individuality is merged in him. The wife, by her marriage is born again in the husband's family, and becomes half the

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(*s*) *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758; *Bai Raman* v. *Jagjivan Das* (1917) 41 Bom. 618, 41 I.C. 277, ('17) A.B. 229 [sons take before grandson].

(*t*) (1893) 17 Bom. 758, 768, *supra*.

(*u*) See *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 451, 33 I.A. 176, 197; *Laxman* v. *Gangabai* ('55) A. Madh. Bha. 138, 142.

(*v*) *Jankibai* v. *Sundra* (1890) 14 Bom. 612; *Gulappa* v. *Tavawa* (1907) 31 Bom. 453.

(*w*) *Vithal Tukaram* v. *Balu Bapu* (1936) 60 Bom. 671, 38 Bom. L.R. 520, 164 I.C. 268, ('36) A.B. 283.

(*x*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C.J. 244. See particularly remarks of West, J., at p. 257 *et seq*. where he compares both the Mitakshara and the Mayukha law bearing on the subject of Stridhana.

body of the husband. It is by virtue of the doctrine that the husband's sapindas become the sapindas of his wife. The wife's sapindas, however, in her father's family do not become the husband's sapindas. The reason for this lies in the wife's subordinate position and dependence (*y*).

## D.—SUCCESSION TO STRIDHANA—MADRAS SCHOOL

**152. Succession to stridhana—Madras school.**—We propose, first, to state the rules of succession given in the Smriti Chandrika (*y*1), and then to consider which of them have been rejected by the High Court of Madras. We select the Smriti Chandrika, for though by no means exhaustive on the question of succession to stridhana, it is more comprehensive than the other commentaries.

The Smriti Chandrika recognizes technical stridhana only, in other words it confines stridhana to gifts from relations made at any time, and gifts from strangers if made before the nuptial fire or at the bridal procession [§ 118]. It does not recognize non-technical stridhana.

Like the Mayukha the Smriti Chandrika divides stridhana, that is technical stridhana, into four classes, namely:—

(1) *shulka;*
(2) *yautaka;*
(3) *bhartridatta* and *anwadheyaka;* and
(4) other kinds of technical stridhana.

*Shulka* is defined as wealth received as "the price of household utensils, of beasts of burden, of milch cattle, or ornaments." *Yautaka, bhartridatta* and *anwadheyaka*, have already been defined in § 150.

(i) *Shulka,* devolves in the order mentioned in § 146, sub-§ (1).
(ii) *Yautaka* passes to—
  (1) unmarried daughters; and then to
  (2) sons.
(iii) *Bhartridatta* and *anwadheyaka* pass to sons and daughters, all inheriting together in equal shares. Daughters include maiden daughters and married daughters whose husbands are alive, but not widowed daughters.
(iv) Other kinds of technical stridhana pass in the following order—
  (1) maiden daughters and married daughters (*z*), who are not provided for, all taking in equal shares;
  (2) married daughters who are provided for;
  (3) daughters' daughters [§ 160];
  (4) daughters' sons [§ 160];
  (5) sons;
  (6) sons' sons [§ 160].

If the woman dies without leaving issue, her stridhana of all descriptions (except *shulka*) passes, if she was married in an approved form, to her husband, and if she was married in an unapproved form, to her mother, and then to her father. There is no provision in the Smriti Chandrika for the case in which there is a failure of husband or mother and father. But the Parashara Madhaviya cites a text of Brihaspati which is supposed to give a right of succession to certain relations named therein, immediately after the husband or father as the case may be [see § 153].

As to *yautaka, bhartridatta,* and *anwadheyaka,* it will be observed that the Smriti Chandrika makes no provision for the case in which there is a failure of sons and daughters.

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(*y*) *Janglubai* v. *Jetha* (1907) 32 Bom. 409, 413; *Gojabai* v. *Shrimant Shahajirao* (1893) 17 Bom. 114, 118.

(*y*1) See Introduction pp. 54-55 *supra.*

(*z*) *Rajamma* v. *Padmavatamma* (1952) Mad. 668, ('51) A.M. 1047.

Having noted the order of succession according to the Smriti Chandrika we proceed to consider the judicial decisions on the subject. Before doing so, however, it may be as well as to remember that according to the Mitakshara stridhana of every description (excepting *shulka*) goes, first, to daughters, then to daughters' children, and it is only on failure of these that it goes to sons.

1. *Yautaka*, that is, gifts made at the time of marriage.—There is no recent decision as to succession to *yautaka*.

2. *Bhartridatta*, that is, gift or bequests from the husband, and *anwadheyaka*, that is, gifts from relations made after marriage.—These two kinds of stridhana pass, according to the Smriti Chandrika, to sons and daughters jointly, but according to the Mitakshara they pass to daughters in the first instance. The Madras High Court has preferred the order of succession given in the Mitakshara (*a*).

3. As to the text of Brihaspati referred to above, the Madras High Court has refused to give effect to it on the ground that it is differently interpreted in the said four commentaries, and it has held that where a woman dies without leaving issue, her stridhana devolves according to the Mitakshara (*b*) [§ 147].

4. The Smriti Chandrika does not recognize non-technical stridhana; therefore, there are no rules in that work for the descent of such stridhana. But the Madras High Court, following the Mitakshara, has recognized as stridhana certain kinds of property which come within the category of non-technical stridhana, namely property given to a woman for her maintenance (*c*) and gifts from strangers though made during coverture (*d*), and has held that they pass according to the Mitakshara.

## E.—SUCCESSION TO STRIDHANA—MITHILA SCHOOL

**153. Succession to stridhana—Mithila school.**—The Vivada Chintamani, which is one of the leading authorities of the Mithila school, recognizes technical stridhana only; in other words, it confines stridhana to gifts from relations, and to gifts from strangers if made before the nuptial fire at the bridal procession. It does not recognize non-technical stridhana [§ 119]. For the purpose of succession, it divides stridhana into three classes, namely:—

(1) *shulka*, which is defined as property received by a woman at the time of her marriage, where the marriage has been celebrated in an unapproved form;

(2) *yautaka*, defined in § 150; and

(3) technical stridhana of other descriptions.

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(*a*) *Muthappudayan* v. *Ammani* (1898) 21 Mad. 58 [gift from father after marriage]; *Bhujanga* v. *Ramayamma* (1884) 7 Mad. 387 [gift from husband of immoveable property].

(*b*) *Raja* v. *Ammani* (1906) 29 Mad. 358; *Nanja* v. *Sivabagyathachi* (1913) 36 Mad. 116, 12 I.C. 128.

(*c*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

(*d*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100.

*Shulka* devolves in the order mentioned in § 146(1).

*Yautaka* passes to unmarried daughters. Failing these, it is conceived that it passes to married daughters, then to daughters' daughters, and then to daughters' sons, as in the Mitakshara (*e*).

Technical stridhana of other descriptions passes to sons and unmarried daughters, all taking together in equal shares. Failing these, it is conceived that it passes to sons and married daughters jointly, then to daughters' daughters, and then to daughters' son.

If the woman dies without leaving any issue, her stridhana (except *shulka*) devolves as under the Mitakshara [§ 147].

It has been so held by the High Court of Calcutta in a case from Mithila (*f*), though in a subsequent case (*g*) the same Court gave effect to a text of Brihaspati cited in the Vivada Ratnakara which is another leading authority of the Mithila school. The effect of that text is stated to be that if a woman married in an approved form dies without leaving any issue or husband, her stridhana does not go to the husband's heirs in the order of propinquity to him as under the Mitakshara, but to three special heirs named in the said text in preference to any other of the husband's heirs, namely the husband's sister's son, husband's brother's son, and husband's younger brother. If she is married in an unapproved form, and dies without leaving any issue or mother or father, her stridhana does not pass to her father's heirs in the order of propinquity to him as under the Mitakshara, but to the three special heirs named in the said text in preference to any other of the father's heirs, namely her sister's son, her brother's son, and her son-in-law. But it is not at all clear in what order the said three relations in each set are to take (*h*). The Patna High Court recently followed the earlier Calcutta case and dissented from the later case (*i*).

## F.—SUCCESSION TO STRIDHANA—DAYABHAGA SCHOOL

**154. Classification of stridhana.**—Stridhana according to the Dayabhaga school [§ 120] may be divided, for the purposes of succession, into four classes, namely:—

(1) *Shulka,* that is, a present to induce the bride to go to her husband's house.

(2) *Yautaka,* that is, gifts made at the time of marriage. This term has been interpreted by the High Court of Calcutta as including not only gifts made before the nuptial fire [§ 113, sub-§(1)], but gifts made during the continuance of the marriage ceremonies (*j*), that is the ceremonies beginning with *shraddha* and ending with that of prostrating before the husband (*k*). It is conceived that it includes gifts from strangers made before the nuptial fire and at the bridal procession.

(3) Gifts and bequests from the father made *after* marriage. [Gifts made by relations subsequent to marriage are called *anwadheyaka.* The present class relates to *anwadheyaka* from father.]

(4) *Ayautaka,* that is, gifts and bequests from relations made *before* or *after* marriage. This class includes gifts and bequests from the father made

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(*e*) *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398.

(*f*) *Bachha* v. *Jugmon* (1886) 12 Cal. 348.

(*g*) *Mohun Pershad* v. *Kishen* (1894) 21 Cal. 344.

(*h*) See *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 445-451, 33 I.A. 176, 190-197 where the text of Brihaspati is fully discussed.

(*i*) *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398.

(*j*) *Bistoo Pershad* v. *Radha Soonder* (1871) 16 W.R. 115.

(*k*) See Raghunandana's Dayattattwa, G. C. Sastri's Translation, chap. ix, 15.

*before* marriage, but not those made *after* marriage. The latter come under the third class. Gifts from the father *at the time* of marriage fall within the second class.

*Shulka* devolves in the order mentioned in § 145, sub-§ (2).

We proceed to state in the next three sections the order of succession to *yautaka, anwadheyaka* from the father, and *ayautaka.*

**155. Succession to yautaka.**—*Yautaka* [§ 154 (2)] passes in the following order:

(1) unbetrothed daughters;
(2) betrothed daughters;
(3) married daughters who have (*l*), or are likely to have, sons;
(4) barren married daughters and childless widowed daughters taking together in equal shares;
(5) sons;
(6) daughter's sons [§ 160];
(7) sons' sons [§ 160];
(8) sons' sons' sons;
(9) step-sons;
(10) step-sons' sons;
(11) step-sons' sons' sons.

If there be none of these, the succession depends upon the form of marriage. If the deceased was married in an approved form, the *yautaka* passes to the following heirs in succession, namely:—

(1) husband;
(2) brother;
(3) mother;
(4) father.

If she was married in an unapproved form, it passes in the following order, namely:

(1) mother;
(2) father;
(3) brother;
(4) husband;

if there be none of these, the successive heirs are—

(5) husband's younger brother;
(6) husband's brother's son;
(7) sister's son (*m*);
(8) husband's sister's son;
(9) brother's son;
(10) daughter's husband;

The heirs beginning with the husband's younger brother and ending with the daughter's husband are heirs mentioned in a text of Brihaspati, as to which see the observations of the Privy Council in *Kesserbai* v. *Hunsraj* (*n*), which was a case from the Bombay State governed by the Mayukha law. See § 153, last paragraph.

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(*l*) The expression "married daughters who have a son," includes a "*widowed* daughter having a son," *Charu Chunder* v. *Nobo Sunderi* (1891) 18 Cal. 327.

(*m*) Sister's son includes step-sister's son; *Dasharathi* v. *Bipin Behari* (1905) 32 Cal. 261; *Shashi Bhushan* v. *Rajendra Nath* (1913) 40 Cal. 82, 15 I.C. 225 [step-sister's son excludes daughter's son of great-grandson of great-great-grandfather of deceased's husband].

(*n*) (1906) 30 Bom. 431, 441-452, 33 I.A. 176, 190-197.

(11) husband's sapindas, sakulyas and samanodakas;
(12) father's kinsmen.

**156. Gifts and bequests from father after marriage.**—Property given or bequeathed by the father *after* marriage passes in the same order as *yautaka* [§ 55], with this difference that—

(i) sons take *before* married daughters, and *not after* them as in the case of *yautaka* (*o*); and that

(ii) where the woman dies without leaving issue the four immediate heirs take, not in either of the two orders given in § 155 but in the following order, namely:

(1) brother (*p*);
(2) mother (*q*);
(3) father;
(4) husband.

In the case of *Pritidatta* Stridhana, *Kanya* or the maiden daughter is the successor in the 1st instance, under the Dayabhaga law; Kanya does not, however, mean or include a step-daughter and consequently in case of conflict between husband's brother and step-daughter the former succeeds (*r*).

**157. Succession to ayautaka**— *Ayautaka* [§ 154 (4)] passes in the following order:

(1) sons (*s*) and maiden (*t*) daughters (*u*), taking together in equal shares;
(2) married daughters who have, or are likely to have, sons;
(3) son's son [§ 160];
(4) daughters' sons [§ 160];

Daughter's son does not include step-daughter's son (*v*).

(5) barren married daughters and childless widowed daughters.

The above order is according to the Dayabhaga. The Dayakrama Sangraha places the (1) son's son's son, (2) step-son, (3) step-son's son, and (4) step-son's son's son before barren married and childless widowed daughters. But this enumeration being contradictory to that in Dayabhaga cannot be accepted. According to Dayabhaga, in first group of heirs to succeed to the Ayautaka property of a woman are her descendants and the co-wife's son does not come under this category; on failure of descendants the property goes to her kindred i.e. her brother, mother and father. On a competition between step-son and mother, the mother succeeds. The step-son if he is an heir at all would come after the husband (*w*). The brother is preferential heir to a step-son (*x*).

If there be none of the above relations *ayautaka* passes to the following heirs in succession, irrespective of the form of marriage, namely:

(1) brother (*y*);
(2) mother;

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(*o*) *Prosanno Kumar* v. *Sarat* (1909) 36 Cal. 86.
(*p*) *Gopal Chandra* v. *Ram Chandra* (1901) 28 Cal. 311 [brother takes before husband].
(*q*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315 [mother takes before husband].
(*r*) *Provashini* v. *Jogeswar* (1950) 55 C.W.N. 61, ('51) A.C. 375.
(*s*) Sons of a predeceased son of a widow cannot, on her death, succeed when her other sons are living, *Prakash Chandra* v. *Nandrani Debi* (1951) 1 Cal. 581.
(*t*) It has been held that a maiden (*coomaree*) daughter means one not only unmarried but also unbetrothed; *Sreenath* v. *Surbo* (1868) 10 W.R. 488. If so, a betrothed daughter would take after the sons and unbetrothed daughters, but before married daughters.
(*u*) *Basania* v. *Kamikshya* (1906) 33 Cal. 23, 32 I.A. 181. *Sankara Dome* v. *Kalidasi Dasi* ('70) A.C. 461 (husband's daughter by another wife gets preference over husband's brother's son s son).
(*v*) *Krishnabihari* v. *Sarojinee* (1933) 60 Cal. 1061, 347 I.C. 473, ('33) A.C. 858.
(*w*) *Chamatkari* v. *Narendra* (1947) 1 Cal. 173.
(*x*) *Kenaram* v. *Maniklal* (1953) 2 Cal. 178.
(*y*) See f.n. (*x*) above.

(3) father;
(4) husband;
(5) husband's younger brother (*z*);
(6) husband's brother's son;
(7) sister's son;
(8) husband's sister's son;
(9) brother's son;

In the absence of the earlier preferential heirs, succession to Ayautaka Stridhana under the Dayabhaga law is governed by Para 29 of Dayabhaga Chap. IV, Sec. III, that is to say it goes first to brother of full blood, in the absence of brothers to the mother, in her absence to the father, and failing all these to the husband. The step-brother does not come in this class of heirs at all, and the principle of religious benefit has nothing to do with determination of heirship (*a*).

A brother's son is preferred to a step-daughter's son (*b*), as the latter is not included in the term 'daughter's son.' Step-daughter's son comes under (11) below.

(10) daughter's husband;
(11) husband's sapindas, sakulyas and samanodakas;
(12) father's kinsmen.

## VI.—RULES COMMON TO ALL THE SCHOOLS

**158. Escheat.**—On failure of her husband's heirs, the stridhana of a *widow* goes to her blood relations in preference to the Government (*c*).

**159. Stridhana heirs take as tenants-in-common.**—Two or more stridhana heirs inheriting stridhana together take as tenants-in-common without benefit of survivorship, even if they are members of a joint family (*d*).

*Illustration*

A female Hindu dies leaving two sons who are members of a joint family. The sons inherit the stridhana. They take as tenants-in-common, and not as joint tenants. The result is that on the death of either of them, his share of the stridhana will pass to his heirs, and not to the survivor.

**160. Stridhana heirs take per stirpes.**—Stridhana heirs in the second generation, that is, son's sons, daughter's sons, and daughter's daughters, take *per stirpes*, and not *per capita* (*e*).

*Illustration*

A female Hindu dies leaving two sons by a daughter *A*, and three sons by another daughter *B*. Her stridhana will be divided into two parts, of which one will go to the two sons of *A*, and the other to the three sons of *B*. To divide it *per capita* would be to divide it into *five* equal parts, and to give one share to each of the five grandsons.

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(*z*) Succeeds before the deceased woman's step-brother; *Debiprasanna* v. *Harendra* (1910) 37 Cal. 863, 6 I.C. 534.

(*a*) *J. P. Banerjee* v. *B. Banerjee* (1949) 28 Pat. 75.

(*b*) *Krishnabihari* v. *Sarojinee* (1933) 60 Cal. 1061, 147 I.C. 473, (33) A.C. 858.

(*c*) *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I.C. 901, ('15) A.M. 18; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I.C. 109, ('21) A.B. 138; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 673.

(*d*) *Bai Parson* v. *Bai Somli* (1812) 36 Bom. 424, 15 I.C. 774; *Karuppai* v. *Sankuranarayanan* (1905) 27 Mad. 300; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 558, 7 I.C. 459.

(*e*) Mitakshara, chap. ii, sec. ii, para. 16; Mayukha chap. 4, sec. 10, para. 21; Smriti Chandrika, chap. 9 sec. 3, para. 26; Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., pp. 411, 421. But see also *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300, 308, and *Nagesh* v. *Gururao* (1893) 17 Bom. 303, 305-306.

**161. Where stridhana heir a male.**—A male inheriting stridhana takes it absolutely, and on his death it passes to his heirs.

Stridhana heirs are either males, such as sons, daughter's sons, son's sons, etc., or they are females, such as daughter, daughter's daughters, etc.

**162. Where stridhana heir a female.**—According to the Bombay school a female inheriting stridhana takes it absolutely, and on her death it passes to her heirs [§ 171].

According to all other schools a female inheriting stridhana takes a limited interest in it, and on her death it passes not to her heirs, but to the next stridhana heir of the female from whom she inherited it (§ 169).

**163. Illegitimate children: succession to stridhana.**—(1) The illegitimate children of a Hindu woman are not excluded from inheritance to their mother's stridhana (*f*). But when a woman dies leaving both legitimate and illegitimate children, the legitimate children are preferred to the illegitimate (*g*).

(2) The illegitimate sons of a Hindu woman are entitled to succeed to each other (*h*). But an illegitimate daughter's daughter cannot succeed to her grand-mother's stridhana (*i*).

(3) The illegitimate son of a daughter of a Sudra woman cannot succeed to the latter's stridhana in preference to the husband of the latter (*j*).

See note (5) to § 147. Also see § 43 No. 5 'daughter' note (vi).

**164. Succession to property of dancing girls (naikins) and prostitutes.**—Though prostitution, according to the Hindu law, entails degradation and loss of caste, it does not sever the tie which connects the prostitute to her kindred by blood, nor does it sever the tie of kindred between her and the members of her husband's family when she becomes a prostitute after marriage. Consequently, the property of a prostitute devolves as if it were her stridhana, so that her brother, her sister, her brother's son and other relations by blood, and her husband, her step-son and her husband's other sapindas are entitled to inherit to her (*k*).

Under the Bengal School of Hindu Law a sister is not heir to the stridhana property of her degraded sister (*l*). It has been held by the Madras High Court, that when a dasi leaves a *dasi* daughter as well as a married daughter both of them would take the mother's property in equal shares (*m*).

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(*f*) [Ghose's Hindu Law, 3rd ed., p. 763; *Arunagiri* v. *Ranganayaki* (1898) 21 Mad. 40; *Dundappa* v. *Bhimawa* (1921) 45 Bom. 557, 59 I.C. 561, ('21) A.B. 137 (Sudra)]; *Sunder Devi* v. *Jhaboo Lal* ('57) A.A. 215 [Muslim mistress of a Hindu converted to Hinduism); *Y. Venkanna* v. *N. Narayanamma* (1953) 1 M.L.J. 697, ('54) A.M. 136.

(*g*) *Meenakshi* v. *Muniandi* (1915) 38 Mad. 1144, 25 I.C. 957, ('15) A.M. 63 [legitimate son preferred to illegitimate daughter]; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 559, 7 I.C. 459. Reference may also be made to *Sudarshan* v. *Suresh* ('60) A.P. 45.

(*h*) *Myna Boyee* v. *Ootaram* (1861) 8 M.I.A. 400; *Mayna Bai* v. *Uttaram* (1864) 2 Mad. H.C. 196.

(*i*) *Meenakshi Ammal* v. *Murugayya Mooppanar* (1940) Mad. 739, 191 I.C. 60, ('40) A.M. 463, (1940) 1 M.L.J. 288.

(*j*) *Sadu Ganaji* v. *Shankerrao* ('55) A.N. 84.

(*k*) *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171 [step-son]; *Narain Das* v. *Tirlok* (1907) 29 All. 4 [husband]; *Hiralal* v. *Tripura* (1913) 40 Cal. 650, 19 I.C. 129 [F.B.] [brother's son]; *Narayan* v. *Lakshman* (1927) 51 Bom. 784, 106 I.C. 87, ('27) A.B. 456. See also *Adyapa* v. *Rudrava* (1880) 4 Bom. 104.

(*l*) *Sarna Moyee* v. *Secretary of State* (1897) 25 Cal. 254; *Chandra Bala* v. *Province of Bengal* 54 C.W.N. 940, ('50) A.C. 473.

(*m*) *Jagadambal* v. *Saraswati Ammal* (1950) Mad. 755.

Adoption of daughters by naikins (dancing girls): See § 487.

Where a married woman becomes a prostitute after her husband's death and dies leaving a son born in lawful wedlock and a daughter born in prostitution, the legitimate son excludes the illegitimate daughter (*n*).

The sons of a dancing woman, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them and also to their legitimate sons (*o*).

In the absence of any custom succession to a *dasi* (dancing girl) must be governed by the rule of propinquity as a rule of justice, equity and good conscience and her *dasi* daughters and married daughters will succeed to her property in equal shares (*p*).

Where a woman of the "dancing girl" caste does not follow her traditional calling but marries and leads the life of an ordinary married woman and reverts to her original calling after widowhood, it has been held that her position is not different from that of an unchaste married woman and her property devolves on her heirs according to ordinary Hindu law, that is, when it descends to daughters they take only a limited estate and a mortgage by them does not bind the reversions (*q*).

*Illustrations*

(a) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving *B*. *B* is entitled to succeed to *A*.

(b) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving *C*. *C* is entitled to succeed to *B*.

(c) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving a legitimate son *D*. Then *D* dies leaving *C*. *C* is entitled to succeed to *D*. The same principle applies to the remote legitimate descendants of *A* and *B*.

**165. Contracts by married women.**—A Hindu wife is competent to contract and the amount due by her in respect of her contractual liability can be recovered from her stridhan (*r*).

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(*n*) *Mecnakshi* v. *Muniandi* (1915) 38 Mad. 1144, 25 I.C. 957, ('15) A.M. 63.

(*o*) *Viscanatha* v. *Doraiscami* (1925) 48 Mad. 944, 91 I.C. 193, ('26) A.M. 289.

(*p*) *Saraswathi Ammal* v. *Jagadambal* (1953) S C.R. 939, (1953) 1 M.L.J. 697.

(*q*) *Balasundaram* v. *Kamakshi Ammal* (1937) Mad. 257, ('36) A.M. 958.

(*r*) *Nathubhai* v. *Jacher* (1876) 1 Bom. 121; *Govindji* v. *Lakmidas* (1880) 4 Bom. 318; *Narotam* v. *Nanka* (1882) 6 Bom. 473; *Radhi in re the petition of* (1888) 12 Bom. 228.

# CHAPTER XI

# WOMEN'S PROPERTY: PART II—PROPERTY ACQUIRED BY A WOMAN BY INHERITANCE

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

1. *Devolution of property inherited by female*—§§ 168-173.
2. *Power of female heirs over such property*—§§ 174-199.
3. *Remedies against unauthorised acts of female heirs*—§§ 202-210.

*Note.*—Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, now confers full and heritable capacity on a female heir in respect of all property acquired by her whether before or after the commencement of that Act with the result that by retro-active operation of that section she holds the property in her possession as full owner and not as a limited owner.

**166. Property inherited by males.**—When a male succeeds, as heir, whether to a male or to a female, he becomes full owner of the property inherited by him, and the property at his death passes to his heirs. The only recognized exception to this rule is where property is inherited by a Hindu governed by the Mitakshara law from his father, paternal grandfather or great-grandfather.

*Illustrations*

(a) *A* male Hindu dies leaving a brother. The brother will succeed to his property, and he will take it as *full owner* and on his death it will pass to his heirs. [This is an illustration of property inherited by a male from a *male.*]

(b) A female Hindu, who is possessed of stridhana, dies leaving a son. The son, as stridhana heir, will succeed to the property, and he will take it as *full owner* thereof, and on his death it will pass to his heirs. [This is an illustration of property inherited by a male from a female.]

Except in the cases mentioned in the section, a Hindu *male* inheriting property whether from a male or from a female, has all the powers of a full owner over that property. He can sell it, or dispose of it by gift or by will, at his pleasure. Further, he becomes a *fresh stock of descent*, that is to say, the property at his death passes to *his* heirs. The rule of Hindu law is different in the case of property inherited *by female* heirs, as will be seen presently.

**167. Property inherited by females.**—The present chapter deals with *property inherited by females* from males as well as females. It may be considered under three heads, namely:—

(1) *Devolution* of property inherited by females.

(2) *Powers of female heirs* over such property.

(3) Remedies against unauthorized acts of a widow and other female heirs.

## I.—SUCCESSION TO PROPERTY INHERITED BY FEMALES

**168. Property inherited by females from males—in territories other than the Bombay State.**—(1) According to the Bengal school, the only females who can inherit the property *of a male* are (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother [§ 61].

(2) Before the Hindu Law of Inheritance (Amendment) Act, 1929, the only females who could inherit to a *male* were the five mentioned in sub-§ (1). By that Act three more females were constituted heirs, namely, the son's daughter, daughter's daughter, and sister.

(3) The Madras school recognizes not only the said five female heirs, but others also, being those mentioned in § 56. These include the son's daughter, daughter's daughter and sister who are now expressly mentioned as heirs in the Act of 1929. The only difference is that while before the Act they succeeded as bandhus, under the Act they inherit with gotraja sapindas. See § 43, nos. 13A, 13B, and 13C. See also §61A.

(4) According to the Bengal, Benares, Mithila and Madras schools, every female, whether she be a widow (*t*), daughter (*u*), mother (*v*), father's mother (*w*), or father's father's mother, who succeeds as heir to the property of a *male*, takes only a limited estate in the property inherited by her, and at her death the property passes not to her heir, but to the next heir of the male from whom she inherited it. [As to Bombay school, see § 170.]

The son's daughter, daughter's daughter, and sister, who are now expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, also take a limited estate, according to those schools, in the property inherited by them from the last male owner.

*Illustrations*

(a) *A*, a Hindu male governed by the Bengal school of Hindu Law, dies leaving a widow and a brother. On *A*'s death, the widow succeeds as his heir. The widow then dies leaving a daughter's daughter. The widow's stridhana will pass to the daughter's daughter as her stridhana heir, but the property *inherited* by her from her husband *A* will pass to the next heir of her husband, namely, his brother.

(b) *A*, a Hindu male governed by the Benares school of Hindu Law, dies in 1928 leaving a daughter and a paternal uncle. On *A*'s death the daughter succeeds as his heir. The daughter then dies leaving a daughter. The daughter's stridhana will pass to her daughter *as her heir*, but the property *inherited* by her from her father *A* will pass to the next heir of her father, namely, his paternal uncle. If *A*'s daughter dies in 1930, after the Hindu Law of Inheritance (Amendment) Act, 1929, came into force the daughter's daughter, and not the uncle, will succeed to *A*'s estate as *A*'s heir. [*Vide* notes to § 43, 13(C).]

*According to all the schools other than the Bombay school* a female inheriting to a male [§ 168] or to a female [§ 169] is not full owner of the property inherited by her. Her power to deal with the property is limited. She cannot alienate it except for legal necessity. Nor does she become a fresh stock of descent. At her death the property passes not to her heirs, but to the next heir of the last full owner. This result has been arrived at by construing the texts of Katyayana cited above as imposing a limitation on the powers of a widow to deal with property inherited by her from her husband, and the rule is then applied to *other female heirs* by construing the word "widow" in those texts as referring to other female heirs also, namely, daughter, mother, father's mother, father's father's mother, etc.

*Survivorship as between daughters.*—See § 43, n. 5, note (2).

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(*t*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529; *Mst. Thakur Devhee* v. *Rai Baluk Ram* (1867) 11 M.I.A. 140; *Bhugwandeen* v. *Myna Baee* (1866) 11 M.I.A. 487.

(*u*) *Chotay Lall* v. *Chunnoo Lall*, (1878) 4 Cal. 744, 6 I.A. 15; *Mutta* v. *Dorasinga* (1881) 3 Mad. 290, 8 I.A. 99; *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156; *P. Venkateswarlu* v. *D. Chinna Raghavulu* ('57) A.A.P. 604.

(*v*) *Bachiraja* v. *Venkatappadu* (1865) 2 Mad. H.C. 88; *Kutti* v. *Rudakrishna* (1875) 8 Mad. H.C. 88; *Jullessur* v. *Uggur* (1883) 9 Cal. 725; *Hemlatta* v. *Goluck Chunder* (1842) 7 Ben. Sel. R. 108 (new edition 127).

(*w*) *Phukar Singh* v. *Ranjit Singh* (1878) 1 All. 661.

*Custom.*—A Hindu widow may by custom be entitled to her husband's property absolutely (*x*).

*Jains.*—According to the custom prevailing in U.P. and Bengal, a Jain widow takes an absolute interest in the self-acquired property of her husband inherited by her (*y*), but in U.P., not in ancestral property left by him (*z*).

*Mithila law.*—It is not correct to say that according to Vivada Chintamani which is the authority of the Mithila School, when a mother succeeds to the property of her deceased son, the property goes after her death to her husband's heirs. It goes to her son's heirs (*a*)

**169. Property inherited by females from females—in territories other than the Bombay State.**—According to the Bengal, Benares, Mithila and Madras schools, the rule laid down in § 168, sub-§ (3), as to property inherited by a female *from a male*, applies also to property inherited by her *from a female*. Consequently a female inheriting property [stridhana] from a female takes only a limited estate in such property, and at her death the property passes not to her heirs, but to the next stridhana heir of the female from whom she inherited it (*b*). [As to Bombay school, see § 171.]

*Illustration*

*A*, a female Hindu, who is possessed of stridhana, dies leaving a daughter. On *A*'s death her stridhana passes to her daughter as her stridhana heir. The daughter, however, takes a limited estate in the stridhana. She does not become the full owner of the property. It is not stridhana in her hands, and on her death it will pass not to her heirs, but to the next stridhana heirs of *A* to whom it originally belonged. As to who those heirs are depends on the *character* of the stridhana.

It will be seen from what is stated above that according to all the schools except the Bombay school there is no distinction between property inherited by a female from a male and that inherited by her from a female. Both these kinds of property pass to the next heirs of the last full owner.

**170. Property inherited by females from males—in the Bombay State.**—(1) Besides the five females who can inherit to a *male* in all schools, namely (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother, the Bombay school recognises other females as heirs, namely, daughters of descendants, ascendants and collaterals within five degrees, and widows of gotraja sapindas. These include the three females specifically mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, namely, the son's daughter, the daughter's daughter, both these being daughters of descendants, and the sister, she being a daughter of an ascendant (father).

(2) As regards property inherited *from males*, female heirs under the Bombay school are divided into two classes, namely:—

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(*x*) *Krishna Bai* v. *Secretary of State* (1920) 42 All. 555, 57 I.C 520, ('20) A.A. 101 [*Bikanir*].

(*y*) *Sheo Singh* v. *Dakho* (1878) 5 I.A. 87, (1876) 1 All 688; *Shimbhu Nath* v. *Gayan Chand* (1894) 16 All. 379; *Harnabh* v. *Mandil* (1900) 27 Cal. 379.

(*z*) *Pahar Singh* v. *Shamsher Jang* (1931) 29 All. L.J. 314, 133 I.C. 785, ('31) A.A. 695; *Allah Diya* v. *Sona Devi* (1942) All. 745, 204 I.C. 133, ('42) A.A. 331.

(*a*) *Ram Khelawan* v. *Lakshmi* (1950) A. Pat 194, (1949) 28 Pat. 1008.

(*b*) *Sheo Shankar Lal* v. *Debi Sahai* (1903) 25 All. 468, 30 I.A. 202 [daughter succeeding to her mother] explained in *Subramanian* v. *Aruna-chelam* (1905) 28 Mad. 1, 9-12; *Lal Sheo Pertab* v. *Allahabad Bank* (1903) 25 All. 476, 30 I.A. 209; *Venkatarama Krishna* v. *Bhujanga* (1896) 19 Mad. 107; *Virasangappa* v. *Rudrappa* (1896) 19 Mad. 110; *Raju* v. *Ammani* (1906) 29 Mad. 358; *Janakisetty* v. *Miriyala* (1909) 32 Mad. 521, 3 I.C. 281; *Huri Doyal* v. *Grish Chunder* (1890) 17 Cal. 911; *Jogendra* v. *Phani* (1916) 43 Cal. 64, 33 I.C. 810, ('16) A.C. 928, *Sham Biharilal* v. *Ram Kali* (1923) 45 All. 715, 75 I.C. 495, ('24) A.A. 15; *Matru Mal* v. *Meheri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311; *P. Venkateswarlu* v. *D. Chinna Raghavulu* ('57) A.A.P. 604; *Soma* v. *Brij Lal* ('65) A. Punj. 110.

(i) *those who come into the gotra of the deceased owner, by marriage,* that is, the wife of the deceased and the wives of his sapindas and samanodakas [§ 68]; and

(ii) *those who are born in the gotra of the deceased owner, but pass by marriage into a different gotra, and their daughters.* This class includes a daughter, son's daughter, daughter's daughter, sister, niece, grandniece, father's sister, and the like (*c*). See notes to § 130.

The son's daughter, daughter's daughter, and sister are now expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929. See § 43, nos. 13A, 13B, and 13C.

Females coming under class (i), such as widow (*d*), mother (*e*), father's mother (*f*), father's father's mother, and widows of gotraja sapindas (*g*), e.g., son's widow (*h*), brother's widow, uncle's widow, etc., take a *limited* estate in the property inherited by them from males, and on their death the property passes not to their heirs, but to next heir of the male from whom they inherited it (*i*). And this is so even if such a female succeeds immediately after the death of another female who was the widow of a gotraja sapinda and who had previously inherited the property [See ill. (2)].

Females coming under class (ii), such as a daughter (*j*), son's daughter, daughter's daughter, sister (*k*), father's sister, niece (*l*), grandniece (*m*), sister's daughter and the like, take the property inherited by them from males *absolutely*, that is, they become full owners thereof. Such property becomes stridhana in their hands, so that in cases governed by the Mitakshara law (*n*), it passes to the stridhana heirs mentioned in § 147, cl. (2), and in cases governed by the Mayukha (*o*), it passes to the stridhana heirs mentioned in § 151, cl. II.

*Illustrations*

(1) *A* male Hindu, governed by the Bombay school, dies leaving a daughter. On his death, the daughter succeeds to the property as his heir. She takes the estate absolutely. She can dispose of it by gift or will. If she dies intestate, the property will go to her stridhana heirs, and not to the next heirs of her father. Thus if she dies leaving a son and

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(*c*) West and Buhler, 4th ed., p. 120 f.n. (*n*); *Tuljaram* v. *Mathuradas* (1881) 5 Bom. 662, 670, 672.

(*d*) *Bhaskar* v. *Mahadev* (1869) 6 Bom. H.C.O.C. 1.

(*e*) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26; *Narsappa* v. *Sakharam* (1869) 6 Bom. H.C., A.C. 215; *Vinayak* v. *Lakshmibai* (1861) 1 Bom. H.C. 117.

(*f*) *Dhondi* v. *Radhabai* (1912) 36 Bom. 546, 16 I.C. 343; *Madhavram* v. *Dave* (1897) 21 Bom. 739, 744.

(*g*) *Lalloobhai* v. *Mankuvarbai* (1878) 2 Bom. 388. *affd. subnom*; *Lallubhai* v. *Cassibai* (1881) 5 Bom. 110, 7 I.A. 212; (1897) 21 Bom. 739, *supra.*

(*h*) *Gadadhar* v. *Chandrabhagabai* (1882) 17 Bom. 690 [F.B.].

(*i*) *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 237, per Jenkins, C.J.

(*j*) *Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 48 Cal. 30, 57 I.C. 545, ('21) A.PC. 59; *Pranjivandas* v. *Devkuvarbai* (1859) 1 Bom. H.C. 130; *Haribhat* v. *Damodarbhat* (1879) 3 Bom. 171; *Bulakhidas* v. *Keshavlal* (1882) 6 Bom. 85; *Babaji* v. *Balaji* (1881) 5 Bom. 660; *Bhagirthibai* v. *Kahnujirav* (1887) 11 Bom. 285; *Jankibai* v. *Sundra* (1890) 14 Bom. 612; *Gulappa* v. *Tayawa* (1907) 31 Bom. 453; *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445; *Jawahir Lal* v. *Jarau Lal* (1924) 46 All. 192, 79 I.C. 861, ('24) A.A. 350 [Nagar Brahmans].

(*k*) *Vinayak* v. *Lakshmibai* (1861) 1 Bom. H.C. 117, affirmed in *Venayeck* v. *Luxemeebaee* (1864) 9 M.I.A. 516, *Rindabai* v. *Anacharya* (1891) 15 Bom. 206.

(*l*) (1897) 21 Bom. 739, 744, *supra.*

(*m*) *Tuljaram* v. *Muthuradas* (1881) 5 Bom. 662.

(*n*) (1907) 31 Bom. 453, *supra.*

(*o*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C. 244. So much of this decision as lays down that the property will descend as if the daughter was a male is no longer law, having regard to the decision in *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758 which was approved by the Privy Council in *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I.A. 176.

a daughter, then, if she is governed by the Mitakshara law, the property will pass to her daughter, and if she is governed by the Mayukha, the property will pass to her son. [Contrast this with ill. (b) to § 168.]

(2) *N* and *H* are divided brothers. *H* dies leaving a son *T*. Then *N* dies leaving a widow *J*. Then *T* dies leaving widow *M*. Then *J* dies and on her death *M* succeeds to *N*'s property as *N*'s brother's [*H*'s] son's [*T*'s] widow. Here *M* inherits the property of *N*, a male and she inherits it as a widow of a gotraja sapinda. She therefore takes only a limited estate though she succeeds immediately after the death of another female *J*. *J* as *N's* widow, took only a Hindu widow's estate. She could not, therefore, be a fresh stock of descent. What *M* inherits is not the property of *J*, but of her husband *N* (*p*).

According to the Bombay school, two or more daughters, sisters, or nieces, take an absolute estate in severalty, and not as joint tenants (*q*). Any one of them may, therefore, alienate her share by sale or gift or give it by will.

It will be seen from what has been stated above that in the Bombay State, the general leaning is in favour of women's proprietary capacity. In other parts of India, the principle is that property inherited by a woman cannot stay in the family into which she has married, but must revert *in every case* to the family in which she was born.

**171. Property inherited by females from females—in the Bombay State.**—(1) According to the Bombay school, a female inheriting property *from a female* takes it absolutely, that is, she becomes full owner thereof. Such property becomes stridhana in her hands, so that in cases governed by the Mitakshara, it passes to the stridhana heirs mentioned in § 147, cl. (2), and in cases governed by the Mayukha it passes to the stridhana heirs mentioned in § 151, cl. II. [See ill. (1).]

(2) The same rule applies though the female inheriting *from a female* inherits as the widow of a gotraja sapinda. [See ill. (2).]

*Illustrations*

(1) *A*, a Hindu male, governed by the Bombay school, dies leaving a daughter and mother. The daughter succeeds to *A's* property as his heir. Being a daughter she takes the property absolutely [§ 170], and on her death it will pass to her stridhana heir. Suppose now that the daughter dies a maiden, leaving her father's mother as her only heir. The father's mother will take [§ 145] the property *absolutely* as stridhana under the present section with power to dispose of it by gift or will, and on her death intestate the property will pass to her stridhana heirs (*r*). [Note that a father's mother inheriting to her *grandson* takes a limited estate, and on her death the property passes not to her heirs, but to the next heirs of the grandson. In the case given in the illustration, she inherits to her *granddaughter*. Contrast this with the illustration to [§ 169].

(2) *A*, a Hindu male, governed by the Bombay school, dies leaving a son *S*, and a widow *W*, of a predeceased son. On *A*'s death *S* succeeds to his estate. Then *S* dies leaving a daughter *D*. *D*, as a daughter, takes an absolute estate in the property of her father *S*. *D* then dies a maiden. On her death *W* succeeds to *her* estate as the nearest sapinda of *D's* father *S*, being *D's* father's brother's widow [§ 145]. *W* takes an absolute interest in *D's* property, though she inherits as the widow of a gotraja sapinda, that is as *D's* uncle's widow (*s*).

(3) *P* died in 1890. In 1904, his widow *U* adopted *B*. A suit between *U* and *B* was compromised, *U* being given a life interest in the immovable property and the remainder being vested in *B*. *B* died in 1916 leaving his widow *L* who died in December 1916, and an infant daughter who died in January 1917. Here when *B* died his widow *L* took a limited estate in his property. When *L* died his infant daughter succeeded to it absolutely and *U* succeeded to her under the rule in this section. *U*, therefore, takes an absolute

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(*p*) *Madhavram* v. *Dave* (1897) 21 Bom. 739.

(*q*) *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445; *Rindabai* v. *Anacharya* (1891) 15 Bom. 206.

(*r*) *Gandhi Maganlal* v. *Bai Jadab* (1900) 24 Bom. 192 [F.B.] (case of grandmother inheriting granddaughter's stridhana); *Parshottam* v. *Keshavlal* (1932) 56 Bom. 164, 137 I.C. 56, ('32) A.B. 213, see *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 236, 237.

(*s*) *Narayan* v. *Waman* (1922) 46 Bom. 17, 63 I.C. 1001 ('22) A.B. 134.

estate in the remainder belonging to *B*. This added to her life estate, makes her absolute owner of the property. It must be observed that *U* does not succeed to *B* but to his infant daughter (*t*).

**172. Share allotted to a woman on partition.**—The share allotted to a wife, mother or father's mother on partition is not her stridhana, unless it was given absolutely to her, and it descends on her death not to her heirs, but to the sons or grandsons out of whose portion it was taken. See § 128 above.

**173. Summary of sections 168 to 171.**—The following is a summary of the rules contained in §§ 168 to 171:

(1) According to the Bengal, Benares, Mithila and Madras schools, every female who succeeds as an heir whether to a male or to a female, takes a limited estate in the property inherited by her, and on her death the property passes not to her heirs, but to the next heir of the last full owner.

(2) According to the Bombay school—

(a) Property inherited by every female from a female, and property inherited from a male by female heirs other than those who come into the *gotra* of the deceased owner by marriage, is stridhana, and the provisions of the last chapter apply to it; but

(b) Females who come into the *gotra* of the deceased owner by marriage take a limited estate in the property inherited by them from a male, and on their death the property passes to the next heir of the last full owner.

(3) The expression "*limited* estate" in this section is used in contradiction to "stridhana" or "*absolute* estate". The rest of this chapter deals with the incidents of "limited estate."

## II.—POWERS OF FEMALE HEIRS OVER INHERITED PROPERTY

**174. Limited heirs.**—(1) According to the Bengal, Benares, Mithila and Madras schools *every* female who succeeds as an heir, whether to a male or to a female, takes a limited estate in the property inherited by her [§§ 168-169].

Thus a widow, daughter, mother, father's mother, father's father's mother, son's daughter, daughter's daughter, and sister take a limited estate. So do female bandhus in the Madras State. And so do all female stridhana heirs.

(2) In the Bombay State, every female who succeeds as an heir *to a female* takes the property absolutely [§ 171]. But as regards property inherited from a *male*, those females who by marriage have entered into the *gotra* (family) of the deceased owner take a *limited* estate, while other female heirs take absolutely (*u*).

Thus a widow, mother, father's mother, father's father's mother, and widows of gotraja sapindas, *e.g.*, son's widow, brother's widow, uncle's widow, etc., take a limited estate. All these are females who come into the *gotra* of the deceased by marriage. All other female heirs, such as a daughter, sister, niece, etc., take absolutely [§ 170].

(3) It follows from what has been stated above that the following females, inheriting from a male, take a limited estate according to all the schools, namely, (1) widow, (2) mother, (3) father's mother, and (4) father's father's mother. The daughter takes absolutely in the Bombay school; in

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(*t*) *Parshotam Bechardas* v. *Keshavlal Dalpatram* (1932) 56 Bom. 164, 137 I.C. 561, ('32) A.B. 213.

(*u*) *Gandhi Maganlal* v. *Bai Jadab* (1900) 24 Bom. 192, 214 [F.B.].

every other school she takes a limited estate. The son's daughter, daughter's daughter, and sister, who are expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, also take absolutely in the Bombay school; in every other school they take a limited estate.

(4) Females who take a *limited* or *restricted* estate in property inherited by them are hereinafter called "limited heirs."

**175. Reversioners.**—(1) The heirs of the last full owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited heir, if they be then living, are called "reversioners". A reversioner may be a male or a female (*v*).

(2) *Interest of reversioners.*—The interest of a reversioner is an interest *expectant* on the death of a limited heir. It is *not a vested interest.* It is a *spes successionis* or a *mere chance of succession* within the meaning of the Transfer of Property Act, 1882, sec. 6. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. A transfer of a *spes successionis* is a nullity, and it has no effect in law (*w*).

The widow as guardian of a minor reversioner and not as representing the estate cannot enter into a compromise or agreement to refer disputes to arbitration so as to affect the minor's rights when the estate comes into the minor's possession (*x*). But the interest of a reversioner is an interest within the meaning of s. 174 Bengal Tenancy Act and the reversioner is a person "interested" within the meaning of s. 17 of the same Act (*y*).

(3) Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be said to claim through or derive his title from another reversioner, but each derives his title from the last full owner (*z*).

*Illustrations*

(a) A Hindu, *A*, dies leaving a widow, a brother, a son of that brother, and an uncle. Here the brother, his son, and the uncle are all reversioners. The brother is the "next" or "presumptive" reversioner. The other reversioners are "remote" or "contingent" reversioners. If the brother dies in the widow's lifetime, his son becomes the "next" reversioner. Suppose now that the brother dies first, and then the widow. In that case the brother's son will succeed to *A*'s estate, *not as the heir of his father,* for *A*'s property never vested in his father, *but as the heir of his uncle, A.*

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(*v*) *Moniram* v. *Keri Kolitani* (1880) 7 I.A. 115, 154, 5 Cal. 776, 789-790; *Sham Sunder* v. *Achhan Kunwar* (1899) 21 All. 71, 25 I.A. 183.

(*w*) *Janaki Ammal* v. *Narayanaswami* (1916) 43 I.A. 207, 209, 39 Mad. 634, 638, 37 I.C. 161 ('16) A.PC. 117; *Venkatnarayana* v. *Subbammal* ('15) 42 I.A. 125, 128, 38 Mad. 406, 410-411, 29 I.C. 298, ('15) A.PC. 124; *Amrit Narayan* v. *Gaya Singh* (1918) 45 I.A. 35, 45 Cal. 590, 44 I.C. 408, ('17) A.PC. 95 [renunciation]; *Jagan Nath* v. *Dibbo* (1909) 31 All. 53, 1 I.C. 818; *Nund Kishore* v. *Kanee Ram* (1902) 29 Cal. 355; *Annada* v. *Gour Mohan* (1921) 48 Cal. 536, 65 I.C. 27, ('21) A.C. 501; *Manickam* v. *Ramalinga* (1906) 29 Mad. 120; *Muthuveeru* v. *Vythilinga* (1909) 32 Mad. 206, 3 I.C. 476; *Pindiprolu* v. *Pindiprolu* (1907) 30 Mad. 486; *Ramchandar* v. *Kallu* (1908) 30 All. 497; *Bhana* v. *Guman* (1918) 40 All. 384, 44 I.C. 629, ('18) A.A. 184; *Gangabai* v. *Hari Ganesh* (1921) 45 Bom. 1167, 62 I.C. 680, ('21) A.B. 446; *Dhoorjeti* v. *Dhoorjeti* (1907) 30 Mad. 201 [renunciation]; *Musammat Bhagwati* v. *Jagdam* (1921) 6 Pat. L.J. 604, 621-622, 62 I.C. 933, ('21) A.P. 260; *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 69, 45 All. 179, 71 I.C. 629, ('22) A.PC. 403 [limitation]; *Annada Mohan* v. *Gour Mohan* (1923) 50 I.A. 239, 50 Cal. 929, 74 I.C. 499, ('23) A.PC. 189 [limitation]; *Thakur Prasad* v. *Mussammat Dipa Kuer* (1931) 10 Pat. 352, 365, 134 I.C. 129, ('31) A.P. 442. See also *Ma Yait* v. *Mahomed* (1927) 5 Rang. 145, 102 I.C. 690, ('27) A.R. 165.

(*x*) *Amrit Narayan Singh* v. *Gaya Singh*, 45 I.A. 35, 45 Cal. 590, 44 I.C. 408; *Musammat Har Narain Kunwar* v. *Sajjan Pal Singh & Ors.* (1940) All. 719, (1940) Kar. 366, 190 I.C. 184, 67 I.A. 386, ('40) A.PC. 181.

(*y*) *Susheelasundaree* v. *Bishnupada De* (1933) 60 Cal. 636, 146 I.C. 641 ('33) A.C. 622.

(*z*) *Bhagwanta* v. *Sukhi* (1900) 22 All. 33 [F.B.]; *Bahadur Singh* v. *Mohar Singh* (1901) 29 I.A. 8-9, 24 All. 94; *Lala Soni Ram* v. *Kanhaiya Lal* (1915) 40 I.A. 74, 35 All. 227, 19 I.C. 291; *Srimutty Manokarani Debi* v. *Haripada* (1914) 18 C.W.N. 718, 24 I.C. 311, ('14) A.PC. 164; *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 83-84, 42 Mad. 523, 536, 50 I.C. 498, ('18) A.PC. 198.

(b) A Hindu, *F*, dies leaving a widow, *A*, a mother, *B*, a father's mother, *C*, and a father's brother, *D*. Here there are three reversioners of whom two, namely, *B* and *C* are *females*, and one, namely, *D*, is a *male*. On *F*'s death, his widow, *A* will succeed to his property. On *A*'s death, *F*'s property will *revert* or pass to *F*'s next heir, *B*, if she is then living. On *B*'s death, *F*'s property will *revert* to his next heir *C*, if she is then living. On *C*'s death, *F*'s property will *revert* or pass to *D*, if he is then living. *D*, however, will take the property as *full* owner and on his death it will pass to his own heirs and not to *F*'s heirs.

*Spes successionis.*—"Under the Hindu law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*" (*a*). "A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit, to his heirs (*b*). His right becomes concrete only on her demise; until then it is mere *spes successionis*" (*c*). No effect can be given to a contract for sale of a reversion made by a reversioner before the reversion has fallen in even though the reversioner succeeds to the reversion on the widow's death (*d*). Further, the interest of a reversioner being a mere *spes successionis*, he is not entitled to redeem a mortgage of the estate, executed by the widow's husband, in the lifetime of the widow (*e*). When at the request of a Hindu widow, who had mortgaged her husband's property to pay off her husband's debts, the plaintiff her daughter who was the immediate reversioner paid off the mortgage debt, and the mortgagee delivered over to her the mortgage deed with an endorsement of satisfaction upon it, and she was given possession of the mortgaged property but was later on dispossessed by the sons of her deceased sister in whose favour the widow had executed an unregistered deed of gift; it was held, on a suit brought by the plaintiff against her sister's son, for recovery of possession of the property, that although as a reversioner pure and simple the plaintiff could not claim any right of subrogation, yet she was entitled to a possessory lien both as a matter of law and equity on the strength of which she could claim to recover property from the defendants who were mere trespassers (*f*).

*Jats.*—Among Jats who have migrated to the district of Meerut from the Punjab there exists a custom by which reversioners irrespective of degree succeed equally to the last male owner, each branch of the family taking its share *per stirpes* (*g*).

*Burden of proof.*—It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs (*h*).

**176. Widow's estate.**—A widow or other limited heir is not a tenant-for-life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death (*i*). The whole estate is for the time vested in her, and she represents it completely (*j*). As stated in a Privy Council case (*k*), "her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but . . . so

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(*a*) *Venkatanarayana* v. *Subbammal* (1915) 42 I.A. 125, 128, 38 Mad. 400, 410, 411, 29 I.C. 298, ('15) A.PC. 124; *Lakshmi* v. *Anantharama* (1937) Mad. 948 [F.B.], 171 I.C. 7, ('37) A.M. 699; *Ramaswamy* v. *Arumanayagam* ('55) A. Tra. Co. 20; *Subbareddi* v. *Govindareddi* ('55) A. Andhra 49.

(*b*) *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, 162 I.C. 718, ('36) A.L. 124.

(*c*) *Amrit Narayan* v. *Gaya Singh* (1918) 45 I.A. 35, 39, 45 Cal. 590, 603, 44 I.C. 408, ('17) A.PC. 95.

(*d*) *Jaganadha* v. *Prasada Rao* (1916) 39 Mad. 554, 29 I.C. 241, ('16) A.M. 579; *Ram Gopal* v. *Gurbux Singh* ('55) A. Punj. 215.

(*e*) *Chhotey Singh* v. *Surat Singh* (1930) 5 Luck. 691, 12 I.C. 211, ('30) A.O. 294. *Vide* in this connection the observations of Ray. C.J., in *Mitra* v. *Mt. Gurubari* ('50) A. Orissa 150.

(*f*) *Mitra* v. *Gurubari* ('50) A. Orissa 150.

(*g*) *Dharam Singh* v. *Hira* (1922) 44 All. 390, 65 I.C. 828, ('22) A.A. 141.

(*h*) *Rama Row* v. *Kuttiya* (1917) 40 Mad. 654, 34 I.C. 294, ('17) A.M. 872; *Javitri* v. *Gendan Singh* (1927) 49 All. 779, 102 I.C. 167, ('27) A.A. 767; *Mt. Barro* v. *Narain Prasad* (1938) 13 Luck. 167, 167 I.C. 72, ('37) A.O. 243.

(*i*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87, 91-92.

(*j*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 789, 7 I.A. 115, 154; *Jagdish Prasad* v. *Shreedharpant* ('55) A.A. 625.

(*k*) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 209, 39 Mad. 634, 637, 37 I.C. 171, ('16) A.PC. 117; *Kalishanker Das* v. *Dhirendra Nath* (1955) 1 S.C.R. 467.

long as she is alive no one has any vested interest in the succession." The principles relating to the nature of a widow's estate were recently reiterated by the Supreme Court (*k*1).

A widow under the Hindu law takes a special and qualified estate, and she has a limited power of disposition of her husband's property. The restrictions on her power of alienation are *inseparable from her estate*, and their existence does not depend on that of heirs capable of taking on her death. If, for want of heirs, the right to the property passes to the Government, the Government has the same power that an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow (*l*). See § 185A.

The estate taken by a Hindu widow in property inherited by her from her husband is called "Widow's estate", or "Woman's estate." The estate taken by every other limited heir is similar in its incidents to a widow's estate. The incidents of a widow's estate are set forth in §§ 177 to 201.

See Note at the beginning of this chapter and s. 14, Hindu Succession Act, 1956.

A widow or other limited heir does not take merely an estate for life, for, as will be seen presently, she can in certain cases dispose of the *whole* estate inherited by her which she could not do if she were a mere life-tenant. What vests in her is not a mere life-estate, but the whole estate. Further, she represents the estate *completely*, and it is for this reason that in certain cases a decree passed against her with reference to property inherited by her binds not only herself, but also the reversioners, though the reversioners were not parties to the suit. In other words the estate of a Hindu widow is an absolute one *subject to certain restrictions.*

*Incidents of widow's estate.*—The expression "stridhana" predicates an *absolute* estate; the expression "widow's estate" implies a *limited* estate. A female takes an absolute estate in her stridhana, but she takes a qualified estate in *property inherited by her except* in certain cases governed by the Bombay school [§ 173]. When she takes a qualified estate, it is said that she takes a *widow's estate*. The following is a brief statement of the peculiar features of a *widow's estate*:—

(1) The estate taken by a widow in property inherited by her from her husband may best be described by saying that she is the owner thereof, except that she cannot sell the *corpus* of the property or mortgage it, or make a gift of it, or grant leases thereof for a long term, or otherwise alienate it, unless it be for legal necessity or for the benefit of the estate *or* with the consent of the next reversioners. Where an alienation is made by her for a legal necessity or with the consent of the next reversioners, it passes an absolute estate to the alienee to the same extent as an alienation made by a full owner [§§ 178-185].

A widow inheriting her husband's property takes it and holds it as his legal representative. Rents accruing from it are to be considered as part of his estate and as such are liable to pay his debts and to be attached in execution of simple money decree obtained against him (*m*).

(2) Subject to the above restrictions on alienation, she holds the property absolutely, and she completely represents it. She may, therefore, institute suits in respect of the property, and she may be sued in respect thereof, and decrees passed against her as *representing* the estate in respect of debts or other transactions binding on the estate, are binding not only on her, but on the reversioners, though the reversioners are not parties to the suit [§ 199].

(3) If she is dispossessed of any portion of the property by a third person, she can sue to recover it, but if she fails to sue and allows the possession of such person to become adverse to her, the reversioners are not affected by such adverse possession for they succeed not as her heirs, but as her husband's heirs, and they may, therefore, sue for possession within 12 years from the date of her death [§ 201].

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(*k*1) *Jaisri* v. *Rajdewan* ('62) A.S.C. 83. *Jagat Singh* v. *Teja Singh* ('70) A. Punj. & H. 309.

(*l*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 553; *Kalishanker Das* v. *Dhirendra Nath* (1955) 1 S.C.R. 467, 479, ('54) A.SC. 505. Also see *Natvarlal* v. *Dalubhai* (1934) S.C.R. 339, 355, 356, 56 Bom. L.R. 447, ('54) A.SC. 61.

(*m*) *Phool Kunwar* v. *Rikhi Ram* (1935) 57 All. 714, 153 I.C. 865, ('35) A.A. 261.

Where a widow or other limited female owner sues for arrears of profits against a sharer and obtains a decree and executes it but on appeal the amount is reduced, the liability to refund is personal to her and does not attach to the estate so as to bind the reversioner after her death (*n*).

(4) She can sell her *life interest* in the property or mortgage it or make a gift of it to anyone she likes. She is entitled to the whole income of the property. She may spend the income in any way she likes. She is not bound to pay her husband's debts out of the income, nor is she bound to maintain the members of her husband's family out of the income, or to perform their marriage ceremonies out of the income. She can throw the burden of all these charges on the *corpus* of the property, and sell or mortgage the same to meet those expenses, such expenses being regarded in law as legal necessities (*o*) [§§ 177 to 181].

(5) The entire estate being vested in her, she is entitled to manage the same. But she must manage it as a prudent owner would do. She must not commit waste or do any act injurious to the reversion [§ 198].

(6) The limitations imposed upon her estate are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she cannot alienate the *corpus* of the property except for a legal necessity. If she does alienate it without legal necessity, then if there be no reversioners, the alienation may be set aside by the Government taking the property by escheat (*p*).

(7) A widow cannot by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow (*q*).

The incidents of the estate taken by other limited heirs, such as the mother, father's mother, daughter (except in the Bombay school), are similar to those of the widow's estate.

**177. Income and savings from income.**—A widow or other limited heir is not a trustee for the reversioners (*r*). She has absolute power of disposal of the *income* of the property inherited by her. She is not bound to save the income. She may spend the whole income upon herself, or give it away as she likes during her life (*s*).

But difficult questions arise when the income is *accumulated* either when the estate is in her possession or in the possession of others. Where the property was not inherited by her but a life estate is given to her by deed, no question of an intention to treat the accumulated income as an accretion to the main estate can arise inasmuch as there is a separation of the income from the date of the deed and she is not the representative of the last male owner (*t*) [*Vide* § 127(4) *ante*].

The law as to the right of a widow or other limited heir to accumulations of the income of the estate of the last male holder may be considered under six heads namely:—

(1) Accumulations of income which accrued during the life of her husband or other male whom she succeeds.

(2) Accumulations of income after his death and before delivery of the estate to her.

(3) Accumulations of income of the estate made by herself personally.

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(*n*) *Kishan Lal* v. *Muhammad Ishaq* (1938) All. 761 (F.B.), 176 I.C. 509, ('38) A.A. 426.

(*o*) *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433.

(*p*) *Collector of Masulipatam* v. *Cavaly Vencata* (1860) 8 M.I.A. 520; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 673.

(*q*) *Sham Lall* v. *Amarendro* (1896) 23 Cal. 460, 473; *Kanni Ammal* v. *Ammakannu* (1900) 23 Mad. 504. See also *Brij Indar* v. *Janki Koer* (1877) 5 I.A. 1, 1 C.L.R. 318; *Kashi Prasad* v. *Inda Kunwar* (1908) 30 All. 490.

(*r*) *Viraraju* v. *Venkataratnam* (1939) Mad. 226.

(*s*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 434; *Biswanath* v. *Khantomani* (1870) 6 Beng. L.R. 747; *Grose* v. *Amritamayi* (1869) 4 Beng. L.R.O.C. 1, 40-41; *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794.

(*t*) *Mohini Mohan Basu* v. *Rashbihari Ghosh* (1937) 2 Cal. 97, 169 I.C. 519, ('37) A.C. 229.

(4) Arrears of income and income held in suspense.

(5) Accumulations of income where the income is given to her by her husband by deed or will.

(6) Accretion to the estate in other cases.

(1) *Accumulations which accrued during husband's life.*—Accumulations which accrued during the husband's life form part of the corpus of the estate. They are accretions to the estate, and the widow succeeds to both for a woman's estate (*u*).

(2) *Accumulations between death and delivery and afterwards realised by the limited owner.*—Cases have arisen in which possession of the estate has been withheld from the widow, and the estate together with the accumulations of income is eventually handed over to her long after her husband's death; or in which the corpus of the estate is bequeathed by the husband to others, but there is an intestacy as to the income and the income which has accumulated owing to litigation or other causes is handed over to the widow long after the husband's death. As these *accumulations* accrue *after* the husband's death, the widow does not take them by succession. She takes them as she would have taken the *income itself* had she been let into possession at once, that is, as Stridhana (*v*) and she may spend them as she chooses.

But the question still remains whether, if she keeps them distinct for some time she is entitled to deal with and dispose of the *accumulations* as she would have been entitled to do with the *income* if she has been let into possession at once and there had been no accumulation. This question should be determined by the intention of the widow to treat the accumulations as accretions to the estate or as her own absolute property. If she does nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate (which was in *other* hands) or to justify the inference that she wished it to revert to her husband's heirs, the fund is her stridhana which she may dispose of by deed or will. But if she does indicate such intention or does any act to justify such inference, she takes only a widow's estate in the fund, and she cannot dispose of it except for legal necessity, and on her death it passes to her husband's heirs. This was the view taken by the Judicial Committee in *Sawdamini Dasi* v. *Administrator-General of Bengal* (*w*).

(3) *Accumulations made by the widow personally.*—The third case is where the accumulations are made by the widow herself personally, and either are invested by her or remain uninvested in her hands. A widow, as stated above, may spend her whole income either upon herself, or by giving it away as she likes during her life. She is not bound to make any savings. But if she does make savings, the question arises whether she has the same power of disposal of the savings as she has of the income, or whether the savings are to be treated as accretions to the estate, that is, as part of the corpus of the estate, so as to be subject to the same restraint on alienation as the corpus itself [§ 178]. The trend of decisions is that the case should be determined by the intention of the widow. If she does nothing to indicate an intention to make the savings part of her husband's estate, or to justify the inference that she wished them to revert to her husband's heirs, the savings

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(*u*) *Chandrabulee* v. *Brody* (1868) 9 W.R. 584, 585; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo* (1862) 9 M.I.A. 123; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo* (1857) 6 M.I.A. 526.

(*v*) *Sreemutty Sorjeemoney Dossee* v. *Denobundoo* (1862) 9 M.I.A. 123, 138-139; *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 335, 10 I.A. 150.

(*w*) (1892) 20 I.A. 12, 20 Cal. 433 [estate in hands of executor—settlement by widow of accumulations upheld].

are her stridhana (*x*) which she may dispose of by deed or will. But if she indicates any such intention or does anything to justify any such inference, she takes only a widow's estate in them, and she cannot dispose of them except for legal necessity, and on her death they will pass to her husband's heirs.

Thus if she invests the savings in the purchase of land or securities, and makes no endeavour or attempt for the purpose of distinguishing the original estate from the after-purchases, but deals with the after-purchases in the same manner as the original estate, it is an indication of intention on her part to treat the after-purchases as accretions to the original estate, and she cannot alienate them for any purpose which would not justify alienation of the original estate. But if there is no evidence of any dealing on her part which would show that she intended to treat the after-purchases as accretions to her husband's estate, then the savings are her stridhana which she may dispose of by deed or will, and on her death intestate they will pass to her stridhana heirs (*y*).

It has thus been held that where a widow inherits landed property in a village from her husband, and with the savings of the income of that property she purchases other lands *in the same village*, and *long after the purchase* she makes a gift *both of the original estate and the after-purchases to one and the same person* (being the daughter in that case), only reserving to herself a life-interest in part of them, the after-purchases constitute accretions to the estate which she has no power to alienate except for a purpose which would justify alienation of the original estate (*z*). It has similarly been held, that where the widow erects buildings on land belonging to the husband's estate (*a*), or deposits money belonging to her husband's estate with a banker upon the understanding that the interest at the end of every year shall be added to the principal and the amalgamated sum should be treated as a fresh deposit (*b*), the buildings and the accumulations of the interest must be deemed to be accretions to the estate, and descendible to the husband's heirs.

In *Sheolochun Singh* v. *Saheb Singh* (*c*) their Lordships said: "Where a widow comes into possession of the property of the husband, and receives the income and does not spend it, but invests it in the purchase of other property, their Lordships think that, *prima facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *prima facie*, be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way."

On the other hand, if she advances the savings made by her on a mortgage of land and subsequently assigns the mortgage for value (*d*), or purchases land with the savings and not very long after the purchase mortgages it as her own and afterwards makes a gift of it (*e*), or purchases land with the savings and soon after the purchase makes a gift of it (*f*), the subsequent acquisitions cannot be treated as accretions to the original estate, her conduct in all these cases being consistent only with an intention to treat them as her own absolute property.

In *Akkanna* v. *Venkayya* (*g*) the High Court of Madras observed with reference to the dictum in *Sheolochun Singh* v. *Saheb Singh* above quoted:—"This was only a dictum which must be understood with reference to the facts and circumstances of that case which it was held indicated that it was the intention of the widows to keep the estate entire, and that the same should descend in one line of succession" and further proceeded as follows:—

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(*x*) *Prabhakar* v. *Sarubai* (1943) Nag. 779, 208 I.C. 211, ('43) A.N. 253; *Lalsingh* v. *Vithalsingh* ('50) A.N. 62, (1950) Nag. 176; *Ganu Purnaji* v. *Shriram* (1954) Nag. 646, ('54) A.N. 353; *Ajit* v. *Nagendra* ('60) A.C. 484.

(*y*) *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 337, 10 I.A. 150; *Sheolochun* v. *Saheb Singh*, (1887) 14 Cal. 387, 393-394, 14 I.A. 63; *Nirmala* v. *Deva Narayan* (1928) 55 Cal. 269, 276, 104 I.C. 284, ('27) A.C. 868; *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518, 155 I.C. 213, ('36) A.P. 200; *Tustu Charan* v. *Kali Kumar* ('57) A.C. 122; *Sitaji* v. *Bijendra* (1949) 28 Pat. 447, ('51) A.P. 356; *Sumantrabai* v. *Rishabhkumar* (1953) Nag. 69, ('52) A.N. 295; *Hariharsingh* v. *Deonarayan* (1954) Nag. 692, ('54) A.N. 319.

(*z*) (1883) 10 Cal. 324, 10 I.A. 150, *supra*; (1887) 14 Cal. 387, 14 I.A. 63, *supra*.

(*a*) *Venkata* v. *Surenani* (1908) 31 Mad. 321.

(*b*) *Narayana* v. *Suppiah* (1920) 43 Mad. 629, 58 I.C. 639, ('20) A.M. 983.

(*c*) (1887) 14 Cal. 387, 393, 14 I.A. 63; *Nabakishore* v. *Upendrakishore* (1922) 42 Mad. L.J. 253, 74 I.C. 612, ('23) A.PC. 563.

(*d*) *Akkanna* v. *Venkayya* (1902) 25 Mad. 351.

(*e*) *Wahid Ali* v. *Tori Rama* (1913) 35 All. 551, 21 I.C. 91.

(*f*) *Keshav* v. *Maruti* (1922) 46 Bom. 37, 62 I.C. 954, ('22) A.B. 144.

(*g*) (1902) 25 Mad. 351.

"The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one, which though derived from her husband's property, was at her absolute disposal....Her absolute power of disposition over the income derived from [her] limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect this presumption." In a case where the widow purchased a house and within less than 4 months sold the property it was held by the Allahabad High Court that it is for the person who alleges that she meant to keep the property as her Stridhana to prove that it is so (*h*). It is submitted that this decision is inconsistent with the later decisions of the Privy Council.

Where the widow lends part of her savings on mortgage to the next reversioner, and afterwards obtains a decree against him for the amount of the loan and takes proceedings in execution, but dies pending execution, the person entitled to proceed with the execution is her stridhana heir, her conduct manifesting a clear intention to treat the decretal amount representing the savings as her own absolute property (*i*). A purchase of property by a widow out of the savings of the income in the name of another person, affords an indication of an intention to treat the property as her own (*j*). Where there is nothing to indicate the intention of a limited owner about the immovable properties acquired by her out of the savings of the property of the last male holder the presumption is that she intended to keep them at her absolute disposal (*k*).

When a woman's stridhana was inherited by her two minor daughters but was managed for them by their guardians who purchased some additional property out of its income and one of the daughters died before obtaining possession of the estate, her share of the property purchased was held to belong to her absolutely as stridhana and descended to her heir and not to the other daughter (*l*).

(4) *Income held in suspense or unrealized by the limited heir.*—A widow or other limited heir may not have recovered the rents of the estate inherited by her, or she may have obtained decrees for arrears of rent and may not have realised them, or she may have recovered the arrears of rent and realised the decrees but may not have invested the amount. In cases such as these the question arises whether on her death the arrears of income or the decrees held by her or the income held in suspense constitute her stridhana or whether they constitute "savings" or "accumulations." Dealing with this question, the High Court of Bengal in a case decided in 1876 said: "But what are accumulations in the view of these cases? Not surely the accidental balances, of one or two years of the widow's income, but a fund distinct and tangible. There is nothing whatever in this case to indicate that any such fund ever had been formed or had existed" (*m*). In another case, the High Court of Bombay said: "In the present case the cash balance in question does not amount to more than half the yearly payment and had not been separated so as to form a distinct fund" (*n*). In *Venkatadri* v. *Parthasarathi* (*o*) the Rani of Medur who became entitled to the estate on the death of her son and its income till her death filed a suit to recover the estate. Pending the disposal of the suit the estate was in the hands of a receiver appointed by the Court. Before the suit was disposed of she died leaving a will bequeathing the income of the estate. The Judicial Committee observed

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(*h*) *Bhagwan Das* v. *Bittam* (1945) All. 148.
(*i*) *Sita Ram* v. *Dulam* (1919) 41 All. 350, 50 I.C. 372, ('19) A.A. 338.
(*j*) *Nirmala* v. *Deva Narayan* (1928) 55 Cal. 269, 275, 104 I.C. 284, ('27) A.C. 868.
(*k*) *Prabhakar* v. *Sarubai* (1943) Nag. 779, 208 I.C. 211, ('43) A.N. 253.
(*l*) *Kailasanatha Mudaliar* v. *Vadivammi* (1935) 58 Mad. 488, ('35) A.M. 749.
(*m*) *Sreemutty Puddo* v. *Dwarka Nath Biswas* (1876) 25 W.R. 335, 341.
(*n*) *Rivett-Carnac* v. *Jivibai* (1886) 10 Bom. 178.
(*o*) 48 Mad. 312, 52 I.A. 214, ('25) A.P.C. 105.

"that income or any part of it she could while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise."

In *Balasubrahmanya* v. *Subbayya* (*p*) the estate was under the court of wards who were in possession of the savings of the income. The Rani could not make any attempt to dispose of it during her life time, but left a will bequeathing the accumulations. Their Lordships observed "The High Court held that the savings were the personal property of the Rani and would pass under her will. Their Lordships see no reason to differ from the High Court's findings". Following *Isri Dutt* v. *Hunsbutti* cited above, it has been held in Calcutta (*q*) that if the widow does not dispose of in her lifetime the arrears of income or the decrees held by her or the income held in suspense, she cannot dispose of them by her will and they pass on her death to her husband's heirs. But the decision in *Venkatadri* v. *Parthasarathi* was not referred to by Page J. and in a later Calcutta decision (*r*) it was observed "He held her Will to be ineffective. It would, however, be difficult to agree with all his reasonings on the latter point." But, when there is no will and the income is unrealised (*e.g.*, when due under decrees not yet executed) it is held in Calcutta and in Oudh (*s*) that the right to the income will not pass to the stridhana heirs of the limited owner.

(5) *Accumulations of income granted by husband by deed or will.*—Where by a deed or will the husband grants the income of his property to his wife for her life, and the *corpus* is given to others, the savings from such income and the property purchased out of such savings are her stridhana, and they pass to her stridhana heirs.

They are not accretions to the estate for the simple reason that the *corpus* of the estate is in other hand (*t*). The widow takes the income not as a widow, but as a taker of a life estate under the settlement or will (*u*). Similarly, savings from maintenance allowance directed to be paid to a widow under a decree out of the husband's estate and property purchased out of such savings are her stridhana, and they pass to her stridhana heirs (*v*).

(6) *Enlargement of estate inherited by a widow.*—The estate inherited by a widow from her husband may be enlarged otherwise than by savings from the income. Thus it may be enlarged by action of Government (*w*), or by compromise with the superior owner (*x*), or otherwise (*y*). In such cases the enlarged estate is still a widow's estate.

The enlargement is no more than an accretion to her husband's estate; it does not change the character of the estate so as to convert the widow's estate into stridhana. It has been held in the undermentioned cases that a female heir derives no stronger title from the fact that the Inam Commissioner has enfranchised in her name property inherited from a male, and has given a new title deed in her name. In *Venkata* v. *Veerabhadrayya* (*z*), the Judicial Committee held that when karnam service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an inam title deed is granted comprising the lands to the holder of the office, his representatives and

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(*p*) (1938) Mad. 551, 65 I.A. 93, ('38) A.PC. 34.

(*q*) *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794.

(*r*) *Surendra Nath Basu* v. *Radha Rani Debi* (1940) 2 Cal. 415, 187 I.C. 108.

(*s*) *Sarnam* v. *Raja Bisheshwar* (1930) 5 Luck. 608, 125 I.C. 161, ('31) A.O. 66.

(*t*) *Srimati Krishna* v. *Bhaiya Rajendra* (1927) 2 Luck. 43, 82-89, 104 I.C. 15, ('27) A.O. 240 [legacy]; *Bhugbutti Das* v. *Bholanath* (1875) 2 I.A. 256, 25 W.R. 168.

(*u*) *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 336, 10 I.A. 150.

(*v*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

(*w*) *Vangala* v. *Vangala* (1906) 28 Mad. 13; *Kashi Prasad* v. *Inda Kunwar* (1908) 30 All. 490; *Subbaroya* v. *Aiyaswami* (1909) 32 Mad. 86, 1 I.C. 749.

(*x*) *Ram Shankar* v. *Lal Bahadur* (1926) 1 Luck. 98, 92 I.C. 637, ('26) A.O. 277.

(*y*) *Chandrakisor* v. *Upendra Chandra* (1923) 37 Cal. L.J. 319, 74 I.C. 612, ('23) A.C. 563 [purchase by widow of rights of tenants in occupation of her husband's estate].

(*z*) (1921) 48 I.A. 244, 44 Mad. 643, 61 I.C. 667, ('22) A.PC. 96.

assigns, the lands are his separate property, and are not subject to any claim for partition by other members of the family. Following the principle of this decision, the High Court of Madras has held that where a similar enfranchisement takes place in favour of a widow of karnam service lands and a similar title is given to her, she takes an absolute interest in the lands (*a*). When the widow, at her husband's wish, rounded off the property by acquiring another portion and treated both as one, it was held that a case of accretion had been established and that she could not alienate the acquired property as if it were her own (*b*).

**177A. Acquisition of new property from sale proceeds of property left by husband.**—Where a widow sells the entire property left by her husband and from the sale proceeds acquires new property the property so acquired partakes of the nature of her husband's estate (*c*).

**177B. Doctrine of blending.**—The doctrine of blending which applies in case of coparceners where property is thrown into common stock (§ 227) cannot be involved in regard to property held by a Hindu female (*e.g.*, widow) as a limited owner (*d*).

**178. Limited power of disposal of immoveable property.**—To uphold an alienation, by a widow or other limited heir, of the *corpus* of immoveable property inherited by her, it should be shown (*e*)—

(1) that there was legal necessity (*f*) (§§ 181-182); *or*

(2) that the alienee, after reasonable inquiry as to the necessity acted honestly in the belief that the necessity existed (§§ 181-182); *or*

(3) that there was such consent of the next reversioners to the alienation as would raise a presumption that the transaction was a proper one (§ 183); *or*

(4) that it was a surrender by her of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of alienation (§ 197).

Where any one of the first three positions is established, the alienation may be of the *whole* or *any part* of the estate; but where the fourth alone is proved then the alienation must be of the whole estate.

A widow or other limited heir has no power to dispose of the *corpus* of immoveable property inherited by her except in the four cases mentioned above.

A widow may alienate her husband's property to pay a debt incurred by her for legal necessity though that debt is barred at the time of alienation (*g*).

**179. Limited power of disposal of moveable property.**—In territories other than the Bombay State, a widow or other limited heirs has no greater power of disposal over moveable property inherited by her than over im-

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(*a*) *Palaniyandi* v. *Velayudam* (1929) 52 Mad. 6, 112 I.C. 320, ('29) A.M. 93.

(*b*) *Bharosa Shukul* v. *Monbasi Kuer* (1932) 54 All. 1014, 143 I.C. 259, ('32) A.A. 690.

(*c*) *Tod Singh* v. *Begam Bai* ('60) A.M.P. 64; *Ayyangouda* v. *Godigeppagouda* ('40) A.B. 200.

(*d*) *Mallesappa Bandeppa* v. *Desai Mallappa* (1962) 2 S.C.J. 589.

(*e*) *Debi Prosad* v. *Golap Bhagat* (1913) 40 Cal. 721, 752, 753, 19 I.C. 273 [F.B.]; *Rangasami* v. *Nachiappa* (1919) 42 Mad. 523, 46 I.A. 72, 50 I.C. 498, ('18) A.P.C. 196.

(*f*) *Fateh Singh* v. *Raghubir Sahai* (1938) All. 904 (F.B.) (relates to usufructuary mortgage rights inherited by widow).

(*g*) *Darogi Rai* v. *Basdeo Mahto* (1937) 16 Pat. 45, 166 I.C. 555, (37) A.P. 40. *Ratilal* v. *Indravadan* ('66) A. Guj. 133.

moveable property, and she cannot dispose of it by deed or will (*h*). The same is the law in the Bombay State in cases governed by the Mitakshara (*i*). But in cases governed by the Mayukha, it has been held that she can dispose of moveable property inherited by her by act *inter vivos*, that is, by sale, gift, or otherwise (*j*), but not by *will*, and what remains of the property at her death descends to the next heirs of the last full owner (*k*). So also moveable property obtained by a Hindu widow in a partition with her son stands on the same footing as moveables acquired by inheritance and therefore, may be disposed of by her during her lifetime unrestricted by any rights of other persons (*l*). See, however, sec. 2 and sec. 3(3) of the Hindu Women's Rights to Property Act, 1937, *supra*. The result is somewhat startling.

**180. No power to dispose of inherited property by will.**—A widow or other limited heir cannot in any case dispose of *by will* property inherited by her or any portion thereof, whether the property be moveable or immoveable (*m*).

**181. Alienations by widow.**—A widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely:—

(I) Religious or charitable purposes [§ 181A].

(II) Other purposes amounting to legal necessity [§ 181B].

For purposes of the first class she has a larger power of disposition than for purposes of the second class (*n*).

A surrender by a Hindu widow in favour of the next reversioner is not an alienation of her husband's estate (*o*).

**181A. Alienation by widow for religious or charitable purposes.**—(1) *Extent of power of alienation.*—A widow or other female heir may alienate the estate for certain religious or charitable purposes. These purposes may be divided into two classes, namely:—

(a) The performance of the obsequial ceremonies of the deceased owner mentioned in cl. (i) below, and the payment of his debts (*p*) mentioned in cl. (iv) below.

(b) The performance of religious ceremonies of persons other than the deceased owner mentioned in cl. (ii) below, and religious or chari-

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(*h*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487 (Benares); *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214 (Bengal); *Buchi* v. *Jagapathi* (1885) 8 Mad. 304 (Madras).

(*i*) *Pandharinath* v. *Govind* (1908) 32 Bom. 59.

(*j*) *Bechar* v. *Bai Lakshmi* (1863) 1 Bom. H.C. 56; *Bhagirthibai* v. *Khanujirao* (1887) 11 Bom. 285, 297.

(*k*) *Chamanlal* v. *Doshi Ganesh* (1904) 28 Bom. 453; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690; *Harilal* v. *Pranvalavdas* (1892) 16 Bom. 229.

(*l*) *Chamanlal* v. *Bai Parvati* (1934) 58 Bom. 246, 150 I.C. 854, ('34) A.B. 151.

(*m*) *Thakoor Deghee* v. *Rai Baluk Ram* (1866) 11 M.I.A. 139; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690; *Durga Nath* v. *Chintamoni* (1903) 31 Cal. 214; *Narasimha* v. *Venkatadri* (1884) 8 Mad. 290; *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794; *Tirath Ram* v. *Khan Devi* (1920) 1 Lah. 388, 60 I.C. 101, ('21) A.L. 149; *Jagleo Singh* v. *Mussammat Raja Kuer* (1927) 6 Pat. 788, 103 I.C. 482, ('27) A.P. 262; *Shambhu Dayal* v. *Basdeo* ('70) A.A. 525.

(*n*) *Collector of Masulipatam* v. *Caraly Venkata* (1861) 8 M.I.A. 529, 551.

(*o*) *Kasubai* v. *Chandrabhaga* (1947) Nag. 455.

(*p*) *Ashutosh* v. *Chidam* (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 371.

table acts which are supposed to conduce to the spiritual welfare of the deceased owner mentioned in cl. (iii) below.

The first class relates to acts which are *essential and obligatory*. The second class relates to acts which although not indispensable or obligatory are still pious purposes which conduce to the benefit of the soul of the deceased. With reference to the first class of acts, the powers of the Hindu female who holds the estate are wider than in respect of the acts which are simply pious. As regards acts of the first class, if the income of the estate or the estate itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. As regards the second class, she can alienate a small portion only of the estate for the pious or charitable purpose she may have in view (*q*); the expense that is allowable as regards this class of acts must be limited by a due regard to the entire bulk of the estate, and may even be totally disallowed where it is not warranted by the circumstances of the family.

In *Kamla Devi* v. *Bachulal Gupta*, the Supreme Court (*r*) observed that one of the principles which clearly emerged from the decisions on the subject was that a Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory but are still pious observances which conduce to the bliss of the deceased husband's soul. In the case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it; but for acts which are pious and which conduce to the bliss of the deceased husband's soul, she can alienate a *reasonable* portion of the property.

To justify an alienation for a religious or charitable purpose, it is not necessary to show any "benefit to the estate," or to prove any "pressure on the estate," such as is necessary in the case of an alienation for other purposes (*s*) [§ 181B (1)].

(2) *What are religious or charitable purposes.*—Having stated the extent of the power of disposition of a Hindu widow or other limited heir for religious or charitable acts, we proceed to consider the precise nature of these acts. The religious or charitable acts for which an alienation may be made are as follows:—

(i) Performance of the funeral (*t*) and *shraddha* ceremonies (*u*) of the deceased owner. These acts are essential and obligatory.

Thus a widow may alienate property inherited by her from her husband for the performance of the funeral and *shraddha* ceremonies of the *husband*. Similarly, a daughter succeeding as heir to her *father* may alienate property inherited by her for the performance of similar ceremonies of the father (*v*). So debts incurred by a daughter for the *shraddha* ceremony of her father, while the widow is alive, are on the same footing as debts incurred by the widow. Such debts bind the daughter when she succeeds as reversioner (*w*).

But this principle applies only to a widow or other limited owner or a donee from her in lawful possession. Where the property has devolved from the last owner upon his mother and after her death a person without lawful title enters into possession of the property, and incurs expenses for the funeral ceremonies of the mother, such person cannot claim a charge on the estate for the expenses so incurred against the reversioner (*x*).

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(*q*) *Sardar Singh* v. *Kunj Behari Lal* (1922) 44 All. 503, 511, 49 I.A. 383, 391, 69 I.C. 36, ('22) A.P.C. 261; *Kashirao* v. *Motiram* (1951) Nag. 284.

(*r*) ('57) A.S.C. 431, 443.

(*s*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 551; *Ram Surat* v. *Hitanandan* (1931) 10 Pat. 474, 131 I.C. 137, ('31) A.P. 330; *Nandlal* v. *Hari Prasad* ('55) A.P. 251.

(*t*) *Ratanchand* v. *Jaicherchand* (1898) 22 Bom. 818; *Lakshminarayana* v. *Dasu* (1888) 11 Mad. 288.

(*u*) *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I.C. 152.

(*v*) *Raj Chunder* v. *Sheeshoo* (1865) 7 W.R. 146.

(*w*) *Daroga Rai* v. *Basdeo Mahto* (1937) 16 Pat. 45, 166 I.C. 555, ('37) A.P. 40.

(*x*) *Nand Rani* v. *Krishna Sahai* (1935) 57 All. 997, 156 I.C. 23, ('35) A.A. 698.

(ii) Performance of religious ceremonies of persons whose ceremonies the deceased owner was bound to perform, as for instance, the *shraddha* of the husband's mother (*y*) and where a daughter inherits to her father, the performance of her mother's *shraddha* (*z*). These ceremonies are not essential or obligatory.

(iii) Religious or charitable acts which conduce to the spiritual welfare of her husband (*a*). These acts are not essential or obligatory.

No mathematical limit can be fixed to the power of alienation of a widow of her husband's property for the purpose of religious acts which conduce to his spiritual benefit. The question whether the property dedicated or alienated constitutes a reasonable proportion of the whole estate must depend upon the facts and circumstances of each case (*c*).

An alienation by a widow to pay off debts incurred by her for the Upanayana ceremony (investiture with the sacred thread) and marriage of her daughter's son will be upheld provided the debts are reasonable according to the ordinary notions of Hindus (*d*).

Following this and other decisions it has been held that an alienation of husband's property by a widow for meeting the marriage expenses of her daughter's son would be binding on the reversioners provided the limited owner acted with the best of motives and without extravagance (*e*).

The first set of religious acts referred to above relates to the performance of the ceremonies referred to in cl. (i) above, and the payment of debts referred to in cl. (iv) below (*f*). Both these are religious purposes which a widow is bound to carry out *at any expense* to the estate as laid down in *Sardar Singh's* case. These are absolute necessities. The second set of religious acts comprises the ceremonies referred to in cl. (ii) above, and religious or charitable acts which conduce to the spiritual welfare of the husband mentioned in cl. (iii). For these purposes the widow can make a gift of or alienate only a reasonable portion of the estate as laid down in *Kamla Devi's* case and other cases cited below (*g*. An endowment by a widow for the upkeep of Thakurdwara out of ail proportion to the estate, was held not to be binding on the reversioners though they raised no objection to the construction of the Thakurdwara (*h*). The gift may be of movable property, or it may be of immovable property. The circumstance that the widow has sufficient income to provide for the observances without an alienation of the estate is immaterial, for the income is *her* property (*i*). Almost all cases under this head relate to acts conducing to the spiritual welfare of the husband. The following are instances of such acts:—

Pilgrimages for the spiritual benefit of her husband and in performance of her duty to his soul, *e.g.*, pilgrimage to Gaya for performing her husband's *shraddha* (*j*); performance of Gaya *Shraddha* of the husband (*k*); or pilgrimage to Pandharpur (*l*), but not a

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(*y*) *Chowdry Jummejoy* v. *Russomoyee* (1868) 11 Beng. L.R. 418; *Ramcoomar* v. *Ichamoyi* (1881) 6 Cal. 36.

(*z*) *Srimohan* v. *Brijbehary* (1908) 36 Cal. 753.

(*a*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 551; *Raj Lukhee Debea* v. *Gokool Chunder* (1866) 13 M.I.A. 209; *Sardar Singh* v. *Kunj Behari Lal* (1922) 44 All. 503, 511, 49 I.A. 383, 391, 69 I.C. 36, ('22) A.PC. 261 affirming, (1919) 41 All. 130, 48 I.C. 847, ('18) A.A. 40; *Vuppuluri Tatayya* v. *Garimilla* (1911) 34 Mad. 288, 6 I.C. 240; *Khub Lal* v. *Ajodhya* (1915) 43 Cal. 574, 31 I.C. 433, ('16) A.C. 792; *Rabidat* v. *Mst. Jawali* (1946) All. 580 (F.B.); *Mahalakshamma* v. *Machamma* ('61) A.A.P. 263.

(*c*) *Sri Ram* v. *Chandeshwar Prasad* (1952) 31 Pat. 417, ('52) A.P. 438; *Nathuni Prasad* v. *Kachnar Kuer* ('65) A.P. 160.

(*d*) *Venkatasubba Rao* v. *Ananda Rao* (1934) 57 Mad. 772, 155 I.C. 79, ('34) A.M. 432.

(*e*) *Parisa Mudaliar* v. *Nataraja* (1950) A.M. 337, (1950) 1 Mad. L.J. 90. Also see § 181B (iv), *infra*. And see *Kamala Devi's* case at p. 222, *infra* (gift on the occasion of marriage of daughter).

(*f*) *Ashutosh* v. *Chidam* (1930) 57 Cal. 901, 126 I.C. 263, ('30) A.C. 351.

(*g*) *Panachand* v. *Manoharlal* (1918) 42 Bom. 136, 43 I.C. 729, ('17) A.B. 155 [gift of four-fifths of the estate held invalid]; *Rama* v. *Ranga* (1885) 8 Mad. 552; *Bhaskar* v. *Mahadeo* (1869) 6 Bom. H.C.O.C. 1, 13; *Ram Kawal* v. *Ram Kishore* (1895) 22 Cal. 506; *Kunj Bihari Lal* v. *Lallu Singh* (1919) 41 All. 130, 48 I.C. 847, ('18) A.A. 40; *Ram Charan* v. *Girjanandani Devi* ('59) A. All. 473; *Thakurji* v. *Parmeshwar Dayal* ('60) A. All. 339; *Thakur Indraj Bux* v. *Thakur Sheo Naresh* (1927) 2 Luck. 713, 104 I.C. 676, ('27) A.O. 450; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 422; *Chandradip Rai* v. *Mahip Rai* ('60) A.P. 112.

(*h*) *Mst. Tulsha* v. *Lachman Prasad* (1943) 18 Luck. 501, 204 I.C. 68, ('43) A.O. 109.

(*i*) (1922) 44 All. 503, 49 I.A. 383, 69 I.C. 36, ('22) A.PC. 261, *infra*.

(*j*) *Muteeram* v. *Gopal* (1873) 11 Beng. L.R. 416; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902.

(*k*) *Maniruddin* v. *Aminuddin* ('56) A.P. 142.

(*l*) *Ganpat* v. *Tulsiram* (1912) 36 Bom. 88, 12 I.C. 271.

second pilgrimage to Gaya (*m*); a gift to the temple of Jagannath at Puri for *bhog* (food offerings) to the deity and for the maintenance of the priests there "for the salvation of my husband and his family members and my own salvation" (*n*); a gift made by a daughter at the time of performing her father's *shraddha* on the occasion of the Pushkaram, a peculiarly holy event among the Hindus (*o*); a gift for erecting and maintaining a temple for the benefit of the soul of the husband, though it may be also for the benefit of her soul (*p*); a gift for the excavation and maintenance of a tank to be attached to a temple founded by the husband (*q*); a gift for the construction of a tank pursuant to her husband's wishes (*r*); a gift to the husband's *purohit* (priest) on the occasion of her visit to Gaya (*s*); a gift by way of *suphal sankalpa* to a priest of Gaya (*t*); a gift to a family deity (*u*). A gift of a small portion of the estate by a Hindu widow to an educational institution has been held to be valid by the East Punjab High Court on the ground that it is not unrelated to the desire of rendering spiritual welfare to her husband (*v*).

But it is not competent to a Hindu widow to alienate any portion of her husband's property for *her sole* spiritual benefit. Hence the following gifts have been held to be invalid:—

A gift by a widow to a favoured idol made sixteen months after her husband's death without any reference to him or his funeral ceremonies (*w*); a gift to the *pujari* (worshipper) of a temple established by her husband's mother for which no provision was made by the deceased himself in his lifetime (*x*); a feast given by a widow on her return from pilgrimage (*y*); a gift for building a dharamsala about sixteen years after her husband's death, there being nothing to show that the intention was to confer spiritual benefit on her deceased husband (*z*); a gift for the construction of a temple and installation of idols for her own welfare and salvation in the next world (*a*), and a dedication of property to the idols installed in such temple (*b*); a gift to her own Guru nine years after her husband's death (*c*).

(iv) Payment of debts of the deceased owner, even though barred by limitation whether during his lifetime or after his death (*d*). Payment of these debts is essential and obligatory.

A widow or other limited female heir is not bound to pay the principal amount of the last male owner's debts, for the income belongs wholly to her (*e*). She is only bound

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(*m*) *Gur Prasad* v. *Ram Sukh* ('52) A.A. 938. In the Bombay and Calcutta cases next cited a pilgrimage to Benares was held not to be a pilgrimage for the spiritual benefit of the deceased. It is submitted that there can be no general rule about Benares or any other holy place and each case must turn on its own facts; *Shripati Raoji* v. *Vishwanath* (1955) Bom. 1033, ('55) A.B. 457, 57 Bom. L.R. 840; *Hari* v. *Bairand* (1909) 13 C.W.N. 544, 547, 1 I.C. 434. Reference may also be made to *Sudhir Chandra* v. *Jagadish Chandra* ('59) A. Orissa 112.

(*n*) *Sardar Singh* v. *Kunj Bihari Lal* (1922) 44 All. 503, 49 I.A. 383, 69 I.C. 36, ('22) A.PC. 261.

(*o*) *Tatayya* v. *Garimilla* (1911) 34 Mad. 288, 6 I.C. 240.

(*p*) *Thakur Indraj Bux* v. *Thakur Sheo Naresh* (1927) 2 Luck. 713, 104 I.C. 676, ('27) A.O. 450.

(*q*) *Khub Lal* v. *Ajodhya* (1916) 43 Cal. 574, 31 I.C. 433, ('16) A.C. 792.

(*r*) *Ram Surat* v. *Hitanandan* (1931) 10 Pat. 474, 134 I.C. 137, ('31) A.P. 330.

(*s*) *Gobind* v. *Lakhrani* (1921) 43 All. 515, 63 I.C. 221, ('21) A.A. 109; *Ishwari* v. *Babunandan* (1925) 47 All. 563, 571, 88 I.C. 193, ('25) A.A. 495 [gift to a family priest set aside as it was of a *large* proportion of the estate].

(*t*) *Baldeo Prasad* v. *Fateh Singh* (1924) 46 All. 533, 79 I.C. 654, ('24) A.A. 933.

(*u*) *Madan Mohan* v. *Rakhal Chandra* (1930) 57 Cal. 570, 124 I.C. 327, ('30) A.C. 173.

(*v*) *Prithi Pal* v. *The Sikh Educational Society for Women* ('51) A Simla 175.

(*w*) *Puran Dai* v. *Jai Narain* (1882) 4 All. 482, 484.

(*x*) *Ram Kawal* v. *Ramkishore* (1895) 22 Cal. 506. The property alienated was, moreover, about one-third of the whole.

(*y*) *Makhan Lal* v. *Gayan Singh* (1911) 33 All. 255, 9 I.C. 199.

(*z*) *Sham Devi* v. *Birbhadra* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178; *Munshi Lal* v. *Shiv Devi* (1923) 4 Lah. 336, 78 I.C. 266, ('24) A.L. 137.

(*a*) *Bishen Bayal Singh* v. *Musammat Jaisari Kuer* (1918) Pat. 323, 48 I.C. 746, ('17) A.P. 4; *Kalandi* v. *Sadhu* ('67) A. Orissa 74 (performance of her obsequies).

(*b*) *Thakur Prasad* v. *Musammant Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442; *Kashirao* v. *Motiram* (1951) Nag. 284, ('51) A.N. 460.

(*c*) *Har Mitra* v. *Raghubar* (1928) 3 Luck. 645, 110 I.C. 618, ('28) A.O. 342.

(*d*) *Ashutosh* v. *Chidam* (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 351; *Bhala* v. *Parbhu* (1878) 2 Bom. 67; *Chimnaji* v. *Dinkar* (1887) 11 Bom. 320; *Kondappa* v. *Subba* (1890) 13 Mad. 189; *Udai Chunder* v. *Ashutosh* (1893) 21 Cal. 190; *Santu Ram* v. *Mst. Dodan Bai* (1928) 9 Lah. 85, 103 I.C. 706, ('27) A.L. 657; *Tulshi Prasad* v. *Jugmohanlal* (1935) 57 All. 422, 152 I.C. 92, ('34) A.A. 1048; *Mt. Mallan* v. *Paramatma Das* (1936) 17 Lah. 588, 166 I.C. 421, ('36) A.L. 558; *Kammi* v. *Popur*, ('50) A. Hy. 50; *Vinayak* v. *Md. Hanif* (1953) Nag. 281, ('54) A.N. 11; *Rattan Devi* v. *Jagadhar Mal* ('56) A. Punj. 46; *cf. Wamanrao* v. *Shantabai* (1953) Nag. 413, ('52) A.N. 317.

(*e*) *Ramasami* v. *Mangaikarasu* (1893) 18 Mad. 113, 119-120; *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433, 443.

to pay the interest on the same out of the surplus of her income. When an alienation is made to pay off the principal and interest of a debt of the last male owner, it is not for a binding purpose so far as the interest is concerned, when she could have paid it off from her income, but if the proportion of the interest to the whole of the principal amount of the debt is small (e.g., one-fifth) the whole alienation will be upheld (*f*).

The act being a religious act of the first class, there is no restriction on her power of alienation and she may sell the whole estate for that purpose (*h*). She may pay even a debt barred by limitation but she is not entitled to pay a time-barred debt which was repudiated by her husband (*i*). But where a Hindu widow mortgages property to pay off the time-barred debt of her husband, and later on executes another mortgage to pay off the claim under the prior one which had by that time become time-barred, the last mortgage is not binding on the reversioner as it was executed only to pay off her time-barred debt (*j*). A daughter-in-law also is under a moral obligation to pay the time-barred debt of her father-in-law and she may alienate his property for the payment of such debts (*k*). But it has been held that a mother who has succeeded to her *son's* estate is not under any obligation to pay a time-barred debt of her *husband*, though the estate to which she has succeeded originally belonged to her husband; and alienation, therefore, of any part of the estate for the payment of such a debt is not binding on the reversioner (*l*). Where a widow has paid her husband's debts with her money *in his lifetime*, the presumption is that the payment was voluntary; she cannot therefore sell her husband's property after his death to pay herself the amount (*m*). A widow is not entitled to pay off her husband's debts incurred by him when he was a minor, so as to bind the reversioners of his estate (*n*).

(3) *Widow not in possession.*—A widow or other female heir who is not in possession of the estate, but is entitled to maintenance only, cannot burden the estate with any expense for religious or charitable purposes (*o*). The Court should in fixing the maintenance take into consideration the necessary religious expenses which she has to undergo (*p*), and if that has not been done she may apply in the suit in which the decree for maintenance was passed for an increase of maintenance so as to provide for those expenses.

**181B. Alienation by widow for legal necessity.**—(1) *Extent of power of alienation.*—The power of a widow or other limited heir to alienate the estate inherited by her *for purposes other than religious* or *charitable is analogous* to that of a manager of an infant's estate as defined by the Judicial Committee in *Hunooman Persaud* v. *Musamat Babooee* (*q*) [§ 242, note (1)]. That power is a limited and qualified one; it can only be exercised rightly "in a *case of need or for* the *benefit of the estate*" [sub-§ (3)]. But where the alienation is one that a prudent owner would make in order to benefit the estate, a *bona fide* alienee is not affected by the previous mismanagement of the estate. "The actual pressure on estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded" (*p*). If the alienation is for purposes of legal necessity or for the benefit of the estate, it binds not only her interest in the estate, but the whole

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(*f*) *Jagannadham* v. *Vighneshwarudu* (1932) 55 Mad. 216, 134 I.C. 810, ('32) A.M. 177.

(*h*) (1930) 57 Cal. 901, 126 I.C. 263, ('30) A.C. 351, *supra*.

(*i*) *Bhagwat* v. *Nivritti* (1915) 39 Bom. 113, 27 I.C. 346, ('14) A.B. 245; cf. *Anganna* v. *Appasami* (1953) 1 M.L.J. 304 ('53) A.M. 106 (son's time barred debt).

(*j*) *Chandrika Prasad* v. *Bhagwan Das* (1940) 15 Lucknow 167; *Raja Rao* v. *Chiranjeevulu* ('55) A. Orissa 17.

(*k*) *Bhau* v. *Gopala* (1887) 11 Bom. 325.

(*l*) *Sheo Ram* v. *Sheo Ratan* (1921) 43 All. 604, 63 I.C. 279, ('21) A.A. 163; cf. *Lakshminarasayya* v. *Papayya* ('55) A. Andhra 97.

(*m*) *Bhawani* v. *Himmat* (1911) 33 All. 342, 10 I.C. 274 [P.C.], affirming *Himmat* v. *Bhawani* (1908) 30 All. 352.

(*n*) *Bajrang Singh* v. *Govind Prasad* (1936) 11 Luck. 11, 154 I.C. 841, ('35) A.O. 373.

(*o*) *Ramabai* v. *Dattatraya* (1931) 33 Bom. L.R. 1244, 135 I.C. 491, ('31) A.B. 497.

(*p*) *Baisni* v. *Rup Singh* (1890) 12 All. 358; *Devi Persad* v. *Gunwanti Kuar* (1895) 22 Cal. 410.

(*q*) (1856) 6 M.I.A. 393; *Koneswar Pershad* v. *Run Bahadur* (1881) 6 Cal. 843, 8 I.A. 8.

body of reversioners (*r*). The principles relating to the widow's power to alienate property were reiterated by the Supreme Court in *Jaisri* v. *Rajdewan* (*s*).

"The touchstone of the authority is necessity" (*t*). The word "necessity," when used in this connection, has a somewhat special, almost technical, meaning. It does not mean actual compulsion, but the kind of *pressure* which the law recognizes as serious and sufficient (*u*). The receipt even of full value for property sold by her, where there is no pressure on the estate, will not justify the sale; otherwise every transaction with a limited heir for full value would be valid (*v*).

(2) *Purposes of legal necessity.*—The following purposes have been held to amount to legal necessity for which an alienation may be made:—

(i) Costs of taking out probate, or letters of administration, or a succession certificate in respect of the estate of the deceased owner (*w*).

(ii) Payment of arrears of Government revenue and of decrees for rent accrued due after the death of the deceased owner, provided she had no funds when she mortgaged or sold the property to pay the revenue or the decrees *and* the mortgage or sale was absolutely necessary in order to discharge the debt, which if not discharged would have resulted in a forcible sale of the property (*x*). If there is an actual existing necessity, the circumstance that the necessity was brought about by the mismanagement of the widow does not vitiate the mortgage or sale, unless it is shown that the mortgagee or purchaser himself contributed to the mismanagement [§ 182].

Arrears of Government revenue and of rent due by the deceased owner himself constitute his *debts*, and they fall under § 181A(2)(iv) and they are payable out of his estate. But arrears of revenue and rent accrued due in respect of her husband's property *after* his death must be paid out of the gross income (*y*).

(iii) Maintenance of herself (*z*), and of persons whom the deceased owner was bound to maintain, such as his mother, paternal grandmother, unmarried daughters, and the like (*a*), or paying off debts incurred for family expenses (*b*).

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(*r*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 550-551; *Sham Sunder* v. *Acchhan Kunwar* (1898) 25 I.A. 183, 189, 192, 21 All. 71, 80, 83. Widow dying before completion of sale—Doctrine of part performance applied. *Ranchhod* v. *Manubai* (1954) Bom. 194, (1953) 55 Bom. L.R. 890, ('54) A.B. 153.

(*s*) ('62) A.S.C. 83; (1962) 1 S.C.J. 578. Also see *Rani* v. *Shanta Bala* ('71) A.S.C. 1028 (strained financial circumstances).

(*t*) *Sham Sunder* v. *Achhan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83.

(*u*) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 745, 69 I.C. 71, ('22) A.PC. 356.

(*v*) *Ravaneshwar* v. *Chandi Prasad* (1916) 43 Cal. 417 [P.C.], 36 I.C. 499, ('15) A.C. 57, affirming same case (1911) 38 Cal. 721, 750, 12 I.C. 931; *Chandrakishore* v. *Upendra Chandra* (1923) 37 Cal. L.J. 319, 74 I.C. 612, ('23) A.C. 563.

(*w*) *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I.C. 153.

(*x*) *Jagannath* v. *Gur Charan* (1929) 4 Luck. 279, 114 I.C. 783, ('29) A.O. 422; *Rameswar* v. *Provalati* (1914) 19 C.W.N. 313, 25 I.C. 84, ('15) A.C. 141; *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I.C. 153; *Ganesh Lal* v. *Khetra Mohan* (1926) 53 I.A. 134, 5 Pat. 585, 95 I.C. 839, ('26) A.PC. 56; *Jiban* v. *Brojo Lal* (1903) 30 Cal. 550, 30 I.A. 81; *Ghansham* v. *Badiya Lal* (1902) 24 All. 547; *Lakshman* v. *Radha Bai* (1887) 11 Bom. 609.

(*y*) *Jagannath* v. *Gur Charan* (1929) 4 Luck. 279, 282-283, 114 I.C. 783, ('29) A.O. 422; *Ishwari* v. *Babunandan* (1925) 47 All. 563, 88 I.C. 193, ('25) A.A. 495.

(*z*) *Sadashiv* v. *Dhakubai* (1881) 5 Bom. 450 at p. 460. See also *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 745, 69 I.C. 71, ('22) A.PC. 356; *Umakanta* v. *Satya Charan* ('65) A.C. 189; *Ratilal* v. *Indravadan* ('66) A. Guj. 133.

(*a*) *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902.

(*b*) *Venkatasubba Rao* v. *Ananda Rao* (1934) 57 Mad. 772, 155 I.C. 79, ('34) A.M. 432.

No hard and fast rule can be expected on the question whether a widow in possession of very little property left by her husband can or cannot sell the same for her future maintenance. It would be difficult to say with exactitude that she has no such power since ultimately each case must depend on its own facts and circumstances (*c*).

(iv) Marriages of relations of the deceased owner, such as his daughter, son's daughter, daughter's daughter, grandson's daughter (*d*), paternal uncle's son's daughter (*e*), and others, which are a burden on the estate.

A daughter inheriting to her father or mother may defray the marriage expenses of her own *daughter* or *daughter's daughter* out of the estate, if the father of the girl to be married, is a man of no means and is unable to defray those expenses (*f*).

No hard and fast rule can be laid down as to the amount of marriage expenses (*g*).

(v) Gift by a widow to her daughter on the occasion of her marriage or at her *gauna* ceremony (*h*), also a gift to her son-in-law on the occasion of the daughter's marriage (*i*) or a gift by way of marriage customary present called Bhat on the occasion of the marriage of her niece (husband's sister's daughter) (*j*), provided that in each case the gift is of a reasonable amount. But there is no rule that the daughter is entitled to no more than $\frac{1}{4}$ share of her deceased father's estate on the occasion of her marriage (*k*).

In *Kamla Devi* v. *Bachulal Gupta* (*l*) the Supreme Court reviewed a number of decisions on the subject of gift of reasonable portion of property to a daughter on marriage and held that it was competent to a widow to make a gift of a reasonable portion of the estate of her husband to her daughter as a marriage dowry in pursuance and fulfilment of an ante-nuptial agreement, even though the gift was made two years after the marriage ceremony.

In the abovementioned case the gift was of immovable property of the value of Rs. 19,000 which was about $\frac{1}{4}$ of the property allotted to her share out of the estate of her deceased husband. Two of the principles accepted by the Supreme Court as emerging from the decisions on the subject were: Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage or any ceremonies connected with the marriage are well recognised in Hindu law. If a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards

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(*c*) *Neelambal* v. *Rajarathnam* ('56) A.M. 336 (F.B.).

(*d*) *Ramcoomar* v. *Ichamoyi* (1880) 6 Cal. 36; *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433; *Makhan* v. *Gayan* (1911) 33 All. 255, 9 I.C. 199; *Ganpat* v. *Tulsiram* (1912) 36 Bom. 88, 12 I.C. 271 [*betrothal* of daughter]; *Bhagwati* v. *Ram Jatan* (1923) 45 All. 297, 73 I.C. 648, ('24) A.A. 23; *Mahadeo Prasad* v. *Musammat Dhanraj* (1926) 1 Luck. 477, 95 I.C. 574, ('26) A.O. 425; *Krishnamachariar* v. *Ramabadran* (1952) Mad. 318, ('52) A.M. 706; *cf. Narainbati* v. *Ramdhari* (1916) 1 Pat. L.J. 81, 34 I.C. 277, ('16) A.P. 178. Also cf. *Lacchan Puranik* v. *Fulkunwar* ('61) A.M.P. 239.

(*e*) *Baijnath Rai* v. *Mangla Prasad* (1926) 5 Pat. 350, 90 I.C. 732, ('26) A.P. 1.

(*f*) *Rustom Singh* v. *Moti Singh* (1896) 18 All. 474; *Rajagopalachariar* v. *Sami Reddi* (1926) 50 Mad. L.J. 221, 93 I.C. 49, ('26) A.M. 517; *Kamla Prasad* v. *Lalji Prasad* (1930) 9 Pat. 721, 127 I.C. 842, ('30) A.P. 600; *Srinivasa Rao* v. *Annadhanam Seshacharulu* (1942) Mad. 42, 198 I.C. 169, ('42) A.M. 106.

(*g*) (1923) 45 All. 297, 299, 73 I.C. 648, ('24) A.A. 23, *supra*, (1926) 1 Luck. 477, 95 I.C. 574, ('26) A.O. 425, supra; *Churaman* v. *Gopi Sahu* (1910) 37 Cal. 1, 5-6, 1 I.C. 945.

(*h*) (1909) 37 Cal. 1, 1 I.C. 945, *supra*; *Jowala Ram* v. *Hari* (1924) 5 Lah. 70, 80 I.C. 680, ('24) A.L. 429; *Udai Dat* v. *Ambika Prasad* (1927) 2 Luck. 412, 100 I.C. 503, ('27) A.O. 110.

(*i*) *Ramasami* v. *Vengidusami* (1898) 22 Mad. 113; *Ram Sumran* v. *Govind Das* (1926) 5 Pat. 646, 99 I.C. 789, ('26) A.P. 582.

(*j*) *Gulab Devi* v. *Banwari Lal* (1940) All. 555, 190 I.C. 202, ('40) A.S. 403, (1940) A.L.J. 464. This case seems to go too far though the plaintiff's action in questioning the alienation seems to be without any grace as it was for her own daughter's marriage.

(*k*) *Krishna Pratap Singh* v. *Prembada Kunwar* (1942) All. 708, 203 I.C. 97, ('42) A.A. 365, (1942) A.L.J. 487.

(*l*) ('57) A.S.C. 434.

in fulfilment of the promise provided the condition that the gift must be of a reasonable portion of the property is satisfied.

(3) *Alienation by widow for "the benefit of the estate."*—Besides legal necessity a widow or other limited heir may alienate the estate "for the benefit of the estate" [see § 243A]. An alienation of property to meet the costs of litigation necessary for preserving the estate is an alienation "for the benefit of the estate" (*m*). So too is an alienation for making necessary repairs to properties belonging to the estate. So also is an exchange of land for effective management of the estate (*m*1). But an alienation for developing or improving the properties is not one "for the benefit of the estate," though it may bring additional income, and it does not bind the reversioners (*n*).

**181C. Alienation for legal necessity by one widow without consent of other widows.**—If a Hindu dies leaving two widows they succeed as joint tenants with a right of survivorship, but they can partition the property so that each may separately enjoy an equal share of the *income* [§ 43, no. 4, note (4)]. No agreement to partition is however possible if one of the widows is a minor, and there is no legal guardian to act on her behalf (*o*).

If they act together, they can alienate the corpus of the estate for debts contracted for necessity, but one of them cannot prejudice the right of survivorship of the other by alienations, even though for a legal necessity, save by the consent of the other, or possibly save where that consent has been applied for and unreasonably withheld. The mere fact that a partition has taken place between them does not imply a right to prejudice the claims of the survivor (*p*). The arrangement between the two widows may be of such a character that each may relinquish her right of survivorship as to the portions of the estate held by the other. In such a case the alienation (with or without legal necessity and without the consent of the other) cannot be questioned by the other but it will not bind the reversioners (*q*).

A Hindu dies leaving two widows *A* and *B*, and leaving two properties *X* and *Y*. The widows divide the properties so that *A* obtains possession of property *X*, and *B* of property *Y*. *A* afterwards mortgages property *X* for debts contracted by her for a legal necessity, and puts the mortgagee in possession. On *A*'s death, *B* is entitled to possession of property *X* from the mortgagee.

The same principles apply to two or more daughters (*r*). See § 31 *ante*.

**181D. Alienation by widow may be by way of mortgage or sale.**—Where a case of necessity exists, the widow or other limited heir is not bound to raise money on her personal security. She may sell the property or mortgage it. She is not bound to mortgage it, if a mortgage would be more

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(*m*) *Karimuddin* v. *Gobind Krishna* (1909) 31 All. 497, 36 I.A. 138, 3 I.C. 795; *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433; *Jagdat Singh* v. *Rawat* (1929) 4 Luck. 26, 112 I.C. 238, ('29) A.O. 364; *Maniklal* v. *Kisni* (1941) Nagpur 135, 192 I.C. 798, ('41) A.N. 78; *Sura Prasad* v. *Makhna Devi* (1945) All. 465; *Beni Madho* v. *Ram Kuer* ('54) A.P. 451; *Ananto Mohini* v. *Khalil Sahu* ('54) Orissa 107 (criminal case against slanderers).

(*m*1) *Kanhaiya Singh* v. *Ram Kisto* ('64) A.P. 254.

(*n*) *Hurry* v. *Gonesh* (1884) 10 Cal. 823; *Ganap* v. *Subbi* (1908) 32 Bom. 577; *Makhan* v. *Gayan* (1911) 33 All. 255, 9 I.C. 199, *supra*. In *Dayamani* v. *Srinibash* (1906) 33 Cal. 842, the circumstances were special; *Sundarmani Devi* v. *Rupei Dei* ('56) A. Orissa 16 (sale of a dilapidated house was an act of prudent management).

(*o*) *Kasubai* v. *Chandrabhaga* (1947) Nagpur 455.

(*p*) *Gajapati* v. *Pusapati* (1892) 19 I.A. 184, 16 Mad. 1; *Gauri Nath* v. *Gaya Kuar* (1928) 55 I.A. 399, 111 I.C. 485, ('28) A.PC. 251, overruling *Jai Narain* v. *Munna Lal* (1928) 50 All. 489, 107 I.C. 699, ('28) A.A. 92. See also *Vallura* v. *Sasapu* (1925) 49 Mad. L.J. 479, 90 I.C. 881, ('26) A.M. 6; *Krishna Pratap Singh* v. *Prembada Kunwar* (1942) All. 708; 203 I.C. 97, ('42) A.A. 365, (1942) A.L.J. 487; *Chanderjit Das* v. *Debi Das* (1953) 1 All. 437 ('51) A.A. 522; *Rajasekaran Pillai* v. *K. Phillipose* ('54) A. Trav. Co. 101.

(*q*) *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518, 155 I.C. 213, ('36) A.P. 200; *Ammani Ammal* v. *Periasami Udayan* (1923) 45 Mad. L.J. 1, 74 I.C. 58; *Beni Madho* v. *Ram Kuer* ('54) A.P. 451. Also see *Karpagathachi* v. *Nagarathinathachi* ('65) A.S.C. 1752.

(*r*) *Yelumalai Chetty* v. *Natesachari* (1945) Mad. 35.

prejudicial to her than a sale by reducing her income to a greater extent (*s*). Even if a mortgage would have been more beneficial than a sale, still if she and the purchaser are both acting honestly, the sale cannot be set aside on the ground solely that she ought to have mortgaged and not sold (*t*). Where there is a mortgage subsisting on the property, the question whether the widow could sell it in discharge of the liability is a question which must be determined on the facts of each case, there being no absolute prohibition against her effecting a sale in a proper case. What has to be determined is whether the act is one which can be justified as that of a prudent owner managing his or her own property. It was held by the Supreme Court, after reiterating the principles relating to the subject, that a sale by the widow of property which is subject matter of a usufructuary mortgage cannot be said to be beyond her powers though the case may be one where the mortgagee cannot sue to recover the amount due on the mortgage (*t*1). If the property has been mortgaged, but the income of the property is not sufficient to pay the interest on the mortgage-debt, she may sell the property even before the debt is due, if in the circumstances this is a proper, though not a necessary, course to take. "A widow, like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs" (*u*).

**182. Burden of proof of necessity: Evidence.**—Those who deal with a person who has only a limited interest in the property and who proposes to dispose of a larger interest, are *prima facie* bound to make out the facts which authorize such a disposition. The power of a widow or other limited heir to sell or mortgage the estate inherited by her is a limited and qualified power. She is at perfect liberty to dispose of her own life-interest in the estate, but if she proposes to alienate the *corpus* of the estate either by way of sale or mortgage, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage. If the sale or mortgage is impeached, the burden lies on him to prove—

(a) *either* that there was legal necessity in fact (*v*); *or*

(b) that he made proper and *bona fide* inquiry as to the existence of the necessity, and did all that was reasonable to satisfy himself as to the existence of the necessity (*w*).

If he proves that there was a necessity in fact, the alienation will be upheld, even though the necessity was brought about by the mismanagement of the limited heir (*x*), unless it be shown that he himself contributed to the mismanagement (*y*).

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(*s*) *Singam* v. *Draupadi* (1908) 31 Mad. 153; *Bal Krishna* v. *Hira Lal* (1919) 41 All. 338, 345, 50 I.C. 74, ('19) A.A. 406.

(*t*) *Phoolchand* v. *Rughoobuns* (1869) 9 W.R. 108; *Nabakumar* v. *Bhabasundari* (1867) 3 Beng. L.R. (A.C.J.) 375; *Kamalini* v. *Himangshu* ('56) A.C. 211 (A Hindu widow has certainly the duty to see that the reversion is not unnecessarily lost).

(*t*1) *Jaisri* v. *Rajdeican* ('62) A.SC. 83; (1962) 1 S.C.J. 578; *Ramjee Rai* v. *Gopal Ahir* ('63) A.P. 34.

(*u*) *Venkaji* v. *Vishnu* (1894) 18 Bom. 534, 536. See also *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121 [powers of manager].

(*v*) *Bajrang Singh* v. *Govind Prasad* (1936) 11 Luck. 11, 154 I.C. 841, ('35) A.O. 373.

(*w*) *Ramanand Lal* v. *Damodar Das* (1941) All. 820, 199 I.C. 369, ('42) A.A. 110, (1942) A.L.J. 94.

(*x*) *Rai Rajeshwar Bali* v. *Har Kishen Bali* (1933) 8 Luck. 538, 150 I.C. 346, ('33) A.O. 170; *Amruti Dei* v. *Saradamoni* ('50) A. Orissa 143.

(*y*) *Birendra Nath* v. *Domon Chandra*, I.L.R. (1953) 1 Cal. 208, ('52) A.C. 473.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid, and that the facts represented to him were such as, if true, would have justified the transaction [ill. (1)].

In no case, however, is he bound to see that the money paid by him is applied to meet the necessity. The reason is that he can rarely have the means of controlling the actual application, unless he himself enters on the management (*z*).

The same rule applies to a transferee from an alienee (*a*) [ill. (2)].

*Illustrations*

(1) *A*, a Hindu widow, whose husband has left collateral heirs (reversioners) alleging that the property held by her as such is insufficient for her maintenance, agrees to sell a field, part of such property, to *B*. *B* satisfies himself by honest and reasonable enquiry that the income of the property is not sufficient for *A*'s maintenance and that the sale of the field is necessary, and acting in good faith, buys the field from *A*. The sale is binding not only on the widow, but on the reversioners, even if it turns out that there was no necessity in fact to sell the property. See the Transfer of Property Act, 1882, s. 38, and § 244 below.

(2) A Hindu governed by the Madras school of Hindu law dies leaving a daughter and her [daughter's] son. The daughter succeeds to his property for a woman's estate. Litigation ensues in respect of the estate between the daughter and a grandnephew *M* of the deceased. A compromise is arrived at between the daughter and *M* whereby the estate of the deceased is divided equally between them. *M* knew that he had no honest claim to the estate. *M* then mortgages the property that came to his share to *K*, the mortgage deed stating that the property had been transferred to *M* under the compromise. The daughter's son sues *M* and *K* for a declaration that the compromise and the mortgage are not binding on him. The compromise between the daughter and *M* is set aside as not binding on the daughter's son. Is *K* in any better position than *M*? The Judicial Committee has held that he is not. *K* had notice that *M* took from one who was a limited heir, and he was therefore bound to inquire whether the compromise was valid, but he had failed to do so. "Here there is no proof either of necessity or of inquiry validating the compromise." The mortgage to *K* also was therefore held not to be binding on the daughter's son. The provisions of ss. 89 and 96 of the Indian Trusts Act, 1882, do not apply to such a case: *Obala Kondama* v. *Kandasami* (1923) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56.

*What the alienee must prove.*—"One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity" (*b*). "In order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shown, either that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was" (*c*). Lapse of time does not affect the question of onus of proof regarding necessity except in so far as it might give rise to a presumption of acquiescence,

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(*z*) *Hunooman Persaud* v. *Mussamat Babooee* (1856) 6 M.I.A. 393; *Cavaly Vencata* v. *Collector of Masulipatam* (1867) 11 M.I.A. 619; *Kameswar Pershad* v. *Run Bahadur* (1881) 6 Cal. 843, 8 I.A. 8; *Hurro Nath* v. *Randhir Singh* (1891) 18 Cal. 311, 18 I.A. 1; *Amarnath* v. *Achan Kuar* (1892) 14 All. 420, 19 I.A. 196; *Maheshar* v. *Ratan Singh* (1896) 23 Cal. 766, 23 I.A. 57; *Sham Sunder* v. *Achhan Kunwar* (1899) 21 All. 71, 25 I.A. 183; *Dharam Chand* v. *Bhawani* (1898) 25 Cal. 189, 24 I.A. 183; *Bhagwat Dayal* v. *Debi Dayal* (1908) 35 Cal. 420, 35 I.A. 48. *Chansham Singh* v. *Badiya Lal* (1902) 24 All. 547; *Ram Bilas* v. *Ramchander* ('54) A.P. 455.

(*a*) *Obala Kondama* v. *Kandasami* (1923) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56; *Patha Pedda Elliah* v. *Palagiri Gangamma* ('57) A. And. Pra. 776.

(*b*) *Bhagwat Dayal* v. *Debi Dayal* (1908) 35 Cal. 420, 35 I.A. 48, 57-58.

(*c*) *Amarnath* v. *Achan Kuar* (1892) 14 All. 420, 429, 19 I.A. 196, 202; *Kalishanker Das* v. *Dhirendra Nath* (1955) 1 S.C.R. 467, 480, (1954) 2 M.L.J. 351, ('54) A.SC. 505.

or save the alienee from adverse inferences arising from the scanty proof which might be offered on his behalf (*d*).

*Recitals of necessity.*—Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence (*e*), but they are not evidence by themselves of the act (*f*). To substantiate the allegation of the existence of necessity there must be some evidence *aliunde* (*g*). The reason is that the alienee, to protect his interest, may get false recitals to be made (*h*). But when by effluxion of time evidence independent of the recitals becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and, when evidence of actual inquiry by him has become impossible, the recital, coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the deed (*i*).

In a recent decision the Supreme Court pointed out that the recitals may be used to corroborate other evidence of the existence of legal necessity and that the weight to be attached to them varies according to the circumstances of the case. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may in an appropriate case raise an inference against the party seeking to set aside the sale (*ii*).

The absence of a recital of necessity in a deed of sale does not vitiate the sale. The necessity may be proved by other evidence (*j*).

*Lapse of time.*—Where a long period (82 years) has elapsed since the sale took place, it is not reasonable to expect such full and detailed evidence of the circumstances which gave rise to the sale as in the case of an alienation at a more recent date, and presumptions are permissible to fill in the details which have been obliterated by time (*k*). But apart from allowing presumptions to fill in details in the evidence which have been obliterated by time, lapse of time does not alter the incidence of the burden of proof, nor does it dispense with evidence direct or circumstantial of justifying necessity (*l*).

*Rate of interest.*—See notes to § 244 under the same head.

*Burden of proof.—"Consent decree" involving alienation to mortgagee.*—It has been held by a Full Bench of the Madras High Court that where a widow who has mortgaged her husband's property is sued by the mortgagee, and the suit is compromised by a transfer of the property by the widow absolutely in consideration of the mortgage debt, the burden of proving that the compromise was valid and binding on the reversioners is on the mortgagee purchaser (*m*). In a Privy Council case a widow sued upon a mortgage executed to her husband and obtained a decree for sale. She then purchased with the leave of Court some of the mortgaged properties at the auction sale. The

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(*d*) *Ravaneshwar* v. *Chandi Prasad* (1911) 38 Cal. 721, 12 I.C. 931, affmd. in (1915) 43 Cal. 417, 36 I.C. 499, ('15) A.P.C. 57; *Subramaniam* v. *Chelikani* (1950) 1 M.L.J. 527.

(*e*) *Banga Chandra* v. *Jagat Kishore* (1915) 43 I.A. 249, 44 Cal. 186, 36 I.C. 420, ('16) A.P.C. 110; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 826, 80 I.C. 31, ('24) A.A. 902.

(*f*) *Bed Nath* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I.C. 725, ('37) A.O. 406; *Kalika Prasad* v. *Jhenjho Kuer* ('64) A.P. 241.

(*g*) *Brij Lal* v. *Inda Kunwar* (1914) 36 All. 187, 23 I.C. 715, ('14) A.P.C. 38; *Biswanath* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422; *Raj Lukhee Dabia* v. *Gokool Chunder* (1869) 13 M.I.A. 209, 3 Beng. L.R. (P.C.) 57. See also *Vasonji* v. *Chanda Bibi* (1915) 37 All. 369, 376, 29 I.C. 781, ('15) A.P.C. 18; *Debendranath Sharma* v. *Nagendranath Datta* (1933) 60 Cal. 1158, 149 I.C. 522, ('33) A.C. 900.

(*h*) *Muhammad* v. *Brij Bihari* (1924) 46 All. 636, 82 I.C. 5, ('24) A.A. 939.

(*i*) *Banga Chandra* v. *Jagat Kishore* (1916) 43 I.A. 249, 44 Cal. 186, 36 I.C. 420, ('16) A.P.C. 110; *Ram Narain* v. *Nandrani* (1928) 50 All. 823, 114 I.C. 868, ('29) A.A. 128; *Thakar Singh* v. *Mst. Uttam* ('29) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295; *Rai Rajeshwar Bali* v. *Har Kishen Bali* (1933) 8 Luck. 538, 150 I.C. 346, ('33) A.O. 170; *Somnath* v. *Ambika Prasad* ('50) A.A. 121.

(*ii*) *Rani* v. *Shanta Bala* ('71) A.S.C. 1028.

(*j*) *Womesh Chander* v. *Digumbure* (1865) 3 W.R. 154.

(*k*) *Chintamanibhatla* v. *Rani of Wadhwan* (1920) 47 I.A. 6, 43 Mad. 541, 55 I.C. 538, ('20) A.P.C. 64; *Ravaneshwar* v. *Chandi Prasad* (1915) 43 Cal. 417, 36 I.C. 499, ('15) A.P.C. 57 affmg. (1911) 38 Cal. 721, 12 I.C. 931; *Ram Narain* v. *Nandrani* (1928) 50 All. 823, 114 I.C. 868, ('29) A.A. 128; *Thakar Singh* v. *Mst. Uttam* (1929) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295; *Piari Lal* v. *Sundar Singh* (1922) 44 All. 756, 68 I.C. 805, ('22) A.A. 436; *Babulal* v. *Maniklal* (1941) Nagpur 124, 192 I.C. 826, ('41) A.N. 79.

(*l*) *Subramanyam* v. *Chelikani* (1950) Mad. 1053, ('50) A.M. 514, (1950) 1 M.L.J. 527, dissenting from the statement of law made by Leach, C.J. in *Govindu* v. *Venkatapathi*, (1947) Mad. 105; *Mukabasappa* v. *Hamantappa* (1953) 55 Bom. L.R. 223; *Venkateswara Rao* v. *Venkatasiva Rao* ('57) A. Andh. Pra. 945; *Sohan Lal* v. *Chhagan Lal* ('57) Raj. 355; *cf. Sumantrabai* v. *Rishabhkumar* (1953) A. Nag. 69, ('52) A.N. 295.

(*m*) *Tirupatiraju* v. *Venkayya* (1922) 45 Mad. 504, 57 I.C. 479, ('22) A.M. 131 [F.B.].

mortgagors filed a petition in objection to the sale. The widow then entered into a compromise with the mortgagors. The High Court of Patna held that the burden was on the reversioners impeaching the compromise to show that the compromise was not binding on them. Their Lordships of the Privy Council said: "Their Lordships do not find it necessary to consider whether the judgment of the High Court, in so far as it places the burden of proof upon the present appellants [reversioners], is absolutely and without qualification sound" (*n*). See also ill. (2) above.

**183. Alienation by widow with consent of reversioners, that is, for presumptive legal necessity.**—(1) When the alienation of the *whole* or *part* of the estate by a Hindu widow or other limited heir is to be supported on the ground of legal necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as may fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one (*o*).

Mere consent of the next reversioners does not validate an alienation; it is only of evidential value. It is no conclusive proof of the existence of legal necessity. It raises a presumption of the existence of legal necessity. As the matter rests in presumption only, the actual reversioner at the widow's death is not precluded from questioning the alienation, but the burden lies upon him to show that there was no legal necessity for the alienation [ill. (a)] (*p*). When he adduces no evidence to rebut the presumption he must fail (*q*). The mere fact that the consent was given for a consideration does not negative the presumption (*r*). If the consenting reversioner himself is the actual reversioner, he will be precluded by his consent from questioning the alienation [§ 191] unless he can show that his consent was obtained by misrepresentation of the facts (*s*). When the presumption, that the alienation was justified by legal necessity, had been displaced, there is no presumption that any of the items constituting the consideration were justified by legal necessity and the onus of proving legal necessity for any item is on the alienee (*t*). The consent of one of several reversioners does not raise the presumption of the existence of legal necessity (*u*).

Where an alienation is made without the consent of the next reversioner, the burden lies on the *alienee* to show that the transaction was one for legal necessity [§ 182].

(2) The quantum of consent necessary to raise this presumption depends upon the facts of each particular case. Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. In any case there should be such a con-

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(*n*) *Ramsumran Prasad* v. *Shyam Kumari* (1926) 49 I.A. 342, 349-350, 1 Pat. 741, 749, 29 I.C. 71, ('22) A.PC. 356.

(*o*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196; *Bajrangi Singh* v. *Manokarnika* (1908) 30 All. 1, 35 I.A. 1, overruling *Ramphal Rai* v. *Tula* (1884) 6 All. 116; *Debi Prosad* v. *Golap Bhagat* (1913) 40 Cal. 721, 19 I.C. 273 [F.B.]; *Vinayak* v. *Govind* (1901) 25 Bom. 129; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584; *Ramkrishna* v. *Tripurabai* (1911) 13 Bom. L.R. 940, 12 I.C. 529; *Bijoy Gopal* v. *Girindra Nath* (1914) 41 Cal. 793, 805, 23 I.C. 162, ('14) A.PC. 128; *Moti* v. *Laldas* (1917) 41 Bom. 93, 37 I.C. 945, ('16) A.B. 85; *Ghisiawan* v. *Mussammat Raj Kumari* (1921) 43 All. 534, 63 I.C. 556, ('21) A.A. 33 [presumption rebutted]; *Bhup Singh* v. *Jhamman Singh* (1921) 44 All. 95, 64 I.C. 630, ('22) A.A. 619; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902 [presumption not rebutted]; *Muhammad Salid* v. *Kunwar Darshan* (1928) 50 All. 75, 103 I.C: 116, ('27) A.A. 835; *Ramamurty* v. *Bhimasankararao* (1938) Mad. 688, 178 I.C. 784, ('38) A.C. 433; *Allah Diya* v. *Sona Devi* (1942) All. 745, 204 I.C. 133, ('42) A.A. 331, (1942) A.L.J. 443; *Sharm Singh* v. *Hakim* ('50) A.E.P. 1; *Munga Kuer* v. *Domari*, I.L.R. (1955) 34 Pat. 317.

(*p*) *Muhammad Said* v. *Kunwar Durshan* (1928) 50 All. 75, 103 I.C. 116, ('27) A.A. 835; *Ramamurty* v. *Bhimasankararao* (1938) Mad. 688, 178 I.C. 784, ('38) A.C. 433.

(*q*) *Rai Bajrang Bahadur Singh* v. *Rameshar Bux Singh* (1937) 12 Luck. 684, 166 I.C. 113, ('37) A.O. 189.

(*r*) *Bajrangi Singh* v. *Manokarnika* (1907) 30 All. 1, 35 I.A. 1; *Ambika Prasad* v. *Chandramani* (1929) 8 Pat. 396, 117 I.C. 867, ('29) A.P. 289.

(*s*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*t*) *Indarjit Singh* v. *Jaddu* (1933) 55 All. 157, 144 I.C. 108, ('33) A.A. 169.

(*u*) *Chanderjit Das* v. *Debi Das* (1953) 1 All. 437, ('51) A.A. 522.

currence of the members of the family as suffices to raise a presumption that the transaction is a fair one and one justified by Hindu law. The consent may be given at the time of alienation or it may be given even after alienation (*v*) [ill. (c)].

The consent to be of any effect must be given with full knowledge of the circumstances (*w*) and of the effect of the transaction and with an intelligent intention to consent to such effect. Mere attestation of a deed does not necessarily import consent to an alienation effected by it (*x*).

The "next" reversioners referred to above are persons who would be entitled to succeed to the estate of the last full owner if the widow had died at the moment of the alienation. They are also called "next presumptive reversioners" or "immediate" reversioners. The more remote reversioners are called in some cases "contingent", in some cases "subsequent," and in some cases "distant" reversioners.

Where the next reversioner is a female, as, for instance, a daughter, her consent alone is not sufficient to validate an alienation, whether she takes a limited estate (*y*), or an absolute estate as in Bombay (*z*).

In such a case the consent both of the female reversioner and the immediate *male* reversioner is necessary to validate the alienation (*a*) [ill. (b)]. But though her consent alone would not validate the transaction so as to bind the reversion, it would preclude her from impugning the validity of the alienation on the principle stated in § 191 (*b*).

The consent of a *female* reversioner cannot be regarded as affording the slightest presumption that the alienation was a justifiable one. The reason is that by Hindu law all women are supposed to be in a state of dependence (*c*). An alienation with the consent of a female reversioner and a *distant* male reversioner will not bind the *immediate* male reversioner (*d*).

(3) An alienation made with the consent of reversioners may be of the whole or of a part of the estate; it need not be of the whole estate (*e*).

Prior to the decision of the Privy Council in *Rangaswami's* case (*f*) it was held by the High Court of Madras that, where an alienation made by a widow is sought to be supported on the sole ground that it was made with the consent of the next reversioners, the alienation must be of the *whole* of the property inherited by her and that an alienation of a portion only of the property is not valid (*g*). On the other hand, it was held by the Hiigh Courts of Calcutta (*h*) and Bombay (*i*), that a valid alienation may be made *even of a portion* of the property. The Privy Council has rejected the Madras view, and held that the alienation may be *partial*.

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(*v*) (1907) 30 All. 1, 35 I.A. 1, *supra*; approving *Radha Shyam* v. *Joy Ram* (1890) 17 Cal. 896; *Raj Lukhee Dabea* v. *Gokool Chunder* (1869) 13 M.I.A. 209, 3 Beng. L.R. (P.C.) 57; *Sham Sunder Lal* v. *Achhan Kunwar* (1898) 21 All. 71, 25 I.A. 183; (1914) 41 Cal. 793, 23 I.C. 162, ('14) A.PC. 128, *supra*; (1913) 40 Cal. 721, 19 I.C. 273, *supra*.

(*w*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*x*) *Sham Sunder* v. *Achhan Kunwar* (1898) 25 I.A. 183, 189, 21 All. 71, 80; *Hari Kishen* v. *Kashi Pershad* (1914) 42 I.A. 64, 42 Cal. 876, 27 I.C. 674, ('14) A.PC. 90; *Banga Chandra* v. *Jagat Kishore* (1916) 43 I.A. 249, 255, 44 Cal. 186, 199, 36 I.C. 420, ('16) A.PC. 110; *Thakur Prasad* v. *Mussammat Dipa Kuer* (1931) 10 Pat. 352, 362, 134 I.C. 129, ('31) A.P. 442; *Har Mitra* v. *Raghubar* (1928) 3 Luck. 645, 110 I.C. 618, ('28) A.O. 342; *Rajammal* v. *Sabapathi* (1945) Kar. 260 (P.C.).

(*y*) *Bepin Behari* v. *Durga Charan* (1908) 35 Cal. 1086; *Koor Goolab Singh* v. *Rao Kurun Singh* (1871) 14 M.I.A. 176.

(*z*) *Varjivan* v. *Ghelji* (1881) 5 Bom. 563 (daughter); *Vinayak* v. *Govind* (1901) 25 Bom. 129, 134-135 (sister); *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584 (daughter). But see *Mallik Saheb* v. *Malikarjunappa* (1914) 38 Bom. 224, 22 I.C. 292, ('14) A.B. 187, where it was assumed that a daughter's consent was sufficient.

(*a*) (1881) 5 Bom. 563, *supra*; (1901) 25 Bom. 129, 134-135, *supra*; *contra Krushna Behera* v. *Fakir Mahakud* ('53) A. Orissa 290.

(*b*) *Akkawa* v. *Sayadkhan* (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260.

(*c*) 5 Bom. 563, at p. 571, *supra*.

(*d*) *Muhammad* v. *Brij Bihari* (1924) 46 All. 656, 82 I.C. 5, ('24) A.A. 939.

(*e*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 81-84, 42 Mad. 523, 533-536, 50 I.C. 498, ('18) A.PC. 196; *Munga Kuer* v. *Domari*, I.L.R. (1953) 34 Pat. 317.

(*f*) (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, *supra*.

(*g*) *Muthuveeru* v. *Vythilinga* (1909) 32 Mad. 206, 3 I.C. 476; *Marudamuthu* v. *Srinivasa* (1898) 21 Mad. 128.

(*h*) *Pulin Chandra* v. *Bolai Mandal* (1908) 35 Cal. 939.

(*i*) See *Vinayak* v. *Govind* (1901) 25 Bom. 129, where a sale of a portion only was upheld.

(4) The alienation must be one for consideration, *e.g.*, a sale, a mortgage or a lease (*j*). Except in the cases mentioned in § 179, § 181A (2) (iii), and § 181B (2) (v), a *gift* by a widow or other limited heir of the whole or any part of the estate inherited by her to a *third person* (that is, a person other than the next reversioner), is not binding on the actual reversioner, even if made with the consent of the next reversioner. The consent of the next reversioner, though it affords good evidence of legal necessity in the case of an alienation *for consideration*, cannot possibly afford such evidence in the case of a *gift*, there being no room for the theory of legal necessity in the case of a gift (*k*).

A gift of the *entire* estate *to the next reversioner or reversioners* amounts to a surrender, and is good on that ground [§ 197].

But a gift, though it be of the entire estate, to some only of several reversioners without the consent of the rest (*l*), or a gift of part of the estate though it be in favour of the whole body of reversioners (*m*), does not amount to a surrender. It is a gift pure and simple, and it cannot be supported as an alienation under this section (*n*). It stands on the same footing as a gift to a stranger, and it may be avoided by the actual reversioner at the widow's death.

A deed of gift of *part* of the estate in favour of the next reversioner where there is only one such, followed by a deed of sale by him of that part to a third party, may be supported as an "alienation with the consent of the next reversionee" under this section, if the two documents are so connected as to form one transaction, that is, a transaction of sale (*o*). A conveyance of the whole estate by a widow and the next reversioner jointly to a stranger is valid but an alienation by a widow to a stranger and the next reversioner is not valid, especially if the reversioner is a minor (*p*).

The High Court of Calcutta has held that a gift of the *entire* estate by a widow to a third person with the consent of the *whole body* of the next reversioners, may be supported as a surrender under § 197; such a gift, in the view of that Court, amounts in effect to two transactions, namely, (1) a surrender in favour of the next reversioners which would vest the estate in them, and (2) a gift by them of the estate to the third person (*q*). On the other hand, it has been held by some other High Courts that such a gift is not validated even if made with the consent of the whole body of the next reversioners, and that though it may be binding on the widow and the consenting reversioners, it is not binding on the actual reversioner on the widow's death nor on a son subsequently adopted by her (*r*). The question arose in a Privy Council case (*s*), but their Lordships expressed no opinion on it, the transaction having been set aside on the ground that the consent of the next reversioner was not proved. In *Mummareddi* v. *Pitti Durairaja* their Lordships of the Supreme Court expressed considerable doubt about the correctness of what has been described as the Bengal doctrine and observed that it may become necessary at some time to reconsider the whole law on the subject (*t*).

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(*j*) *Bijoy Gopal* v. *Girindra Nath* (1914) 41 Cal. 793 [P.C.], 23 I.C. 162, ('14) A.PC. 128 [lease for 60 years held valid].

(*k*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 85, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196; *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584; *Baklawar* v. *Bhagwana* (1910) 32 All. 176, 5 I.C. 270; *Abdulla* v. *Ram Lal* (1912) 34 All. 129, 12 I.C. 129; *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86, ('17) A.A. 341; *Harihar* v. *Udai Nath* (1923) 45 All. 260, 74 I.C. 113, ('23) A.A. 190 [next reversioner an insolvent—gift made to his son with his consent—gift held bad—creditor's claim upheld]; *Bindeshwari* v. *Har Narain* (1929) 4 Luck. 622, 127 I.C. 20, ('29) A.O. 185.

(*l*) *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86, ('17) A.A. 341; *Raghunandan Singh* v. *Tulshi Singh* (1924) 46 All. 38, 75 I.C. 244, ('24) A.A. 515.

(*m*) *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584; *Lachhman Das* v. *Chuhra Mal* ('52) A. Pepsu 5.

(*n*) See (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, *supra*.

(*o*) *Muhammad Sa'id* v. *Kunwar Darshan* (1928) 50 All. 75, 103 I.C. 116, ('27) A.A. 835.

(*p*) *Bala* v. *Baya* (1936) 60 Bom. 211, 38 Bom. L.R. 1087, 166 I.C. 771, ('37) A.B. 43.

(*q*) *Nobokishore* v. *Hari Nath* (1884) 10 Cal. 1102 [F.B.] explained in *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 80-81, 42 Mad. 523, 533, 50 I.C. 498, ('18) A.PC. 196; *Radhashyam* v. *Hari Pada* ('62) A.C. 100.

(*r*) *Tukaram* v. *Yesu* (1931) 55 Bom. 46, 129 I.C. 591, ('31) A.B. 100. Also see *Mahalu Shidappa* v. *Shankar Dadu* (1953) 55 Bom. L.R. 301, I.L.R. (1953) Bom. 1231, ('53) A.B. 357; *Mauji Lal* v. *Jagnandan Ram* ('53) A.A. 78.

(*s*) *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 57 I.A. 305, 53 Mad. 692, 128 I.C. 261, ('30) A.PC. 297.

(*t*) 1951 S.C.R. 655, 663-666.

(5) An alienation made by a widow without legal necessity and without the consent of the reversioners does not bind the reversioner (*u*); it binds only her interest in the property [§ 185].

In *Rangasami* v. *Nachiappa* (*v*) a gift was made by a widow to the nearest reversioner who was the cousin of the last owner. The gift was only of a portion of the property. Their Lordships of the Privy Council held that the transaction being a *gift* it could not possibly be held to be evidence of an alienation for value for purposes of necessity so as to bind the actual reversioner. Nor could it be supported as a surrender [§ 197], for a surrender must be of the whole estate, and the gift in that case was of part only of the estate.

In *Mummareddi* v. *Pitti Durairaja* (*w*) a widow purported to surrender her estate by executing a deed of release in favour of her daughter and son-in-law. It was held by the Supreme Court that such a transaction could not be treated as a surrender in favour of the female heir and a transfer by the latter to the stranger and that the transaction was not binding upon the ultimate reversioners.

*Illustrations*

(a) A Hindu dies leaving a widow, three brothers, and a paternal uncle. He leaves three houses. The widow sells one of the houses to X with the consent of *all* the brothers. Here the brothers constitute the next reversion, while the uncle is a *remote* reversioner. The sale having been made with the consent of the brothers, it is binding on the whole reversion including the actual reversioner. The result is that if all the brothers die in the lifetime of the widow, and the uncle succeeds to the estate on the widow's death, the sale will bind him, though he was not a consenting party to it unless he proves that there was no legal necessity for the sale and that the purchaser did not *bona fide* believe that there was such necessity. See sub-§ (1).

(b) *A* dies leaving a widow, a daughter, a brother and a paternal uncle. The widow succeeds to the estate of *A* as his heir. She then sells the property with the consent of her daughter. After the death of the daughter and of the brother, the uncle disputes the sale. Here the consent having been given by a *female* reversioner, there is no presumption that the sale was for legal necessity. The burden, therefore, lies on the purchaser to show that the sale was for legal necessity, or that he had made proper and *bona fide* enquiries and had satisfied himself as to the existence of the necessity. But if *A*'s *brother* had consented to the sale, the burden would have been on the *uncle* to show that there was no legal necessity and that no such enquiries had been made by the purchaser. See sub-§ (2).

(c) A Hindu dies leaving a widow and four male relations who are then the next reversioners. The widow, without the consent of the reversioners, executes several deeds of sale one after another of portions of her husband's estate to her son-in-law. Sometime afterwards all the reversioners pass a writing to the widow *ratifying* the sales to the son-in-law and agreeing not to dispute their validity. The sales are binding not only on the consenting reversioners, but also on the actual reversioners, unless it is shown by the actual reversioners that the transactions were not proper. It is immaterial that the consent was given *after* the execution of the deeds: *Bajrangi* v. *Manokarnika* (1908) 30 All. 1, 35 I.A. 1. See sub-§ (2).

An alienation without legal necessity and with the consent of some of the reversioners does not bind other reversioners (*x*).

**184. Effect of alienation made for legal necessity or with consent of next reversioner.**—An alienation made by a widow or other limited heir of property inherited by her for justifying necessity, or with the consent of the next reversioners as stated in § 183, passes an absolute estate in the property

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(*u*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*v*) (1919) 46 I.A. 72, 85, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196.

(*w*) *Mummareddi* v. *Pitti Durairaja* (1951) S.C.R. 655.

(*x*) *Laxmi Prasad Singh* v. *Kunai Singh* (1944) All. 484.

to the alienee. It is not only binding on her, but also on the reversioners, including reversioners subsequently born (*y*) or adopted (*z*).

**184A. Doctrine of part performance.**—The doctrine of part-performance contained in s. 53A of the Transfer of Property Act is applicable to an alienation by a widow for legal necessity. The words "claiming under him" in that section can apply to a reversioner on a fair and liberal construction of the same (*a*).

**185. Effect of alienation made without legal necessity and without consent of next reversioner.**—An alienation made by a widow or other limited heir of property inherited by her, without legal necessity and without the consent of the next reversioners is not binding on the reversioners, but it is nevertheless binding on her so as to pass her own interest [that is life-interest] to the alienee (*b*).

Even as regards reversioners it is not absolutely void, but voidable at their option. They may affirm it, or treat it as a nullity without the intervention of a Court, and they show their election to do the latter by commencing an action to recover possession of the property (*c*). In such a case they are not entitled to mesne profits for a period before the exercise of the election (*d*). See § 190.

The persons entitled to impeach unauthorized alienation by a widow or other limited heir are obviously the next reversioners. It is not the law, however, that reversioners alone can impeach such alienations. Any person who has an interest in the succession is entitled to impeach them, *e.g.*, the Government taking by escheat (*e*) [§ 176]. One who is an alienee from a lessor who has a chance of succession on the death of the widow would be a person interested in avoiding a transfer made by the widow, but his right to impeach the transfer would come to an end on the death of his transferor prior to the death of the widow (*f*). A stranger to the reversion, *e.g.*, a mortgagee from a widow cannot impeach an alienation made by the widow (*g*). As to suits by reversioners, see § 207.

*A* Hindu widow mortgages a house forming part of her husband's estate to *M* (who is not a reversioner). She then conveys the house by way of gift to *G*. After the widow's death, *G* sues *M* for redemption. *M* contends that the gift is invalid [§ 183(4)], and that *G* is not therefore entitled to redeem. Is *M* entitled to challenge the gift? No, because he is a stranger to the reversion: *Sitaram* v. *Khandu* (1921) 45 Bom. 105, 59 I.C. 480, ('21) A.B. 413.

As to the remedies of reversioners in cases of unauthorised alienations, see § 205 below. As to limitation, see §§ 208-209.

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(*y*) *Vinayak* v. *Govind* (1901) 25 Bom. 129.

(*z*) *Rajkristo* v. *Kishore* (1865) 3 W.R. C.R. 14; *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584; *Ramkrishna* v. *Tripurabai* (1911) 13 Bom. L.R. 940, 12 I.C. 529.

(*a*) *Ranchhod* v. *Manubhai* (1954) Bom. 194, ('54) A.B. 153, (1953) 55 Bom. L.R. 890 differing from *Bhupal Chandra* v. *Jagad Bhusan* (1943) 1 Cal. 56 and agreeing with *Balaram* v. *Kewalram* ('40) A.N. 396, 191 I.C. 885. Also see *Bobba Suramma* v. *Chandramma* ('59) A.A.P. 568.

(*b*) *Ramchandra* v. *Bhimrav* (1877) 1 Bom. 577; *Chidambaramma* v. *Husainamma* (1916) 39 Mad. 565, 30 I.C. 101, ('16) A.M. 347; *Dhanji* v. *Dhuma* (1924) 26 Bom. L.R. 277, 80 I.C. 234, ('24) A.B. 382; *Gowardhan Das* v. *Viru Mal* (1920) 1 Lah. 48, 55 I.C. 847, ('20) A.L. 397; *Salah Mohmed* v. *Gulab* ('70) A.J.&K. 164.

(*c*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227; *Kondama Naicker* v. *Kandasami Goundar* (1923) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56; *Sivanancha* v. *Thirunamakarasu* ('51) A. Tra-Cochin 26. In *Modhu Sudan* v. *Rooke* (1897) 25 Cal. 1, the alienation was affirmed; *Mahibub Usman* v. *Vithal* (1954) 56 Bom. L.R. 221, I.L.R. (1954) Bom. 586, ('54) A.B. 311 (Reversioner transferred the property ignoring alienation by limited owner; held this showed intention to avoid the alienation); *Jagadindra Nath* v. *Ulangini Dasi* ('55) A.C. 312 (overt act indicating intention to avoid).

(*d*) *Mohanlal* v. *Jagjiwan* (1938) Bom. 292, 40 Bom. L.R. 394, 176 I.C. 76, ('38) A.B. 298.

(*e*) *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 359-362, 134 I.C. 129, ('31) A.P. 442; *Maharaja Kesho Prasad* v. *Chandrika* (1923) 2 Pat. 217,, 228, 68 I.C. 394, ('23) A.P. 122; *Sitaram* v. *Khandu* (1921) 45 Bom. 105, 59 I.C. 480, ('21) A.B. 413; *Jhari* v. *Bijai* (1923) 45 All. 613, 616, 74 I.C. 865, ('24) A.A. 109.

(*f*) *Pannalal* v. *Harna Bai* ('50) A. Hy. 37.

(*g*) *Sitaram* v. *Khandu supra*; *Bipat Mohton* v. *Kulpat Mahton* (1934) 13 Pat. 182, 153 I.C. 439, ('34) A.P. 498; *Ajodhia Prasad* v. *Mt. Sanjhari Kuer* (1931) 6 Luck. 710, 139 I.C. 631, ('32) A.O. 342; *Mangilal* v. *Barkatulla* ('56) A.A. 118.

*Escheat.*—Even if there be no reversioners, a widow or other limited heir cannot alienate property inherited by her without legal necessity. Such an alienation will not bind the Government where the Government is entitled to the property by escheat in default of reversioners (*h*).

*Tenant dying without heir.*—A landlord to whom the holding of a tenant reverts on the tenant's death without leaving heirs is entitled to challenge an unauthorized alienation made by the tenant, where the tenant is a Hindu widow or other limited heir (*i*).

**186. Lease by widow.**—A widow or other limited heir may in the exercise of her power of management [§ 198] grant leases of properties belonging to the estate. But she has no power to grant a permanent lease or a lease for a long term so as to bind the reversion, unless it is justified by legal necessity (*j*), or it is for the benefit of the estate (*k*), or made with the consent of the next reversioners (*l*).

Apart from such necessity, benefit or consent, to create a new and fixed rent for all time, though such rent be adequate at the time of fixing it, in lieu of giving the estate the benefit of an augmentation of a variable rent from time to time, is a breach of duty on the part of the widow (*m*). Such a lease, however, is not void, but voidable at the option of the reversioners. It does not come to an end at the death of the widow; it is valid until it is set aside (*n*). A permanent lease is not justified even if it is granted to improve the land. The expression "for the benefit of the estate" has reference to the preservation and protection of the estate, and not to its improvement (*o*). See § 243A.

*Raiyati settlement by a widow.*—A widow may make a raiyati settlement provided the transaction is fair and *bona fide* (*p*).

If a widow is appointed as a Lumbardar then no co-sharer can challenge a lease of Khudkasta lands by her unless he can prove that it was not an act of ordinary village management. A reversioner is not in a better position (*q*).

**187. Alienation by widow with leave of Court under the Indian Succession Act, 1925, S. 307.**—Where a widow or other limited heir obtains letters of administration, and then obtains leave from the Court under S. 307 of the Indian Succession Act, 1925, to alienate the property, she can confer on the alienee an absolute title to the property irrespective of necessity or of the consent of reversioners. The reason is that alienee is entitled to trust to the order of the Court and he is not bound to go behind it (*r*).

**188. Equities on setting aside alienations by widow.**—Where an alienation made by a widow or other limited heir without legal necessity, and without the consent of the next reversioners, is set aside, the question arises

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(*h*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 673.

(*i*) *Prasad Nath* v. *Ambica Prasad* (1930) Pat. 515, 117 I.C. 630, ('30) A.P. 407.

(*j*) *Sankar Nath* v. *Bijoy Gopal* (1908) 13 C.W.N. 201 [lease for 60 years]; *Bejoy Gopal* v. *Girindra Nath* (1914) 41 Cal. 793, 23 I.C. 162, ('18) A.P.C. 128 [lease for 60 years]; *Chandrakisor Datta Majumdar* v. *Kumar Upendra Chandra Chaudhuri* (1923) 37 Cal. L.J. 319, 74 I.C. 612, ('23) A.C. 563.

(*k*) *Bijoy Gopal* v. *Girindra Nath*, *supra* [lease for 60 years].

(*l*) (1914) 41 Cal. 793, 23 I.C. 162, ('18) A.P.C. 128; *supra*; (1908) 13 C.W.N. 201, *supra*; *Upendra Nath* v. *Bindesri* (1915) 20 C.W.N. 210, 32 I.C. 468, ('16) A.C. 483; *Dayamani* v. *Srinibash* (1906) 33 Cal. 842 [permanent lease].

(*m*) *Shibessouree Devia* v. *Mothooranath Acharjo* (1869) 13 M.I.A. 270 [permanent lease by a Mohunt]; *Raghubir Singh* v. *Jethu* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130; *Sant Prasad* v. *Charitar Singh* ('51) A.P. 539; *Sheodutta* v. *Akali Bhumijani* ('53) A.P. 374.

(*n*) *Modhu Sudan* v. *Rooke* (1897) 25 Cal. 1, 24 I.A. 164; *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Upendra Kishore* v. *Nobo Kishore* (1918) 23 C.W.N. 64, 48 I.C. 993, ('19) A.C. 746.

(*o*) *Ganap* v. *Subbi* (1908) 32 Bom. 577. The decision in *Dayamani* v. *Srinibash* (1906) 33 Cal. 842 turned on the special facts of the case.

(*p*) *Biswanath* v. *Ram Prasad* (1931) 10 Pat. 572, 133 I.C. 673, ('33) A.P. 389.

(*q*) *Ghasiram* v. *Girdhari* (1942) Nagpur 680, 195 I.C. 603, ('42) A.N. 306.

(*r*) *Kamikhya* v. *Hari Churn* (1899) 26 Cal. 607; *Annada* v. *Atul* (1919) 23 C.W.N. 1045, 54 I.C. 197; *Chuni Lal Haldar* v. *Srimati Makshada* (1919) 23 C.W.N. 652, 52 I.C. 309, ('19) A.C. 2.

whether the alienation should be set aside in its entirety or upon terms and conditions. The following is the result of the decisions on the subject: —

(1) It has been held in Bombay that when a sale is set aside, the Court may direct, as a condition of setting aside the sale, the return of the purchase money if the money is still intact at the death of the widow (*s*). But see sub-§ (3).

It would seem that a strong case based on equitable considerations would have to be made out before the Court will impose any of the terms or conditions discussed in this paragraph. In *Natverlal* v. *Dadubhai* (*t*) the Supreme Court expressed the following view. Assuming that the Court has the power to impose conditions on the reversioners' right to recover possession during the lifetime of the widow on considerations of equity, justice and good conscience in proper cases, and to prevent the widow, by her own act, from prejudicing the interests she has created, no such equitable considerations arise in favour of persons who have come upon the land as trespassers and claim title by adverse possession.

(2) It has been held by the Judicial Committee that where a Hindu widow *sells* property inherited by her from her husband, *without legal necessity*, and the purchaser believes in good faith that he is absolutely entitled thereto and makes any improvement in the property, the Court may in setting aside the sale direct the reversioner to pay to the purchaser the amount expended by him on such improvements as have enhanced the market value of the property (*u*). The case was one from Lahore where the Transfer of Property Act, 1882, does not apply, but the decision, it seems, would have been the same even if the case had been one under the Act. See sub-§ (3).

The principle of the above decision was followed by the High Court of Bombay in a case of a *mortgage* by a widow without legal necessity (*v*), though in an earlier case the Court refused to allow the mortgagee even to remove the structure erected by him on the land after it was destroyed by floods (*w*). In Allahabad, it has been held that whether the case be one of mortgage (*x*), lease (*y*), or gift (*z*), if the transfer is not one for legal necessity, the transferee is not entitled to any compensation for the improvements made by him even if the improvements were such as have enhanced the market value of the property, the ground of the decision being that s. 51 of the Transfer of Property Act, 1882, does not apply to alienations made by a Hindu widow without legal necessity. That section, it has been said, "applies only to the case of a transferee of the immovable property who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. But in the case of a Hindu widow a person dealing with her would ordinarily know that she has only a life-interest and he can reasonably be expected to make inquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow so as to affect more than her life interest" (*a*). But see sub-§ (3).

The question whether an alienee from a Hindu widow is entitled to compensation for money spent upon the property cannot be raised in a declaratory suit by reversioners

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(*s*) *Someshwar* v. *Someshwar* (1923) 47 Bom. 1, 67 I.C. 658, ('23) A.B. 16.

(*t*) (1954) S.C.R. 339, 359, 56 Bom. L.R. 447, ('54) A.SC. 61.

(*u*) *Kidar Nath* v. *Mathu Mal* (1913) 40 Cal. 555, 18 I.C. 946 (P.C.) [cost of erection of temple not allowed but purchaser allowed to remove the materials]. See also *Raja Rai Bhagwat* v. *Ram Ratan* (1921) 20 All. L.J. 26, 65 I.C. 69, ('22) A.PC. 91 [P.C.], where there was partial necessity for the sale.

(*v*) *Shiddappa* v. *Pandurang* (1923) 47 Bom. 696, 72 I.C. 626, ('23) A.B. 385. But see *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*w*) *Vrijbhukandas* v. *Dayaram* (1908) 32 Bom. 32.

(*x*) *Honsraj* v. *Musammat Somni* (1922) 44 All. 665, 67 I.C. 314, ('22) A.A. 194 [mortgagee allowed to remove structures].

(*y*) *Rajrup* v. *Gopi* (1925) 47 All. 430, 432, 87 I.C. 44, ('25) A.A. 261.

(*z*) *Raghunandan* v. *Tulshi Singh* (1924) 46 All. 38, 75 I.C. 244, ('24) A.A. 315.

(*a*) (1922) 44 All. 665, 667, 67 I.C. 314, ('22) A.A. 194 *supra*.

during the lifetime of the widow. It is premature to raise it in such a suit. It can only be raised after the widow's death in a suit by reversioners for possession (*b*).

(3) It has been held by the Judicial Committee that where a gift is made by a widow of property inherited by her from her husband, to a stranger and the donee sells the property, and the purchaser effects improvements believing in good faith that he was the owner, he is entitled, if the gift is set aside, to the alternative rights mentioned in sec. 51 of the Transfer of Property Act, 1882, namely, to be paid by the plaintiff at whose instance the gift is set aside the value of the improvements, or to require the plaintiff to sell his interest in the property to him (*c*).

*Mesne Profits.*—In a suit by the reversioner to set aside an alienation made by a Hindu widow mesne profits can be awarded to the reversioner from the date of the widow's death even though such an alienation cannot be described as absolutely void. Even in cases where the decree for possession in favour of the reversioner is conditional on his depositing the amount which has been found to have been used for the benefit of the estate, mesne profits can be awarded to the reversioner if he is ordered to pay interest on the amount payable to the alienee (*d*).

**189. Purchase money applied by widow in part only to purposes of legal necessity.**—Cases frequently arise in which property inherited by a widow from her husband is sold by her for legal necessity, but the whole of the price is not proved to have been *applied* to purposes of necessity, and the sale is challenged by the reversioners on that ground. In such cases, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been *applied* to purposes of necessity, would not invalidate the sale, the purchaser not being bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of legal necessity is considerable or small (*e*).

It is wrong in such cases to draw a distinction, as was done by the Allahabad High Court, between the case where the part not proved to have been applied to purposes of necessity is considerable and the case where such part is small, and in the former case to pass a decree setting aside the sale conditionally upon the reversioner paying to the purchaser the part proved to have been applied to purposes of necessity and in the latter case to pass a decree upholding the sale conditionally upon the purchaser paying to the

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(*b*) *Rup Narain* v. *Gopal Devi* (1909) 36 Cal. 780, 36 I.A. 103, 3 I.C. 382.

(*c*) *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 57 I.A. 305, 53 Mad. 692, 128 I.C. 261, ('30) A.P.C. 297.

(*d*) *Mummareddi* v. *Pitti Durairaja* (1951) S.C.R. 655, ('52) A.SC. 109.

(*e*) *Suraj Bhan Singh* v. *Sah Chain Sukh* (1928) 32 C.W.N. 117, 105 I.C. 257, ('27) A.P.C. 244 [price Rs. 19,000—Rs. 1,622 not proved to have been applied to purposes of necessity—sale upheld unconditionally], following *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.P.C. 37 [a case of sale by manager—price Rs. 3,500—Rs. 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Ram Gopal Ghose* v. *Bullodep Bose* (1864) W.R. (Sp. No.) 385 [one-third of the price not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Luchmeedhar Singh* v. *Ekbal Ali* (1867) 8 W.R. 75 [price Rs. 65,000—Rs. 14,000 not proved to have been applied, etc.—sale upheld unconditionally]; *Chatranarayan* v. *Uba Kunwari* (1868) 5 Beng. L.R. 201 [price Rs. 995—Rs. 321 not proved to have been applied, etc.—sale upheld unconditionally]; *Kamikaprasad* v. *Srimati* (1870) 5 Beng. L.R. 508 [sale upheld unconditionally]; *Felaram* v. *Bagalanand* (1910) 14 C.W.N. 895, 6 I.C. 207 [permanent lease on a selami of Rs. 125—Rs. 25 not proved to have been applied, etc.—lease upheld unconditionally]; *Medai Dalavoi* v. *Nainar Tevan* (1922) 27 C.W.N. 365, 74 I.C. 604, ('22) A.P.C. 307 [price Rs. 5,300—Rs. 712 not proved to have been applied, etc.—sale upheld unconditionally]; *Naman Lal* v. *Har Bhagwan* (1921) 2 Lah. 357, 66 I.C. 362, ('22) A.L. 317 [sale upheld unconditionally]; *Bal Krishna* v. *Hira Lal* (1919) 41 All. 338, 50 I.C. 74, ('19) A.A. 406 [price Rs. 19,500—Rs. 11,725 not proved to have been applied, etc.—sale upheld unconditionally].

reversioners the price not proved to have been so applied (*f*). Where the sale was only partially justified by legal necessity, the sale may be set aside conditionally on the reversioner paying to the purchaser that portion of the consideration money which was justified by legal necessity (*g*). See § 245 and notes where the matter is fully discussed.

The leading case on the subject of alienation for necessity is *Hunooman Persaud* v. *Mussumat Babooee* (*h*), decided by the Judicial Committee in 1856. The question in that case was as to the extent of the power of the mother as manager of the estate of her minor son to mortgage the estate. The principles laid down in that case [see note (1) to § 242] have been applied also to alienations by a Hindu widow of property inherited by her from her husband and to alienations of joint family property by the manager of a joint Hindu family.

The principles to be derived from the cases decided by the Judicial Committee may be stated thus. If a sale by a Hindu widow of property inherited by her from her husband is sought to be set aside by the reversioner, and part of the price is proved to have been applied to purposes of necessity, then if the suit is brought during the widow's life-time, the decree should be one declaring the right of the reversioner to the property on the death of the widow and declaring also that the purchaser is entitled to a charge on the property only for the amount proved to have been so applied (*k*). If the suit is brought after the widow's death, the decree should be one setting aside the sale and directing the purchaser to deliver possession to the reversioner and to pay to him the balance of mesne profits from the date of the widow's death after deducting therefrom the amount proved to have been applied to purposes of necessity with interest thereon (*l*). But if the amount proved to have been applied to purposes of necessity exceeds the amount of mesne profits, the decree should be one setting aside the sale and for possession conditionally upon the reversioner paying to the purchaser the difference between the two sums (*m*).

A widow is not always bound to sell exactly for the amount for which there is legal necessity, and the Courts have to see in each case whether, having regard to the circumstances, the alienation was a proper one. It would manifestly be impossible and possibly prejudicial to the interest of the estate if the widow were held to be bound in every instance to sell the property for payment of a debt due from her husband for exactly the sum due to the creditor (*n*). See notes to § 181D.

**190. Estoppel: Election by reversioner.**—(1) An alienation by a widow of her husband's estate without legal necessity or an invalid surrender is not altogether void, but only voidable by the next reversioner. He may affirm it, or he may treat it as a nullity [§ 185]. If he elects to affirm it, he will be precluded from exercising his right to avoid it and from questioning the transaction (*o*). The election may be made after the reversion has fallen into possession, or even before (*p*).

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(*f*) *Jainarain* v. *Bhagwan* (1922) All. 683, ('22) A.A. 321; *Sanmukh* v. *Jagarnath* (1924) 46 All. 531, 83 I.C. 838, ('24) A.A. 708; *Daulat* v. *Sankatha* (1925) 47 All. 355, 86 I.C. 91 ('25) A.A. 324; *Gobind Singh* v. *Baldeo Singh* (1903) 25 All. 330; *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494; *Dwarka Ram* v. *Jhulai* (1923) 45 All. 429, 72 I.C. 134 ('23) A.A. 248; *Ramanand Lal* v. *Damodar Das* (1941) All. 820, 199 I.C. 369, ('42) A.A. 110; *Sumantrabai* v. *Battibai* I.L.R. (1956) Nag. 48, ('55) A.N. 299.

(*g*) *Shantikumar Pal* v. *Mukund Lal Mandal* (1935) 62 Cal. 204, 156 I.C. 209, ('35) A.C. 20.

(*h*) (1856) 6 M.I.A. 393; *Tirbeni Sahai* v. *Ramsingh* (1938) 13 Luck. 230, 167 I.C. 925, ('37) A.O. 361.

(*k*) *Mahomed Shumsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 2 I.A. 7.

(*l*) *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1907) 29 All. 331, 34 I.A. 72. See also *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 555-556; *Doorga Persad* v. *Doorga Konwari* (1878) 4 Cal. 190, 204, 5 I.A. 149; *Madhab Mohapatra* v. *Bhikari Panda* ('64) A. Orissa 26.

(*m*) *Bhagwat Dayal* v. *Debi Dayal* (1908) 35 Cal. 420, 429-430, 35 I.A. 48.

(*n*) *Naman Lal* v. *Har Bhagwan* (1921) 2 Lah. 357, 66 I.C. 362, ('22) A.L. 317; *Bal Kishna* v. *Hira Lal* (1919) 41 All. 338, 50 I.C. 74, ('19) A.A. 406; *Felaram* v. *Bagalanand* (1910) 14 C.W.N. 895, 6 I.C. 207.

(*o*) *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 402, 52 Bom. 1, 7, 105 I.C. 708, ('27) A.PC. 227; *Ram Bharose* v. *Bhagwan Din* (1944) 19 Luck. 37; *Ganga Baksh* v. *Madho Singh*, *infra*.

(*p*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 488, ('18) A.PC. 196; *Akkawa* v. *Sayad Khan* (1927) 51 Bom. 475, 485-486, 102 I.C. 232, ('27) A.B. 260; *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557. But see *Virayya* v. *Bapayya* (1946) Mad. 276; *Ganga Bakhsh* v. *Madho Singh* ('55) A.A. 288 (F.B.); *Krishna Reddi* v. *Yaganti Reddi* (1954) 2 Mad. L.J. (Andhra) 251. But a reversioner who has transferred his interest in the property cannot thereafter affirm the alienation by the limited owner to the detriment of the purchaser: *Thayammal* v. *Rangaswami* (1955) 2 Mad. L.J. 426, ('56) A.M. 15.

(2) The above rule applies not only to male but also to female reversioners (*q*).

**190A. Estoppel: Election: Ratification.**—In a very recent decision the Supreme Court referred to the three types of cases that may arise for consideration in dealing with a reversioner's challenge to the widow's alienation: (1) Estoppel (property so called): (2) Election in the strict sense of the term whereby the person electing takes a benefit under the transaction: and (3) Ratification i.e., agreeing to abide by the transaction (*q*1).

A presumptive reversioner coming under anyone of the aforesaid categories is precluded from questioning the transaction. The Supreme Court in the above decision also considered the position of reversioners who were minors at the time of the challenged transaction (*q*1).

**191. Alienation made by widow with consent of reversioner whether binding on him and actual reversioner.**—(1) A reversioner, whether a male or female (*r*), who consents to an alienation by a widow or other limited heir made without legal necessity, or to an invalid surrender, and transferees from him, are precluded from disputing the validity of the alienation (*s*) [ills. (a) and (b)], though he may have received no consideration for his consent (*t*). It is immaterial that the alienation is by way of gift [see ills. (a) and (b)].

But if the actual reversioner at the widow's death be a different person, he is not precluded from questioning the alienation, though even as regards him the alienation will stand good unless he proves that the transaction was one without legal necessity [§ 183(1)]. The actual reversioner, even if he be the son of the consenting reversioner, is not bound by his father's consent (*u*), unless the consent was given for a consideration and the son enjoyed the benefit of it (*v*) [ill. (c)]. See § 192.

(2) A reversioner who takes from an alienee from a widow a mortgage of the alienated property is not on that ground precluded from questioning the alienation on the widow's death (*w*) [ill. (d)].

(a) A Hindu widow executes a deed of gift of a portion of her husband's property to *D*. *F* who is then the nearest reversioner joins in the deed. After the widow's death *F*,

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(*q*) (1927) 51 Bom. 475, 485-486, 102 I.C. 232, ('27) A.B. 260, *supra*; *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557.

(*q*1) *Shanmugam Pillai* v. *K. Shanmugam Pillai* ('72) A.S.C. 2069.

(*r*) (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260, supra, *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557.

(*s*) *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I.C. 214, ('22) A.B. 102, explaining *Bai Parvati* v. *Dayabhai* (1920) 44 Bom. 488, 58 I.C. 266, ('20) A.B. 355; *Bhausaheb* v. *Ramgauda* (1923) 25 Bom. L.R. 813, 76 I.C. 937, ('23) A.B. 471; *Fateh Singh* v. *Thakur Rukmini* (1923) 45 All. 339, 72 I.C. 8, ('23) A.A. 387 [F.B.]; *Akkawa* v. *Sayad Khan*, *supra*; *Babu Singh* v. *Rameshwar Bakhsh* (1923) 7 Luck. 360, 135 I.C. 881, ('32) A.O. 90; *Jiwan Singh* v. *Misri Lal* (1896) 18 All. 146, 23 I.A. 1 [transfer confined to widow's estate]; *Rup Narain* v. *Gopal Devi* (1909) 36 Cal. 780, 36 I.A. 103, 3 I.C. 382 [transfer confined to widow's estate]; *Baburao* v. *Tukaram* (1931) 33 Bom. L.R. 235, 131 I.C. 660, ('31) A.B. 208; *Ram Bharose* v. *Bhagwan Din* (1944) 19 Luck. 37; *Mst. Lakhpati* v. *Bisram* (1950) All. 91; *Munga Kuer* v. *Domari* I.L.R. (1955) 34 Pat. 317; *Jagannath* v. *Rupnarain* ('60) A.P. 564, *Ramakottayya* v. *Viraraghavayya* (1929) 52 Mad. 556; *Subba Reddi* v. *Govinda Reddi* ('61) A.A.P. 430; *Subbamma* v. *Krishna Murty* ('67) A.A.P. 8.

(*t*) *Ramakottayya* v. *Viraraghavyya* (1929) 52 Mad. 556, 119 I.C. 156, ('29) A.M. 502.

(*u*) *Rangasami* v. *Nachiappa* (1919) 42 Mad. 523, 535, 536, 46 I.A. 72, 83, 84, 50 I.C. 498, ('18) A.PC. 196. See also *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 402-403, 52 Bom. 1, 7, 107 I.C. 708, ('27) A.PC. 227, where part of the alienation was in favour of the father; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442. In *Baburao* v. *Tukaram* (1931) 33 Bom. L.R. 285, 131 I.C. 650, ('31) A.B. 208, the plaintiffs who claimed to set aside a gift to which their *step-mother* had consented were not the reversionary heirs of the deceased owner; *Debendranath Sharma* v. *Nagendranath Datt* (1933) 60 Cal. 1158, 149 I.C. 522, ('33) A.C. 900.

(*v*) *Vinayak* v. *Govind* (1901) 25 Bom. 129, 136, 141. See also *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(*w*) 42 Mad. 523, 537-539, 46 I.A. 72, 85-87, 50 I.C. 498, ('18) A.PC. 196, *supra*.

alleging that the gift is invalid [§ 183(4)] sues *D* for possession of the property. *F* having consented to the gift is estopped from disputing the validity of the gift: *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I.C. 214, ('22) A.B. 102; *Akkawa* v. *Sayad Khan* (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260; *Munga Kuer* v. *Domari* I.L.R. (1955) 34 Pat. 317.

(b) *A* dies leaving a mother *M* and two male relations *F* and *G* who are then the nearest reversioners. On *A*'s death *M* succeeds to the estate of her son. *M* executes a deed of gift of a portion of her son's property in favour of a family idol. *F* joins in the deed of gift. *G* sues *M* and the donee for a declaration that the alienation is invalid, and a decree is passed declaring that the gift is void beyond *M*'s lifetime. After *M*'s death *F* sues the donee for possession of his one-half share in the property comprised in the gift. *F* is bound by his consent, and he is precluded from challenging the validity of the gift, though the gift was declared invalid in *G*'s suit and though *G* would be entitled to recover his one-half share from the donee: *Fateh Singh* v. *Thakur Rukmini* (1923) 45 All. 339, 72 I.C. 8, ('23) A.A. 387 [F.B.].

(c) A Hindu dies leaving a widow *R*, a sister *B*, and *B*'s son *V*. *R* sells a portion of her husband's property with *V*'s consent. The sale is effected to obtain necessary funds for *V*'s marriage. *V* then marries, and a son *G* is born to him. After the sale *B* dies, then *V*, and then *R*, the widow. After *R*'s death, *G*, who is then the actual reversioner, sues the purchaser for possession of the property sold to him. It is proved that there was no legal necessity for the sale. It is not proved that *B* consented to the sale. Upon these facts the High Court of Bombay held that *G* was bound by the consent of his father *V*, *Vinayak* v. *Govind* (1901) 25 Bom. 129, 136, 141. See in this connection *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(d) *A* dies leaving a mother *M*, a paternal cousin *R*, and a remoter paternal cousin *P*. On *A*'s death *M* succeeds to his estate as his heir. *M* executes a deed of gift of a *portion* of her son's property to *R* who is then the nearest reversioner. [The gift is therefore bad in law, § 183(4)]. Afterwards *R* dies and his estate vests in *X*. *X* mortgages to *P*, the property given by *M* to *R*. Then *M* dies. After *M*'s death *P*, who is then the actual reversioner, claims the property given by *M* to *R* and mortgaged by *X* to *P*. *P* is entitled to recover the property. The fact that he took a mortgage of the property does not preclude him from claiming it as a reversioner. "At the time of the mortgage the plaintiff [*P*] did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift": *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 87, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, with facts simplified.

In an Allahabad case it was held that if the nearest reversioner at the time of an alienation made by a Hindu widow of her husband's property assents to the alienation neither he *nor any one claiming through him* [in that case, the reversioner's son] can afterwards dispute its validity (*x*). This ruling, it is submitted, proceeds upon a misapprehension of a passage in the judgment of the Privy Council in *Bajrangi's* case (*y*) which is as follows:—"The appellants [plaintiffs] who *claim through* Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers." *Bajrangi's* case was considered by their Lordships in *Rangasami's* case (*z*).

**192. Family Arrangement: Compromise by widow—Reversioner party to and benefiting by the transaction.**—Where a widow or other limited heir enters into a family arrangement (*b*) [ills. (a) and (b)], or into a compromise which involves an alienation of the estate (c) [ill. (c)], the reversioner who has been a party to and has benefited by the transaction is precluded from questioning the alienation; and so are his descendants (*d*). There is no

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(*x*) *Mahadeo Prasad* v. *Mata Prasad* (1922) 44 All. 44, 53, 63 I.C. 721, ('22) A.A. 297.

(*y*) (1907) 30 All. 1, 35 I.A. 1, 16.

(*z*) (1919) 42 Mad. 523, 535-536, 46 I.A. 72, 83-84, 50 I.C. 498, ('18) A.PC. 196.

(*b*) *Musammat Hardei* v. *Bhagwan Singh* (1919) 24 C.W.N. 105, 50 I.C. 812, ('19) A.P.C. 27; *Pulliah Chetti* v. *Varadarajulu* (1908) 31 Mad. 474; *Barati Lal* v. *Salik Ram* (1916) 38 All. 107, 31 I.C. 919, ('15) A.A. 441; *Chahlu* v. *Parmal* (1919) 41 All. 611, 51 I.C. 919, ('19) A.A. 371; *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227; *Sundar Sahu* v. *Chamra Sahu* ('54) A. Orissa 80.

(*c*) *Kanhai Lal* v. *Brij Lal* (1918) 45 I.A. 118, 40 All. 487, 47 I.C. 207, ('18) A.PC. 70.

(*d*) *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227; *Bindeshri Tewari* v. *Lakhan Tewari* (1941) All. 763, 198 I.C. 13, ('42) A.A. 12, (1941) A.L.J. 587; *Bachchu Singh* v. *Harbans Singh* ('53) A.A. 213; *Krishna Reddi* v. *Yaganti Reddi* (1954) 2 Mad. L.J. (Andhra) 251.

question in a case of this kind of a transfer of *spes successionis* by the reversioner. The reversioner, being a party to the transaction, cannot repudiate it.

Where a widow entered into a compromise with the presumptive reversioners and she was accepted as absolute owner of a portion of the properties and she gave up her claim in the remaining properties, it was held by the Supreme Court that the presumptive reversioners who themselves ultimately became the reversioners were estopped from challenging the transaction. It was held that the settlement could also be considered as a family arrangement binding on the parties (*e*).

The Court leans strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes. In the case of a family arrangement it is not necessary that there should have been any previous dispute as to the rights of the parties (*ee*).

The expression "family" in the context of family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. It is sufficient if the dispute is between near relations (*f*). The subject of family arrangement is further dealt with under § 248A.

*Illustrations*

(a) A Hindu governed by the Benares school of Hindu law dies leaving a widow and three daughters, *D*, *M* and *H*, and grandsons by *D* and *H*. The widow claims an absolute title to certain properties which the daughters allege belonged to their father. An arrangement is then come to between the widow and the daughters whereby certain properties are given to the grandsons and certain other properties are divided among the daughters as their *absolute* property. The daughters and grandsons enter into immediate possession of their lots, and they deal with their shares as absolute owners. *H* executes a mortgage of her share. *M* sells one of the properties which came to her share to *R*. After the death of the widow and of *H* and *M*, *D* brings a suit against *R* for recovery of possession of the property sold to him by *M*, alleging that the property belonged to her father, and that on the death of her mother and sisters she became the sole heir of her father and was entitled to possession. Upon these facts it was held by their Lordships of the Privy Council that *D* who was a party to the arrangement could not be allowed to repudiate it and impeach a sale made on the faith of it. Their Lordships said: *"Whether this arrangement is binding on the grandsons cannot be determined in this suit,* and on that question their Lordships express no opinion. But the plaintiff *at all events is bound by her own agreement;* and in view of this fact, and of the favour shown by the Courts to family arrangements and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement and to impeach a sale which was made upon the faith of it": *Mussammat Hardei* v. *Bhagwan Singh* (1919) 24 C.W.N. 105, 109, 50 I.C. 812, ('19) A.PC 27.

(b) A Hindu died in 1846, leaving a widow, who survived until 1912, and a daughter. On the death of the widow *A* had succeeded to the estate. In 1868 the widow had alienated nearly the whole property by three deeds executed and registered on the same day. By

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(*e*) *Krishna Beharilal* v. *Gulabchand* ('71) A.S.C. 1041.

(*ee*) *Krishna Beharilal supra; Shanmugam Pillai* v. *K. Shanmugam Pillai* ('72) A.S.C. 2069; *Sahu Madho Das* v. *Pandit Mukund Ram* (1955) 2 S.C.R. 22; *Pokhar Singh* v. *Dulari* (1930) 52 All. 716; 125 I.C. 1, ('30) A.A. 687; *Buchi Bai* v. *Nagpur University,* I.L.R. (1946) Nagpur 433; *Chanderjit Das* v. *Debi Das* (1953) 1 All. 437, ('51) A.A. 522. Also see *Pullaiah* v. *Narasimham* ('66) A.S.C. 1836; *M. N. Aryamurthi* v. *Subbaraya* ('72) A.S.C. 1279. Reference may be made to cases cited under § 248A.

(*f*) *Krishna Beharilal supra; Ram Charan Das* v. *Girija* ('66) A.S.C. 323, 328.

the first deed she gave a property to her brother, by another she sold half of another property to *A*, and by the third she sold the other half of that property to her son-in-law. The signature on each of the deeds was attested by the two other alienees. *A*, who survived the widow for six years, did not seek to set aside any of the alienations. After his death his son and grandsons brought a suit to recover the whole property. It was held that the three deeds were to be regarded as forming one transaction entered into by all the persons interested in the properties, and that *A*, and consequently the plaintiffs, were precluded from disputing the two alienations now sought to be set aside, the alienations being by the widow were avoidable, not void, and *A* being precluded from questioning them, it was not necessary to consider whether he could deal validity with his reversionary interest. In the judgment their Lordships said: "Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction.... Their Lordships conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of [the husband's] estate such as was likely to prevent disputes in the future and therefore for the best interest of all the parties. ...If some person other than *A* had been at the death of [the widow] the nearest heir of her husband, it might have been open to him to question all or any of the three deeds, but *A* himself being a party to *and benefiting by the transaction* evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after [the widow's] death, essay to do so": *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 401-402, 52 Bom. 1, 105 I.C. 708, ('27) A.PC 227: *Birendra Nath* v. *Shibaram* ('52) A.C. 473, (1953) 1 Cal. 208.

(c) *A* and *B* are two Hindu brothers governed by the Benares school of Hindu law. *A* dies leaving a widow *P*. On *A*'s death *B* enters into possession of the family property, claiming it by right of *survivorship*. *P* contends that her husband *A* was separate from *B*, and she adopts *K* to her husband. *K* is *P*'s husband's sister's son. *B* dies leaving a widow *R*, a daughter, and *K*. On *B*'s death, his estate devolves on his widow *R*. On the widow's death it would pass to the daughter as a limited heir, and on her death, *K*, if his adoption is valid, would succeed as a reversioner. The daughter is the next or presumptive reversioner, and *K* is a remote or contingent reversioner.

*B*'s widow, *R*, institutes two suits, one for a declaration that her husband was the owner of the entire joint family property, and another for a declaration that *K*'s adoption is invalid. A compromise is then entered into by which the property is divided between *B*'s widow, *R*, her daughter and *A*'s widow, *P*, and *K*'s adoption is recognised. *P* transfers *the property which she got under the compromise to K as her adopted son. K is a party to the compromise.*

Then the daughter dies, and then the widow, *R*. On the death of *R*, *K* claims *B*'s property as *B*'s reversionary heir. Upon these facts it was held by their Lordships of the Privy Council that *K* was precluded from claiming as a reversioner. *Kanhai Lal* v. *Brij Lal* (1918) 45 I.A. 118, 123, 40 All. 487, 47 I.C. 207, ('18) A.PC. 70.

*Reversioner's son, whether compromise binding on him.*—It has been held by the High Court of Allahabad, that where a reversioner is a party to a compromise and obtains some property under the compromise, his son, if he enters into possession of the property after his father's death and enjoys possession thereof in succession to his father, is precluded from repudiating the compromise and from claiming as a reversioner (*g*). See also ill. (c) above.

**193. Compromise and family arrangement by widow—reversioner not a party—binding on reversioner, though not a party, if transaction bona fide.**—(1) A compromise in the nature of a family arrangement entered into by a widow or other limited heir binds the reversioners, though they may not be parties thereto, provided it amounts to a *bona fide* settlement of disputes in respect of the estate (*h*) [ills. (a) and (b)]. Even if it is not in the nature

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(*g*) *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(*h*) *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477; *Hiran Bibi* v. *Sohan Bibi* (1914) 18 C.W.N. 929, 24 I.C. 309, ('14) A.PC. 44; *Upendra Nath* v. *Bindesri Prosad* (1915) 20 C.W.N. 210, 32 I.C. 468, ('16) A.C. 843; *Birendra Nath* v. *Shibaram* ('52) A.C. 473, (1953) 1 Cal. 208; *Bihari Lal* v. *Daud Husain* (1913) 35 All. 240, 18 I.C. 721. In the following cases it was held that the compromise did not bind the actual reversioners; *Himmat Bahadur* v. *Dhanpat Rai* (1916) 38 All. 335, 35 I.C. 148, ('17) A.A. 481 [no *bona fide* dispute and no *bona fide* settlement]; *Kanhaiya Lal* v. *Kishori Lal* (1916) 38 All. 679, 35 I.C. 683, ('16) A.A. 38 [probably no

of a family arrangement, a compromise entered into by her *bona fide* for the benefit of the estate, and not for her personal advantage, binds the reversioners quite as much as a decree against her after litigation, though they may not be parties to the transaction (*i*) [ill. (c)]. In either case the fact that the compromise involves an alienation of the estate does not affect its validity. An alienation which is the result of a compromise, or the mode by which a compromise is carried into effect, falls within the power of the holder of a Hindu woman's estate either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity (*j*). The question whether a compromise is a *bona fide* settlement of a disputed right between the parties depends on the substance of the transaction and in order that it may bind the estate it should be a prudent and reasonable act (*k*).

A reversioner would be precluded from questioning the alienation on any such ground if he has in fact elected to assent to the transaction and received benefit under it in circumstances inviting the application of the doctrine of election or ratification (*k*1). The cases on the subject show that the rule of estoppel also has been involved in such cases. In *Subbu Chetty's Family Charities* v. *Raghava Mudaliar* the Supreme Court pointed out that the principle of election or estoppel or ratification must be applied with due circumspection and held that the mere fact that the reversioner has received some benefit under the transaction or has not challenged the validity of the transaction when it took place cannot bar his rights as a reversioner when reversion in his favour falls open (*k*2).

(2) An alienation by way of compromise entered into between a limited owner and a person who had no *bona fide* claim at all to the estate when the compromise was entered into does not bind the reversioners (*l*). But if the compromise is a *bona fide* one, entered into by the widow with a rival claimant for the benefit of the husband's estate, it would bind the reversioners. The widow cannot however by such compromise with a person claiming adversely to the estate convert her limited estate into an absolute estate in some of the properties (*m*). Where a presumptive reversioner sued to set aside a gift by a widow and a compromise was entered into by which

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longer law]—see (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356 *infra*; *Janak Kishori* v. *Babu Debi Prasad* (1917) 2 Pat. L.J. 370, 39 I.C. 750 ('17) A.P. 490 [compromise by a widow of her claim as a *legatee* under her husband's will]: *Anup Narayan* v. *Mohabir Prasad* (1918) 3 Pat. L.J. 83, 42 I.C. 95, ('17) A.P. 86 [compromise not for the benefit of the estate]; *Narain Singh* v. *Raj Kumar* (1922) 44 All. 428, 66 I.C. 82, ('22) A.A. 217 [compromise not for the benefit of the estate]; *Musammat Bhagwati* v. *Jagadam* (1921) 6 Pat. L.J. 604, 621-622, 67 I.C. 597, ('22) A.P. 352 [no doubtful claim]; *Pullayya* v. *Appanna* ('57) A. Andh. Pra. 846.

(*i*) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356, approving *Mohendra Nath* v. *Shamsunnessa* (1915) 21 Cal. L.J. 157, 27 I.C. 954 ('15) A.C. 629; *Raoji Rupa* v. *Kunjalal Hiralal* (1930) 57 I.A. 177, 55 Bom. 455, 123 I.C. 709, ('30) A.PC. 163.

(*j*) *Ramsumram Prasad* v. *Shyam Kumari* (1922) 1 Pat. 741, 745-746, 49 I.A. 342, 69 I.C. 71, ('22) A.PC. 356; *Babulal* v. *Maniklal* (1941) Nag. 124, 192 I.C. 826, ('41) A.N. 79.

(*k*) *Mst. Phool Kuer* v. *Mst. Pem Kuer* (1952) S.C.R. 793, ('52) A.SC. 207; *Karuppa Udayar* v. *Sellamuthu Udayar* (1956) 2 Mad. L.J. 250; *Arjun Singh* v. *Virendra* ('71) A.A. 29.

(*k*1) *Sahu Madho Das* v. *Mukund Ram* (1955) 2 S.C.R. 22. Also see *Ekkari Ghosh* v. *Chittarekha* ('58) A.C. 447.

(*k*2) (1961) 3 S.C.R. 624, 632.

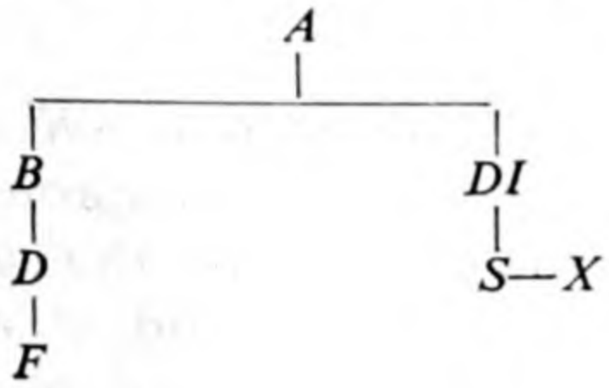
(*l*) *Obala Kondama* v. *Kandasami* (1924) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56; *Baijnath Rai* v. *Mangla Prasad* (1926) 5 Pat. 350, 90 I.C. 732, ('26) A.P. 1; *Mathukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, 69 I.A. 110, ('42) A.PC. 54.

(*m*) *Perireddi* v. *Venkatraju* (1947) Mad. 681.

a portion of the estate was transferred to him, it was held that the compromise was not binding on the actual reversioner (*n*). See § 182, ill. (2).

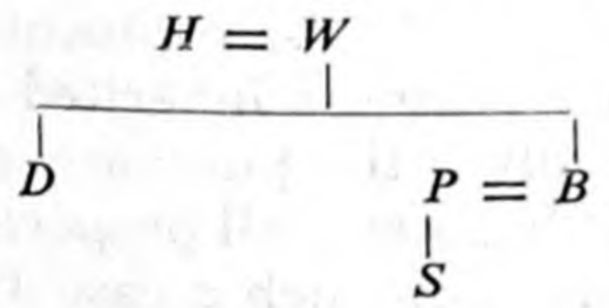
*Illustrations*

(a) *A* has a son *B*, who is joint with him. *A* adopts the Mahomedan faith, but the management of the joint property remains with him. *B* then dies leaving a daughter *D*. Then *A* dies leaving his grand-daughter, *D*, and a son *S* by a predeceased daughter *DI*. On *A*'s death *D* claims the whole of the joint family property on the ground that *A*'s conversion operated as a forfeiture of his rights in the property and that the property became immediately on *A*'s conversion the property of *B*. *S* claims the property as *A*'s daughter's son. A compromise is then arrived at between the parties under which *D* obtains 8½ annas of the joint property and *S* gets 7½ annas. *S* then alienates his shares to *X*. After *D*'s death, her son, *F*, claiming to be the reversionary heir to his grandfather, *B*, brings a suit against *X* to recover from him the property transferred to him by *S*. It is contended on behalf of *F* that *D*, as *B*'s daughter, took only a limited interest in the property, and that she had therefore no authority, in the absence of legal necessity, to alienate the 7½ annas share in favour of *S*.




On the above facts it was held by the Privy Council that the compromise was binding upon *F* and that he was not entitled to recover the property from *X*. Their Lordships said: "The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee *derives title* from the holder of the limited interest or life tenant. In the present case *Khairati Lal* [*S*] acquired no right from the daughter [*D*] of Daulat [*B*], for the 'compromise', to use their Lordships' language in *Rani Mewa Kwar* v. *Rani Hulas Kwar* (*o*), is based on the assumption that there was *an antecedent title of some kind* in the parties and the agreement acknowledges and defines what that title is": *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 102-103, 10 I.C. 471.

(b) A Hindu, *H*, dies leaving a widow, *W*, and a daughter, *D*. After the death of *H*, *W* adopted a son *P* to *H*. *P* dies leaving a widow *B*, and a daughter, *S*. After *P*'s death *D* claiming as the heir of her father, *H*, sues *B* for possession of certain property alleging that it formed part of the estate of *H* and that *B* was not entitled to retain it. *B* contends that the property in dispute belonged to *P* as the lawfully adopted son of *H*, and that on *P*'s death she, as *P*'s widow, became entitled to it. The suit is settled by a compromise by which the property is divided in certain shares between *D* and *B*. *B* then dies, and after her death her daughter *S* sues *D* to set aside the compromise entered into by her mother. *B*, alleging that it involved an alienation of part of the property of her father, *P*, and that *B*, as *P*'s widow, had no authority to alienate it without legal necessity and for recovery of the property from *D*. Upon these facts it was held by the Judicial Committee that the compromise was binding on *S*, and that she was not entitled to recover from *D* the property transferred to her by *B*. Their Lordships said: *"The compromise in question is in no sense of the word an alienation* by a limited owner of the family property, *but a family settlement* in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties": *Hiran Bibi* v. *Sohan Bibi* (1914) 18 C.W.N. 929, 932, 24 I.C. 309, ('14) A.PC. 44.




(c) A Hindu died leaving a widow and a paternal uncle's son. Prior to his death the deceased had brought a suit for a sale of certain properties mortgaged to him. The suit was continued by the widow, and she obtained a decree for Rs. 1,47,000. Six of the mortgaged properties were then put up for sale by auction, and the widow, having leave to bid, bought them for Rs. 65,075. The mortgagors filed a petition in objection to the sale. The widow entered into a compromise with the mortgagors, one of the terms of the compromise being that the sale should be set aside. It was contended in a suit brought

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(*n*) *Mt. Rajpali Kunwar* v. *Surju Rai* (1936) 58 All. 1041 (F.B.), 163 I.C. 756, ('36) A.A. 507; *Mathukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, (1942) A.L.J. 392, 69 I.A. 110, ('42) A.PC. 54.

(*o*) (1875) 1 I.A. at p. 166.

by the paternal uncle's son against the widow, the mortgagors and certain persons to whom the properties were sold under the compromise that as the widow had purchased at the auction, the transaction was an alienation of immovable property and therefore could only be justified by strict proof of necessity. Upon the facts the Judicial Committee held that the compromise was *bona fide* and for the benefit of the estate, and that the widow had power to enter into the compromise: *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356.

This section relates to cases of compromise to which the reversioners are not parties. § 192 deals with cases of compromise to which the reversioners are parties.

As to burden of proof in cases of compromise, see notes to § 182 "Burden of proof; 'Consent decree' involving alienation to mortgagee" at p. 226.

**194. Compromise by widow of claims made by next reversioner.**—Where a widow in possession of her husband's estate has entered into a compromise of a *claim made by the next reversioner* in respect of the estate, and the compromise is in the circumstances a family settlement which is prudent and reasonable, it is binding upon the estate [that is, the whole body of reversioners] (*p*). A mere device, however, between the widow and the next reversioner to divide the estate between them cannot be supported on the ground of a family arrangement (*q*).

Thus a surrender by a widow of the whole of her husband's estate to the next reversioner, coupled with a re-transfer of the estate by him to the widow whereby she is constituted the *absolute* owner thereof, and a transfer back by the widow to him of part of the estate, cannot be supported as a family arrangement, and it is not binding on the actual reversioner at the widow's death, not even if he is the son of the consenting reversioner. If the widow purporting to be the absolute owner of the properties that came to her share, transfers them to a third person the actual reversioner is entitled to have the transfer set aside (*q*).

**194A. Widow's power of alienation for payment of trade debts.**—A widow or other limited heir may alienate or charge the estate for payment of debts properly incurred by her in connection with the business inherited by her from the deceased owner (*r*). If the business involves the purchase and re-sale of immovable property, she may in the course of business sell properties so purchased by her. No question of legal necessity arises in such a case (*s*).

**195. Unsecured debts incurred by widow for legal necessity.**—Debts contracted by a widow or other female heir may be ordinary debts incurred for purposes amounting to a legal necessity, *e.g.*, marriage of her daughter, or they may be trade debts.

As regards ordinary debts incurred for a legal necessity, there is a conflict of opinion whether if the debt is not secured by a mortgage or a charge on the estate, the estate is liable in the hands of the reversioners after the widow's death.

It has been held by the High Courts of Madras (*t*), and Allahabad (*u*), that the estate is not liable in such a case, the reason given being that a creditor who has accepted the

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(*p*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 37, ('25) A.PC. 272 [compromise of suit].

(*q*) *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

(*r*) *Sham Sunder* v. *Acchhan Kunwar* (1898) 21 All. 71, 25 I.A. 183. See also *Amarnath* v. *Achan Kuar* (1892) 14 All. 420, 19 I.A. 196.

(*s*) *Pahalwan Singh* v. *Jiwan Das* (1919) 42 All. 109, 59 I.C. 162, ('20) A.A. 345.

(*t*) *Ramasami* v. *Sellattammal* (1882) 4 Mad. 375. See also *Regella* v. *Nimushakavi* (1910) 33 Mad. 492, 5 I.C. 271.

(*u*) *Dhiraj Singh* v. *Manga Ram* (1897) 19 All. 300 [money borrowed by widow for marriage expenses of grand-daughter—no writing]. But see *Suraj Prasad* v. *Makhna* (1945) All. 465, which seems to overrule this case.

*personal* liability of a widow is not entitled to proceed against the estate. On the other hand, it has been held by the High Court of Calcutta (*v*), that the debt being incurred for a legal necessity the estate is liable even if no mortgage or charge is created on the estate. In a later Calcutta case (*w*) where necessary repairs were executed to a house inherited by a daughter from her father, it was held that the estate of the father was liable though no charge had been created, the ground of the decision being that the estate had *benefited* by the repairs. A Full Bench of the Bombay High Court has followed the Calcutta High Court dissenting from other High Courts and overruling its own earlier decision (*x*). This is also the view taken in Nagpur (*y*). But if the creditor wishes to proceed against the estate he must frame his suit in a proper manner (*z*); for if the suit is filed against the widow personally and not as representing the estate, only the widow's interest can be proceeded against in execution (*a*).

As regards trade debts it has been held that such debts properly incurred by a widow on the credit of the assets of the business inherited by her from her husband are recoverable after her death *out of the assets of the business* as against the reversioners who have succeeded thereto even in the absence of a specific charge on the estate (*b*).

A widow who borrows on a simple bond may bind the estate by *subsequently* creating a mortgage on the estate for payment of the debt comprised in the bond (*c*). As to alienations for trade debts see § 194A.

**196. Acknowledgment of debt by widow.**—It was provided by sec. 3 of the Limitation (Amendment) Act, 1927 that an acknowledgment signed, or a payment made, in respect of any liability, by a widow or other limited heir, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability (*d*).

Now see section 21 (3) (a) of the new Limitation Act 36 of 1963.

**197. Surrender of estate by widow.**—(1) *Surrender must be of whole estate.*—An alienation by a widow or other limited heir of the estate inherited by her may be validated if it can be shown to be a surrender of her *whole interest in the whole estate* (*e*) in favour of *the nearest reversioner, if there be only one, or of the whole body of reversioners, if there be more than one* (*f*), at the time of the alienation. In such circumstances the question of necessity does not fall to be considered [ills. (a) to (d) and (f)]. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with the reversioner (*g*). It must be noted that surrender by the widow and accept-

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(*v*) *Ramcoomar* v. *Ichamoyi* (1881) 6 Cal. 36 [money borrowed by widow for marriage expenses of grand-daughter—no writing].

(*w*) *Hurry* v. *Gonesh* (1884) 10 Cal. 823.

(*x*) *Dhondu Yeshwant* v. *Mishrilal Surajmall* (1936) 60 Bom. 311, 38 Bom. L.R. 6, 160 I.C. 1046, ('36) A.B. 59 [F.B.].

(*y*) *Raghoappa* v. *Balappa* (1939) Nag. 347.

(*z*) *Anandrao* v. *Mt. Annapurnabai* (1937) Nag. 1, ('37) A.N. 299.

(*a*) *Vasant Rao* v. *Beharilal* (1938) Nag. 382, ('38) A.N. 225; *Sheikh Ghasit Mian* v. *Thakur Panchanan Singh* (1936) 15 Pat. 798, 166 I.C. 594, ('37) A.P. 58.

(*b*) *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206; *Pahalwan Singh* v. *Jiwan Das* (1918) 42 All. 109, 59 I.C. 162, ('20) A.A. 345.

(*c*) *Bhup Singh* v. *Jhamman Singh* (1922) 44 All. 95, 65 I.C. 724, ('22) A.A. 169.

(*d*) For the view taken before the Amendment Act of 1927 see *Soni Ram* v. *Kanhaiya Lal* (1913) 40 I.A. 74 35 All. 227, 19 I.C. 291, affmg. 32 All. 33, 3 I.C. 725.

(*e*) *Mathukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, 69 I.A. 110, ('42) A.PC. 54. *Nallaya* v. *Angaiyammal* ('64) A.M. 260.

(*f*) *Manjaya* v. *Sheshgiri* (1925) 49 Bom. 187, 85 I.C. 20, ('25) A.B. 129.

(*g*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 84, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196; *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (1919) 46 I.A. 259, 271, 47 Cal. 466, 483, 53 I.C. 347, ('19) A.PC. 75; *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Behari Lal* v. *Madho Lal* (1892) 19 Cal. 236, 19 I.A. 30; *Rangappa* v. *Kamti* (1908) 31 Mad. 366; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584; *Moti* v. *Laldas* (1917) 41 Bom. 93, 37 I.C. 945, ('16) A.B. 85; *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86 ('17) A.A. 341; *Sham Rathi* v. *Jaichha* (1937) 39 All. 520, 40 I.C. 117, ('17) A.A. 300; *Diltor Koer* v. *Harku Singh* (1917) 2 Pat. L.J. 578, 41 I.C. 631, ('17) A.P.

ance by the reversioner are not matters of contract. The estate vests in the reversioner by operation of law without any act of acceptance by the reversioner (*h*). A sale of the estate for consideration cannot be regarded as a surrender (*i*) [ills. (e), (h) and (i)]. If there are two or more widows, the surrender must be by all of them (*j*).

Though it is open to a widow to surrender the estate to the next reversioner even where the latter is a female heir [§ 197(2)], a widow cannot validly surrender in favour of the next female heir and her husband jointly. The husband would be a stranger in this context (*k*). A valid surrender cannot be made in favour of anybody except the nearest reversioner, if there be one, or of the whole body of reversioners (*l*).

The omission, due to ignorance or to oversight, of a small portion of the whole property, does not affect the validity of the surrender when it is otherwise *bona fide* (*m*). Where the husband exchanged one land for another and the deed of surrender by the widow mentioned the survey number of the former but the latter was actually delivered, the surrender was held to be valid (*n*).

It is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if they are more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The principle on which the whole transaction rests is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now, there cannot be a widow who is partly effaced and partly not so, and consequently there can be no surrender or renunciation of *part* of the estate (*o*). The surrender may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. Thus a compromise between a widow and the next reversioner may operate as a surrender (*p*) [see ill. (d)]. It is not even necessary that the limited owner shall purport to transfer the property to the next reversioner (*q*). Again the surrender need not be effected by a single transfer of all the properties at the same time. It may consist of successive transfers provided the result at the end is a complete effacement of the widow (*r*). The Bombay High Court has held that a surrender is possible and valid even if the estate of the widow is in the possession of an adverse claimant who has completed his title to it by adverse possession (*s*).

The Patna High Court has held that a deed of surrender is really a deed of gift and not a deed of release for purposes of stamp (*t*). The Calcutta High Court has however expressed doubts on the propriety of this view. It has held, that a deed of surrender does not in law or fact purport to transfer any property. The widow merely withdraws herself from the estate and the next heir steps in to the inheritance as a matter of law. At any

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538; *Chunder* v. *Sarnamoyi* (1894) 22 Cal. 354; *Thakur Prasad* v. *Musammant Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442; *Ram Karan* v. *Baidka Singh* ('54) A.P. 545; *Ashalata* v. *Amiya Kumar* ('58) A.C. 71.

(*h*) *Natvarlal* v. *Dadubhai* (1954) S.C.R. 339, ('54) A.SC. 61.

(*i*) *Shantikumar Pal* v. *Mukund Lal Mandal* (1935) 62 Cal. 204, 156 I.C. 209, ('35) A.C. 20.

(*j*) *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(*k*) *Mummareddi* v. *Durairaja Naidu* (1951) S.C.R. 655.

(*l*) *Phool Kuer* v. *Pem Kuer* (1952) S.C.R. 793; *Ram Charan* v. *Girjanandini* ('59) A. All. 473.

(*m*) *Gopal Singh* v. *Ujjar Singh* (1955) 1 S.C.R. 86, ('54) A.SC. 579, 581; *Haribhai Annaji* v. *Narayan Hari* (1938) Bom. 723; *Radhashyam* v. *Hari Pada* ('62) A.C. 100; *Brajeshwaree Dasee* v. *Mano Ranjan Datta* (1937) 1 Cal. 690, 171 I.C. 626, ('37) A.C. 167.

(*n*) *Ramayya* v. *Bapanamma* (1937) Mad. 248, 166 I.C. 153, ('37) A.M. 146.

(*o*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 79-80, 42 Mad. 523, 532, 50 I.C. 498, ('18) A.PC. 196. Also see *Kamlabai* v. *Sheo Shankar* ('58) A.SC. 914.

(*p*) *Bhagwat Koer* v. *Dhanukdhari* (1919) 46 I.A. 259, 271, 47 Cal. 466, 483, 53 I.C. 347, ('19) A.PC. 75; *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Chinnaswami* v. *Appaswami* (1919) 42 Mad. 25, 48 I.C. 147, ('19) A.M. 865; *Angamuthu* v. *Varatharajulu* (1918) 42 Mad. 854, 53 I.C. 386, ('20) A.M. 627; *Rama Nana* v. *Dhondi* (1923) 47 Bom. 678, 76 I.C. 607 ('23) A.B. 432; *Ram Adhar* v. *Ram Manohar* (1923) 45 All. 610, 73 I.C. 990, ('24) A.A. 114.

(*q*) *Prem Narain* v. *Hansraj* (1946) All. 837.

(*r*) *Maru* v. *Hanso* (1926) 48 All. 485, 95 I.C. 543, ('26) A.A. 413.

(*s*) *Natvarlal* v. *Dadubhai* (1949) Bom. 869.

(*t*) *In re*: *Khetramoni Debya* (1937) 17 Pat. 95 (F.B.), 172 I.C. 847, ('38) A.P. 33.

rate if it is not in the form of a deed of gift, it does not require to be stamped and attested as such (*u*).

*Transfer.*—If a widow attempts to transfer any property to the next reversioner, and if the transfer is void by reason of any law, no title is conferred upon the transferee, even though she may have an intention to make a valid surrender (*v*).

It has been held in a case decided by the Patna High Court that surrender not being a transfer is not hit by the doctrine of *lis pendens* (*w*).

*Surrender by widow coupled with a provision for her maintenance.*—A surrender as stated above, must be a *bona fide* surrender, not a device to divide the estate with the reversioner. To make an arrangement for such a device, it is not necessary that the lady surrendering should part with the property directly. An arrangement, by which the reversioner as a consideration for the surrender promised to convey a portion of the property to a *nominee* or *nominees* of the lady surrendering, might well fall under the description of a device to divide the estate. But where disputes arise between a widow and the next reversioner as to title to her husband's property, and a *compromise* is entered into whereby the widow relinquishes her right of succession to the property in consideration of a small portion of the property being set apart *for her maintenance* for her life, the compromise is a *bona fide* surrender of the whole estate, and not a device to divide it with the next reversioner (*x*) [ills. (d) and (e)]. This decision was treated as an authority in a Bombay case for the proposition that a surrender may be *total* in spite of a provision for the maintenance of the widow surrendering the estate (*y*). The surrender amounts to effacement by the widow from the husband's estate and relying on this doctrine it was decided by a Full Bench of the High Court of Andhra Pradesh that a widow after surrendering her estate in favour of the next reversioner cannot claim maintenance out of the estate in the hands of the surrenderee if there was no such arrangement between the parties, and where there is such an arrangement she cannot seek revision of the terms of the arrangement (*z*). Where the estate consisted of 231 acres of land and the widow reserved 42 acres thereout for her maintenance and purported to surrender the rest to her daughter, the next reversioner, it was held that the transaction did not amount to a valid surrender (*a*). Where the widow purporting to surrender her estate reserved a life interest for herself, the Privy Council held that there was no valid surrender (*b*). Where an estate was small and the income was just sufficient for the maintenance of the widow and the deed of surrender stipulated that the entire income after the payment of land revenue should be paid to her, it was held that no valid surrender was possible and that it was therefore invalid (*c*). When a surrender by a Hindu widow of the entire estate in favour of the next reversioner forms an integral part of an arrangement under which certain named relatives of the widow receive the major portion of the property by transfer from the reversioner and only a small portion of the property is left to the latter, it was held that the surrender was not *bona fide* at all (*d*). But from the mere circumstance that other documents such as maintenance deed in favour of the widow and a gift deed in favour of another were executed by the surrenderee on the same day it may not be inferred that the surrender

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(*u*) *Karunamoyee* v. *Maya Moyi* (1948) A.C. 84; *Thiruvenkidaswami* v. *Pallani Ammal* ('61) A.M. 291.

(*v*) *Pandu Mari Lote* v. *Shripati* (1954) Bom. 169, ('53) A.B. 428, (1953) 55 Bom. L.R. 647 (F.B.). Also see *Hardeo Singh* v. *Kaushilla Kunwar* (1954) All. L.J. 562.

(*w*) *Julam Missir* v. *Pradip Missir* ('58) A.P. 115.

(*x*) *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Naru* v. *Tai* (1923) 47 Bom. 431, 76 I.C. 265, ('23) A.B. 191. See also *Hem Chunder* v. *Sarnamoyi* (1894) 22 Cal. 354 [not good law, correct view—alienation wholly void]; *Kanuram* v. *Kashi Chandra* (1909) 14 C.W.N. 226, 21 I.C. 660 [a decision of doubtful authority]; *Challa Subbiah* v. *Paluri* (1908) 31 Mad. 446 [surrender of entire interest to reversioner—transfer back by reversioner of one-third to widow's brother pursuant to agreement at time of surrender—surrender held valid]; *Rangappa* v. *Kamti* (1908) 31 Mad. 366 [not good law—commented on adversely by P.C. in (1919) 46 I.A. 72, 84, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196]; *Sitanna* v. *Viranna* (1934) 57 Mad. 749, 148 I.C. 828, ('34) A.PC. 105, where the widow reserved only 6 acres of land for her maintenance; *Rami Reddi* v. *Rosamma* ('55) A. Andh. Pra. 232 (F.B.); *Ashalata* v. *Amiya Kumar* ('58) A.C. 71.

(*y*) *Rama Nana* v. *Dhondi Murari* (1923) 47 Bom. 678, 76 I.C. 607, ('23) A.B. 432, dissenting from *Adiveppa* v. *Tontappa* (1920) 44 Bom. 255, 55 I.C. 369, ('20) A.B. 345; *Krishna Mhatarba* v. *Baban Rambhau* (1944) Bom. 287.

(*z*) *V. Kondamma* v. *V. Seshamma* ('57) A. Andh. Pra. 156.

(*a*) *Gangadhar* v. *Prabhudha* (1932) 56 Bom. 410, 140 I.C. 884, ('32) A.B. 625.

(*b*) *Behari Lal* v. *Madho Lal* (1891) 19 I.A. 30, 19 Cal. 236.

(*c*) *Anant Nilkanth* v. *Lala Rupnarayan* (1945) Nag. 698.

(*d*) *Chundru Akkamma* v. *Ohundru Brahmadu* (1950) 1 Mad. L.J. 750, ('50) A.M. 617; Reference may also be made to *Venkateswarlu* v. *Challaiya* ('53) A.M. 551, (1953) 1 M.L.J. 167 which was dissented from in *Kuppanna* v. *Peruma* ('60) A.M. 154, (1960) Mad. 115; *Ram Prasad* v. *Sital Prasad* ('65) A.P. 47.

was only a device to divide the property if the facts considered as a whole show that the transactions were *bona fide* (*d*1). The Court has to consider all the surrounding circumstances, the extent of the estate given to the widow, the status of the widow and also the nature and effect of the understanding arrived at between the parties. The mere fact that the document is described as a "*karar*" will not affect the substance of the transaction, nor will the fact that the transaction took place at the instance of the then reversioner be determinative of the matter (*d*2).

In a decision of the Madras High Court (*d*2) it was pointed out that once it is recognised that a provision for maintenance or setting apart a portion of the husband's property for the surrenderor to enjoy for maintenance can be made, there is no reason why the mere circumstance that a charge is created on the entire property for securing due payment should make any difference. If the other requirements of the rule are satisfied such a transaction can be regarded as within the rule upholding a surrender. Of course, the amount of maintenance should be reasonable.

*Motive.*—The widow's motive in making a surrender is immaterial. Therefore, a surrender by her cannot be called into question on the ground of improper motive (*e*).

(2) *Surrender in favour of female reversioners.*—A surrender, of the estate may be made even in favour of a female reversioner (*f*). A surrender, however, to a female reversioner does not enlarge the estate of such reversioner, but merely accelerates it. It does not confer on the female reversioner any larger estate than the limited and qualified estate to which she would have succeeded had she survived the limited heir (*g*) [ill. (g)].

The estate vests in her as a limited owner and on her death it passes to the next reversioner. It cannot, however, revert to the widow, for the widow has by the surrender completely effaced herself (*h*). A widow may surrender the estate in favour of the next male reversioner with the consent of an intermediate female reversioner (*i*) but in such a case the intermediate reversioner cannot reserve for herself a substantial part of the property or stipulate for any benefit except what is necessary for her maintenance. If she does so the surrender is invalid and does not bind the actual reversioners. In such a case a remote reversioner may file a suit for declaration to that effect (*j*).

(3) *Surrender in favour of female reversioners in Bombay.*—The provisions of sub-§ (2) do not apply to such females in Bombay as take an absolute interest in property inherited by them from a male, *e.g.*, the daughter, daughter's daughter, and the like. A surrender to such a female passes the whole estate absolutely to her [see ill. (h)].

(4) *Gift of whole property to a third party with consent of next reversioner.*—There is a conflict of opinion whether a gift by a widow of her entire interest in the whole estate to a stranger with the consent of the next reversioner can be supported as a surrender so as to bind the actual reversioner at the widow's death [§ 183 (4)].

(5) *Where surrender follows prior alienations.*—Where a portion of the estate was validly alienated by the widow for legal necessity (such as discharge of husband's debts) and the remaining estate was then surrendered it

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(*d*1) *Boddu Veeraiah* v. *Aripirala Venkata* ('68) A.A.P. 276.

(*d*2) *Chinnamarappa* v. *Narayammal* ('66) A.M. 169.

(*e*) *Challa Subbiah* v. *Paluri* (1908) 31 Mad. 446; *Subbalakshmi* v. *Narayana Ayyar* (1935) 58 Mad. 150, 152 I.C. 391, ('34) A.M. 535; *Venkateswarlu* v. *Challaiya, supra.*

(*f*) *Sitanna* v. *Viranna* (1934) 57 Mad. 749, 148 I.C. 828, ('34) A.PC. 105.

(*g*) *Bhupal Ram* v. *Lachma Kuar* (1889) 11 All. 253; *Bepin Behari* v. *Durga Charan* (1908) 35 Cal. 1086, 1090; *Rup Ram* v. *Rewati* (1910) 32 All. 582, 6 I.C. 541.

(*h*) *Sartaji* v. *Ramjas* (1924) 46 All. 59, 79 I.C. 25, ('24) A.A. 166. But see *Chengappa* v. *Buradagunta* (1920) 43 Mad. 853, 60 I.C. 135, ('21) A.M. 246.

(*i*) *Sheo Sankar Dayal* v. *Kamalabati* (1950) Nag. 589. Also see *Sumantrabai* v. *Rishabhkumar* (1953) Nag. 69, ('52) A.N. 295.

(*j*) *Janki Nath Ray* v. *Jyotish Chandra Achariya Choudhuri* (1941) I Cal. 231, 193 I.C. 419, ('41) A.C. 41.

was held that the surrender was valid (*k*). Where a widow alienates a portion of the estate inherited by her from her husband without legal necessity and subsequently surrenders the whole of her interest in the estate to the next reversioner, the surrender itself is valid. But there was a difference of judicial opinion as to whether the reversioner in such a case is entitled to claim immediate possession of the portion alienated or he must wait for possession until the death of the widow. In *Natvarlal* v. *Dadubhai* (*l*) the Supreme Court held that although the widow herself was incapable of disputing the title of the alienee or of the person who has title against her by adverse possession, a like disability did not attach to the reversioner as the latter does not derive title from the widow even in the case of surrender. The reversioner does not take the property subject to the rights created by the widow. The reversioner in such a case is entitled to immediately recover possession of the property from that person as heir of the last small holder.

The contrary view taken by the Madras High Court (*m*) and accepted by the Allahabad (*n*) and Patna (*o*) High Courts was commented upon and the view taken by the Calcutta (*p*) and Bombay (*q*) High Courts was referred to with approval by the Supreme Court in that case.

In the above case decided by the Supreme Court (*r*) and in a number of decisions of the Privy Council it has been reiterated that "the whole doctrine of surrender is based upon the analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heir of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that the consequence is the same as if she died a natural death and the next heir of her husband then living step in at once under the ordinary law of inheritance." It was also pointed out by the Supreme Court in that case that "surrender is not really an act of alienation of the widow of her rights in favour of the reversioner. The reversioner does not occupy the position of a grantee or transferee, and does not derive his title from her. It is the self-effacement by the widow that forms the basis of surrender and not the *ex facie* transfer by which such effacement is brought about."

(6) *Surrender followed by adoption.*—It has been held by a Full Bench of the Bombay High Court (*s*) overruling some of its earlier decisions to the contrary (*t*) that a valid surrender made by a Hindu widow of her husband's estate to the next reversioner can be defeated by a subsequent adoption by her of a son to her husband. The effect of the adoption will be to divest the estate of the surrenderee. In an earlier decision of that Court it had been held that a partial surrender being invalid the right of the surrenderee would be defeated (*u*). As to rights of the adopted son, see § 509. Also see § 509A.

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(*k*) *Ramayya* v. *Bapanamma* (1937) Mad. 248, 897, ('26) A.C. 121, 156 I.C. 153, ('37) A.M. 146.

(*l*) (1954) S.C.R. 339, ('54) A.SC. 61.

(*m*) *Subbamma* v. *Subramanyam*, I.L.R. 39 Mad. 1035, *Sundarasiva* v. *Vivamma* (1925) 48 Mad. 933, 91 I.C. 401, ('25) A.M. 1267; *Thripurasundara Rao* v. *Kotayya* ('51) Mad. 753; *Arunachala* v. *Arumuga*, ('53) A.M. 550. But see *Bilige Laxminarayana Rao* v. *Fernandes* (1956) 2 Mad. L.J. 211.

(*n*) *Lachmi* v. *Lachho* (1927) 49 All. 334, 100 I.C. 764, ('27) A.A. 258. But see *Raghuraj* v. *Babu* ('52) A.A. 875.

(*o*) *Basudeo* v. *Baidyanath* ('35) A. Pat. 175. But now see *Ram Karan* v. *Baidka Singh* ('54) A.P. 545. Also see *Julam Missir* v. *Pradip Missir* ('58) A.P. 115.

(*p*) *Ram Krishna* v. *Kausalya*, 40 Cal. W.N. 208. But see *Prafulla* v. *Bhabani*, 52 Cal. 1018, 91 I.C. 803, ('50) A.B. 55 (F.B.); *Kaliaperumal* v. *Kuppayee Ammal* ('63) A.M. 110.

(*q*) *Natvarlal* v. *Dadubhai* (1949) 51 Bom. L.R.

(*r*) (1954) S.C.R. 339, ('54) A.SC. 61.

(*s*) *Bahubali* v. *Gundappa* (1954) Bom. 1026, 56 Bom. L.R. 501 (F.B.); *Vishnu Pandu* v. *Mahadu* (1950) Bom. 487, (1951) A.B. 170; *Tukaram* v. *Gangi* ('57) A.N. 28. *Contra Venkateswarlu* v. *Challiya* (1953) 1 Mad. L.J. 167, ('53) A.M. 551.

(*t*) *Rama Nana* v. *Dhondi* (1923) 47 Bom. 678, 76 I.C. 607, ('23) A.B. 432; *Yeshwanta* v. *Antu* (1934) 58 Bom. 521, 154 I.C. 252, ('34) A.B. 351; *Krishna* v. *Baban* (1944) Bom. 287, ('45) A.B. 24, (1944) 46 Bom. L.R. 634; *Shantaram* v. *Keru Krishna* (1948) Bom. 369, ('48) A.B. 381, (1948) 50 Bom. L.R. 283.

(*u*) *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584.

(7) *Limitation.*—A surrender operates *eo instanti* to clothe the reversioner with the right to impugn the widow's act of alienation as laid down by the Supreme Court in *Natvarlal* v. *Dadubhai* (*v*). In a later case it has been held by the High Court of Andhra Pradesh (*w*), disagreeing with a decision of the Allahabad High Court (*x*), that since the surrenderee is entitled to recover immediate possession his suit to recover any property belonging to the estate from an alienee is governed by Art. 144 and not Art. 141 of the Limitation Act.

Now see Article 65 of the new Limitation Act, 1963.

*Illustrations*

(a) A Hindu dies leaving a widow and a daughter's son. The widow surrenders her estate in *four out of the five properties* inherited by her from her husband to the daughter's son. The surrender is not valid, for it is a surrender only of a portion of the estate: *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584.

(b) A Hindu dies leaving a widow, a daughter and a daughter's son. The widow executes a deed in favour of her daughter's son, whereby she *reserves a life-interest* for herself in her husband's property, and declares that *after her death* the property should go to the daughter's son. This is not a valid surrender, for it is not a surrender of the widow's *entire estate* in the property: *Behari Lal* v. *Madho Lal* (1891) 19 Cal. 236, 19 I.A. 30.

(c) *A* dies leaving a mother *M*. *M* succeeds to *A*'s properties for a woman's estate. She then transfers by way of gift a *portion* of the properties inherited by her to *R* who was then the nearest reversioner. The alienation is not valid, as it is not a surrender of *M*'s entire interest in the whole estate: *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196.

(d) A Hindu dies in 1872 leaving a widow and a nephew. The nephew claimed the property as sole survivor of the joint family and applied for a certificate to collect debts due to the estate of *A*. The widow opposed the application and alleged a partition. The Court found that the alleged partition had not taken place and granted the certificate to the nephew. This decision, being given only on a question of representation, did not preclude the widow from raising the question of title again in a suit properly instituted for that purpose; but the widow accepted the decision and by an agreement made in 1874 she recognized the nephew's title, and was granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894 and the estate passed under his will to *B*. In 1907 *D* claiming as the reversionary heir sued *B* to recover the estate. It was held by the Judicial Committee that the widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner and that *D*'s claim accordingly failed. Their Lordships of the Privy Council said that there was in this case a complete self-effacement by the widow which precluded her from asserting any further claim to the estate: *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (1919) 46 I.A. 259, 47 Cal. 466, 53 I.C. 347, ('19) A.PC. 75.

(e) A Hindu dies leaving a widow and 4 daughters. By his will he bequeaths his immovable property to the daughters. On his death the daughters take possession of the property under the will. The next reversioner sues the widow and daughters to set aside the will. The parties enter into a compromise by which the daughters give up their rights under the will, the widow surrenders all rights of succession to the immovable property, and the plaintiff who by the surrender becomes entitled as next reversioner transfers half of the property to the daughters and the plaintiff and the daughters each give a small portion of the land to the widow for her life. The compromise is a *bona fide* surrender of the whole estate, and not a device to divide it with the next reversioner. In the course of the judgment the Judicial Committee said: "Is it then a device to divide the property between the lady and the reversioner? . . . . . *It is here*

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(*v*) (1954) S.C.R. 339, 56 Bom. L.R. 447, ('54) A.SC. 61.

(*w*) *Venkateswara Rao* v. *Venkatasiva Rao* ('57) A. Andh. Pra. 945; *Veeraju* v. *Venkayya* ('60) A.A.P. 222. Reference may also be made to *Biliga Laxminarayana* v. *Fernandes* ('57) A.M. 90.

(*x*) *Raghuraj Singh* v. *Babu Singh* ('52) A.A. 875.

*that the fact of the arrangement being a compromise becomes of importance.* Once the *bona fide* is admitted, we have the situation of a content under which, if decision were one way, the estate was carried to the daughters away from the family, and a litigation in the course of which the estate would probably be much diminished. The situation made it a perfectly good consideration for the lady in order to avoid these results to consent to give up her own rights by surrender. . . . The conveyance of small portions of land to the widowed mother was unobjectionable as it was only for maintenance": *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 238, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107.

(f) The widows of the late male owner who were each getting rupees 625 a month as maintenance from the Court of Wards which was managing the property executed a deed by which they purported to surrender all their rights in the property inherited from their husband to the next reversioner, the latter agreeing to pay to the widows Rs. 2,000 per month for maintenance, the sum in case of default to be a charge upon the estate. The Privy Council, observing that there was no necessity for the surrender and that in 48 Cal. 100 the giving of a small portion of the estate to the widow for her maintenance was not objectionable, held the surrender to be void in law: *Man Singh* v. *Nowlakhbati* (1926) 53 I.A. 11, 5 Pat. 290, 94 I.C. 830, ('26) A.PC. 2.

(g) A Hindu governed by the Benares school of Hindu law dies leaving a widow, a daughter and a paternal uncle's son. The widow surrenders her interest in the property inherited by her to her daughter. The surrender is valid, but since a daughter, according to the Benares school, takes a limited estate, the surrender will not enlarge her estate, in other words, she will *not* take the property *absolutely*. The effect of the transaction is simply to accelerate the daughter's succession to the property and to entitle her to immediate possession. On the death of the daughter the property will pass to the uncle's son: *Bhupal Ram* v. *Lachma Kuar* (1888) 11 All. 253. It will not revert to the widow though she may then be alive.

(h) A Hindu governed by the Bombay school dies leaving a widow, a daughter and a nephew. In March 1911, the widow executes a deed of gift of the whole estate inherited by her from her husband in favour of her daughter. [A daughter in Bombay takes an absolute estate in the property inherited by her from her father; therefore, sub-§ (2) does not apply.] In December 1912, the daughter transfers the whole estate back to the widow *absolutely*. The daughter dies in 1915 leaving a daughter. In April 1916, the widow makes a gift of the entire estate to her grand-daughter. On the death of the widow the nephew claims the estate as the reversionary heir. The gift to the grand-daughter is valid and the nephew is not entitled to the property. The Court said: "It cannot be suggested in the present case that in 1911, when the widow was in bad health, and her widowed daughter was staying with her, it was intended to be merely a device to divide the estate with the reversioner": *Naru* v. *Tai* (1922) 47 Bom. 431, 437, 76 I.C. 265, ('23) A.B. 191.

(i) A Hindu widow surrenders the whole of her estate to the next reversioner. At the same time the next reversioner transfers it back to the widow, and declares that she is the absolute owner thereof, and the widow in her turn transfers part of the estate to the next reversioner. It is found that there was no dispute of any kind between the parties, and the sole object was to convert the widow's estate into an absolute estate in consideration of a transfer of part of the estate to the next reversioner. The transactions are not binding on the son of the next reversioner, and he is entitled to avoid alienation of the estate purported to have been made by her as the absolute owner thereof: *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

**198. Widow's power of management and investment.**—A widow or other limited heir is entitled to manage the estate inherited by her. Her power to manage the estate is similar to that of a manager of an infant's estate as defined by the Privy Council in *Hunooman Persaud* v. *Mussumat Babooee* (*y*). "A widow like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided,. . . . she acts fairly to the expectant heirs" (*z*). The Court will not interfere with her management, unless there is danger to the estate from the manner in which she is dealing with it (*a*) [§ 204].

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(*y*) (1856) 6 M.I.A. 393; *Kameswar Pershad* v. *Ram Bahadur* (1880) 6 Cal. 843, 8 I.A. 8.

(*z*) *Venkaji* v. *Vishnu* (1894) 18 Bom. 534, 536.

(*a*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 433.

If the husband has left debts, the widow is not bound to apply the income of the estate in discharge of the principal, but is bound to pay out of the surplus of her net income, only the interest (*b*). She is entitled to sell or mortgage the estate for the payment of the debts. The net income is her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. At the same time she is not entitled to ignore the charges which are legally payable out of the gross income such as the *peishcush* and maintenance due to other members of the family and thereby add to the debts left by the husband so as to prejudice the reversioners (*c*).

The widow is entitled to invest monies forming part of her husband's estate in such securities as she thinks proper so as to realize the highest interest. She is not bound to invest in Government securities. She may lend the monies on a mortgage. The Court must take care not to interfere with or restrict her in the full enjoyment of her rights as conferred upon her by law in order to prevent a *possible* danger (*d*).

If the property consists of a quarry, she may work the quarry, and apply the proceeds for her own purposes, provided she does not exhaust the land (*e*).

**199. Decree against widow when binding on reversioners.**—A widow or other limited heir represents the whole estate in legal proceedings relating thereto. Therefore, a decree passed against her and a sale of the estate in execution of such decree is binding not only on her, but on the reversioners, even though they were not parties to the suit, provided—

(1) the suit was in respect of a debt or other transaction binding on the estate (*f*), *and*

(2) the decree was passed against her as representing the estate, and not in her personal capacity (*g*), "unless," as laid down by their Lordships of the Privy Council in the *Shivagunga* case (*h*), "it could be shown that there had not been a *fair* trial of the right in that suit." This does not mean that the suit should have been *contested to the end* as was erroneously held in the under-mentioned cases (*i*).

The widow is entitled to compromise the suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided the compromise was entered into by her *bona fide* for the benefit of the estate and not for her personal advantage. This rests on the fundamental principle that a compromise entered into by a Hindu widow *bona fide* for the benefit of the estate, and not for her own personal advantage, binds the reversioners as

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(*b*) *Jagannadha* v. *Vighneswaradu* (1932) 55 Mad. 261, 134 I.C. 881, ('32) A.M. 177.

(*c*) *Ramasami Chetti* v. *Mangaikarsu* (1895) 18 Mad. 113, 119-120; *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (1904) 31 Cal. 433, 443.

(*d*) *Biswanath* v. *Khantomani* (1870) 6 Beng. L.R. 747-751; *Kunjammal* v. *Malayappa Iyer* (1956) 2 Mad. L.J. 67.

(*e*) *Subba Reddi* v. *Chengalamma* (1899) 22 Mad. 126.

(*f*) *Jugul Kishore* v. *Jotendro Mohun* (1884) 10 Cal. 985, 11 I.A. 66. *Jhari* v. *Bijai* (1923) 45 All. 613, 74 I.C. 865, ('24) A.A. 109. See also *Devji* v. *Sambhu* (1900) 24 Bom. 135; *Veerabadra* v. *Marudaga* (1911) 34 Mad. 188, 8 I.C. 1072.

(*g*) *Katama Natchiar* v. *Raja of Shivagunga* (1863) 9 M.I.A. 539, 543, 608 [decree on ground *personal* to the widow]; *Nugender* v. *Kamince* (1867) 11 M.I.A. 241; *Baijun* v. *Brij Bhookun* (1876) 1 Cal. 133, 2 I.A. 275; *Partab Narain* v. *Trilokinath* (1884) 11 I.A. 197, 207, 11 Cal. 186; *Hari Nath* v. *Mothurmohun* (1894) 21 Cal. 8, 20 I.A. 183 [decree against daughter — *res judicata*]. *Risal Singh* v. *Balwant Singh* (1918) 45 I.A. 168, 40 All. 593, 48 I.C. 553, ('18) A.PC. 87 [*res judicata*]; *Ghelabhai* v. *Bai Javer* (1913) 37 Bom. 172, 17 I.C. 866; *Tirupatiraju* v. *Venkayya* (1922) 45 Mad. 504, 67 I.C. 479, ('22) A.M. 131 (F.B.) [not sued in representative character]; *Sulbi* v. *Ramkrishnabhatta* (1918) 42 Bom. 69, 43 I.C. 233, ('17) A.B. 11; *Bai Kanku* v. *Bai Jadav* (1919) 43 Bom. 869, 53 I.C. 164, ('19) A.B. 146 [decree against widow on ground *personal* to herself]; *Pramatha Nath* v. *Bhuban Mohan* (1922) 49 Cal. 45, 64 I.C. 980, ('22) A.C. 321 [*res judicata*]; *Lalit Mohan* v. *Davamoyi* (1927) 45 Cal. L.J. 404, 105 I.C. 469, ('27) A.PC. 41 [personal decree against daughter]; *Bishan Dayal* v. *Lakshmi Narain* ('67) A.A. 370.

(*h*) *Katama Natchiar* v. *Rajah of Shivagunga supra.*

(*i*) *Mahadei* v. *Baldeo* (1908) 30 All. 75; *Sheo Narain* v. *Khurgo* (1882) 10 C.L.R. 337; *Rajlakshmi* v. *Katyayani* (1911) 38 Cal. 639, 672, 674, 12 I.C. 464; *Jeram* v. *Veerbai* (1903) 5 Bom. L.R. 885, 887; *Ram Sarup* v. *Ram Dei* (1907) 29 All. 239, 241.

much as a decree against her after litigation (*j*). It is necessary that such compromise should be reasonable and prudent (*k*). See § 193.

The suit being against the widow in a *representative* character, that is, as representing her husband's estate, a decree passed against her operates as *res judicata* against the whole body of reversioners under the Code of Civil Procedure, s. 11, Expl. 6. A decree against the widow in respect of a transaction entered into by her husband binds her as well as the reversioners (*l*). A decree against the widow in respect of debts contracted for the purpose of carrying on a money-lending business inherited from her husband would not be a mere personal decree but would bind the reversionary estate (*m*). But a decree passed against a widow *personally* though it be in respect of debt incurred for legal necessity, does not bind the estate; a sale, therefore, in execution of such a decree can pass no more than the life-interest of the widow (*n*).

In *Ramsumran Prasad's* case (*o*), their Lordships of the Privy Council discussed the principle underlying the widow's authority to compromise. It follows from what has been stated above that a decree on an award (*p*) and even a consent decree (*q*) would bind the reversioners if the compromise was for the benefit of the estate. An *ex parte* decree also may bind the reversioners (*r*). The principle has been applied in a suit by a widow where the question was whether certain adoption was valid or not and the widow represented the estate (*s*).

A consent decree in a suit against a widow by her husband's brothers to recover property in her hands on the allegation that it is joint family property, in which she accepts that position and is satisfied with maintenance only, does not bind the reversioners. The reason is that the rule in this section applies only to a widow who *represents* her husband's estate. The moment she admits that the property is joint, she ceases to represent the estate (*t*). A widow sued to recover properties belonging to her husband and obtained a decree. In appeal the matter was settled and a consent decree was passed by which a portion of the properties was adjudged to the opposite party who executed the consent decree and obtained possession. The reversioners then obtained a declaration that the consent decree did not bind them. The widow then filed another suit to recover the properties allotted to the opposite party by the consent decree but failed. It was held by the Privy Council that the last decree did not affect the reversioners (*u*).

A decree against a widow for mesne profits on account of trespass committed by her in her personal capacity can only be executed against her personally and not against her husband's estate (*v*). But where cess was due in respect of the husband's estate and the estate in the hands of the widow was sold under the Public Demands Recovery Act, it was held that only the widow's interest passed to the purchaser (*w*). Where the widows sued to set aside a sale of the husband's property for arrears of revenue,

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(*j*) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356, approving *Mohendra Nath* v. *Shamsunnessa* (1915) 19 C.W.N. 1280, 1285, 27 I.C. 954, ('15) A.C. 629; *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3 [admission of debt by widow—decree on admission]; *Bhogaraju* v. *Addepalli* (1912) 35 Mad. 560, 564-565, 12 I.C. 123; *Gur Nanak* v. *Jai Narain* (1912) 34 All. 385, 14 I.C. 814 [appeal filed by widow withdrawn]; *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272 [compromise of suit between widow and next reversioner].

(*k*) *Kaliammal* v. *Sundarammal* (1949) Mad. 171.

(*l*) *Madivalappa Irappa* v. *Subbappa Shankarappa* (1937) Bom. 906, 39 Bom. L.R. 895, 172 I.C. 184, ('37) A.B. 458.

(*m*) *Barada Prasad Saha* v. *Krishna Chandra Saha* (1934) 38 C.W.N. 33, 151 I.C. 268, ('34) A.C. 414.

(*n*) *Kallu* v. *Faiyaz* (1908) 30 All. 394; *Jugul Kishore* v. *Jotindro* (1884) 11 I.A. 66, 73, 10 Cal. 985; *Lalit Mohun* v. *Dayamoyi* (1927) 29 Bom. L.R. 759, 105 I.C. 469, ('27) A.PC. 41 [personal decree against daughter]; *Vasant Rao* v. *Beharilal* (1938) Nag. 382, ('38) A.N. 225; *Sheik Ghasit Mian* v. *Thakur Panchanan Singh* (1936) 15 Pat. 798, 166 I.C. 594, ('37) A.P. 58; *Anandrao* v. *Annapurnabai* (1937) Nag. 1, ('37) A.N. 299; *Mallikarjungowda-Rudragowda* v. *Venkawa Ramachandrappa* (1940) Bom. 628, 191 I.C. 286, 42 Bom. L.R. 600.

(*o*) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 746, 69 I.C. 71, ('22) A.PC. 356; *Mohendra Nath* v. *Shamsunnessa* (1915) 21 Cal. L.J. 157, 163, 27 I.C. 954.

(*p*) *Shib Deo* v. *Ram Prasad* (1924) 46 All. 637, 644-646, 87 I.C. 938, ('25) A.A. 79. See *Rama* v. *Daji* (1919) 43 Bom. 249, 48 I.C. 125, ('18) A.B. 85.

(*q*) *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3.

(*r*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 492, 87 I.C. 294, ('25) A.A. 339.

(*s*) See *Urbasi* v. *Chandra Dharua* ('57) A. Orissa 201 and the other cases cited there.

(*t*) *Nirman Bahadur* v. *Fateh Bahadur* (1930) 52 All. 178, 126 I.C. 337, ('29) A.A. 963.

(*u*) *Sreemathi Rajlakshmi Dasee* v. *Bhola Nath Sen* (1938) 65 I.A. 365, (1938) 2 Cal. 653, ('38) A.PC. 254.

(*v*) *Maharajadhiraj Kameshwar Singh Bahadur* v. *Beni Madho Singh* (1932) 11 Pat. 430, 134 I.C. 425, ('31) A.P. 422.

(*w*) *Mt. Ramjhari Kuer* v. *Sheonarain Singh* (1934) 13 Pat. 297, 155 I.C. 750, ('34) A.P. 609.

obtained a decree in the trial court and got possession but the decree was set aside on appeal, and the widows became liable for mesne profits and costs and a portion of the estate in their possession was sold in execution of the decree, it was held that the entire estate passed under the sale (*x*).

Even in a case where the decree might have been executed against the whole interest in the estate including the reversion, if what was actually sold, was described as the interest of the judgment debtor, as a widow, only her interest passed (*y*).

*Burden of proof.*—In *Ramsumran Prasad's case* (*z*) their Lordships kept it open whether in a case of compromise of a suit by a widow the burden lies absolutely and without qualification upon the reversioners impeaching the compromise to show that the compromise was not for the benefit of the estate.

As to debts binding on the estate, see § 195.

**200. Decree in reversioner's suit against widow and** *res judicata.*— When in a suit by the next reversioner against a widow relative to her deceased husband's estate an issue is finally determined, the issue is *res judicata* in any subsequent suit by another reversioner. It is not material that the plaintiff in the second suit does not claim through the plaintiff in the first (*a*). See § 210.

The reason is that in such a suit the reversioner sues in his representative character and the decree against him operates as *res judicata* against the whole body of reversioners under the Code of Civil Procedure, s. 11, Expl. 6. The matter is governed by the principles enunciated in § 199.

**201. Adverse possession against widow not adverse against next reversioner.**—A person who has been in adverse possession for twelve years or upwards of property inherited by a widow from her husband by any act or omission on her part is not entitled on that ground to hold it adversely as against the next reversioner on the widow's death. The next reversioner is entitled to recover possession of the property, if it is immovable, within twelve years from the date of the widow's death under Art. 141 of Schedule I of the Indian Limitation Act, 1908, and if it is movable, within six years from that date under Art. 120 of that Act (*b*). The rule, as was pointed out by the Supreme Court (*c*), does not rest entirely upon the particular provision of Article 141. It is in accordance with the principles of Hindu law and the general principle that as the right of the reversioner is in the nature of a *spes successionis* and he does not trace that title through or from the widow, it would be manifestly unjust if he has to lose his rights by the negligence or sufference of the widow. Nor can there be any estoppel under sec. 41 of the Transfer of Property Act against the reversioner by reason of the widow's conduct (*d*). See § 209.

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(*x*) *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(*y*) *Nagendrabala Dasee* v. *Panchanan Mourie* (1933) 60 Cal. 1236, 149 I.C. 1053, ('34) A.C. 162.

(*z*) (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356.

(*a*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272 [consent-decree]; *Venkatanarayana* v. *Subbammal* (1915) 42 I.A. 125, 38 Mad. 406, 29 I.C. 298, ('15) A.PC. 124; *Bansidhar* v. *Dulhatia* (1925) 47 All. 505, 87 I.C. 235, ('25) A.A. 483.

(*b*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Jaggo Bai* v. *Utsava Lal Bai* (1929) 56 I.A. 267, 51 All. 439, 117 I.C. 498, ('29) A.PC. 166; *Bankey Lal* v. *Raghunath* (1929) 51 All. 189, 112 I.C. 801, ('28) A.A. 561; *Aurobinda Nath* v. *Manorama* (1928) 55 Cal. 903, 112 I.C. 496, ('28) A.C. 670, is no longer good law; *Badrinarayan* v. *Narayansingh* (1943) Nag. 213, 206 I.C. 335, ('43) A.N. 193; *Nathulal* v. *Rangoba* ('52) A.N. 133; *Govind Balkrishna* v. *Ramchandra* (1952) Bom. 621, (1952) 54 Bom. L.R. 263, ('52) A.B. 395.

(*c*) *Kalipada Chakraborti* v. *Palani Bala Devi* (1953) S.C.R. 503, ('53) A.SC. 125; *Ram Kristo* v. *Dhankisto* ('69) A.S.C. 204.

(*d*) *Shambu Prasad* v. *Mahadeo Prasad* (1933) 55 All. 554, 144 I.C. 293, ('33) A.A. 493; *Chaturbhuj* v. *Sarbeshwar* ('67) A.P. 138.

But where a *decree* founded upon adverse possession has been obtained against the widow in her lifetime the next reversioner is barred and he does not get the benefit of Art. 141 of the Limitation Act (*e*).

Now see Articles 65 and 113 of the new Limitation Act, 1963.

A Hindu belonging to the Shudra class died in 1849 leaving a widow *A*. In 1862, *A* adopted *B* as a son to her husband and put him in possession of the properties inherited by her from her husband. At that date there was no person who could give *B* in adoption and the adoption was invalid. *B* died in 1864. On his death his nephew, claiming as his heir, entered into possession of the properties. The nephew died in 1881. On his death the nephew's mother *M* entered into possession of the properties and held them until 1884 when *A* forcibly ejected her. In 1887, *M* brought a suit against *A* for possession of the properties. In 1892 a *decree* was passed for possession in favour of *M*, the Court holding that though *B*'s adoption was invalid, *M*'s claim for adverse possession for 12 years was established. *A* died in 1902. In 1905, the plaintiffs claiming to be the reversionary heirs of the original deceased, sued *M* for possession of the properties. The High Court dismissed the suit. On appeal to the Judicial Committee it was held that the principle of the *Shivgunga* case [See § 199] applied and that the *decree* of 1892 against the widow (*A*) was binding upon the reversioners, the decree having been passed after a fair trial of the suit, and the appeal was dismissed: *Vaithialinga* v. *Srirangath* (1925) 52 I.A. 322, 48 Mad. 883, 92 I.C. 85, ('25) A.PC. 249.

## III.—REMEDIES AGAINST UNAUTHORISED ACTS OF WIDOWS AND OTHER LIMITED HEIRS

**202. Reversioners and their rights.**—A reversionary heir, although having those contingent interests which can be differentiated little, if at all, from a *spes successionis* [§ 175], is recognized by Courts of law as having a right to demand that the estate be kept free from danger during its enjoyment by the widow or other limited heir. He may therefore sue to restrain a widow or other limited heir from committing waste or injuring the property [§ 204]. The reason why such a suit by a reversionary heir is allowed is that the suit is by him in a representative character and on behalf of all the reversioners, so that the corpus of the estate may pass unimpaired to those entitled to the reversion (*f*). For the same reason he may bring a suit for a declaration that an alienation effected by her is not binding on the reversion (*g*) [§ 205].

In both cases the right to sue is based on the *danger to the inheritance common to all the reversioners*, presumptive and contingent alike, the object being to forestall an injury which threatens the common interest of *all* the reversioners (*h*). Where a reversioner brings a representative suit for a declaration that an alienation by the widow is not binding on the reversion and dies, his right of suit survives not to his personal heirs but to the next presumptive reversioner (*i*).

The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widow's death, is not entitled to a declaration under the Specific Relief Act, s. 42, that he is the next reversioner, although in that capacity he has the right to sue on behalf of the reversioners for the protection of the estate. Where, therefore, he sues the widow alleging waste [§ 204], but fails to prove any wrongful act on her part, a declaration that he is the next reversionary heir should not be made. The reason is that it is impossible to predicate until the succession opens who is the reversionary heir of the deceased proprietor, and such a declaration, if made, might be rendered valueless by the development of events (*j*).

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(*e*) *Shivagunga* case (1863) 9 M.I.A. 539; *Vaithialinga* v. *Srirangath* (1925) 52 I.A. 322, 48 Mad. 883, 92 I.C. 85, ('25) A.PC. 249.

(*f*) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 209-210, 39 Mad. 634, 638, 37 I.C. 161, ('16) A.PC. 117.

(*g*) *Venkatanarayana* v. *Subbammal* (1915) 42 I.A. 125, 128-129, 38 Mad. 406, 410-411, 29 I.C. 298, ('15) A.PC. 124.

(*h*) *Ibid.*

(*i*) *Rameshwar* v. *Ganapati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A.L. 652.

(*j*) (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.P.C. 117, *supra*; *Sheoparsan* v. *Ramnandan* (1916) 43 I.A. 91, 43 Cal. 694, 33 I.C. 914, ('16) A.PC. 78.

**203. Suit for a declaration that plaintiff is next reversioner.**—The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widow's death, is not entitled to a declaration that he is the next reversioner, although in that capacity he has the right to sue on behalf of the reversioners for the protection of the estate as stated in §§ 204 and 205 below (*k*).

Where a suit is brought on behalf of reversioners for a declaration that a transaction by the widow is not binding on them, the defendants may plead that the person whose reversioners the plaintiffs claim to be was not the last male owner and the defendants themselves are the reversioners of the last male owner and the matter may be tried in the suit (*l*)

If a widow surrenders the whole estate to one of the reversioners [§ 197] and the plaintiffs claiming to be reversionary heirs equally with the grantee sue for a declaration that the surrender is not valid beyond the widow's lifetime, the Court may make the declaration, though it involves a finding that the plaintiffs equally with the grantee are the next reversioners (*m*).

**204. Injunction to restrain waste.**—Where a widow or other limited heir in possession of property inherited by her commits waste or does any act which is injurious to the reversion, the next reversioner may institute a suit for an injunction restraining her from doing so. But the Court will not grant an injunction and will not take the management of the property out of her hands, unless the act complained of constitutes "danger to the property" (*n*).

Where the estate comprises movable property, and the widow has squandered part thereof, the Court may appoint a receiver to prevent further waste of the estate, it may also direct transferees from the widow to replace the property where such property can be traced to their hands (*o*). If a widow gets bonds renewed in her own name in place of bonds that stood in her husband's favour and the recitals of the new bonds show as if consideration was paid in cash, this is clearly waste as far as the reversioner is concerned, which will justify the reversioner in filing a suit against the widow for a permanent injunction restraining her from withdrawing money deposited by her husband in the Post Office Savings Bank and directing her to renew the Post Office Cash Certificate of her husband or otherwise invest amounts due on them after maturity (*p*). See § 179.

No injunction can be granted to restrain a widow or other limited heir from making an unauthorized *alienation* of the estate which she represents. Mere alienation is not waste. In such a case the proper remedy is to bring a suit for a declaratory decree as stated in the next section (*q*). See § 202.

**205. Declaratory suit in cases of unauthorised alienations.**—(1) Where a widow or other limited heir alienates property inherited by her in contravention of the provisions of § 178, the next reversioner, though he has no interest higher than a chance of succession, may institute a suit in her lifetime for a

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(*k*) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.PC. 117; *Patto Padhanuni* v. *Bhikari Padhano* ('54) A. Orissa 211; *Rama Rao* v. *Raja of Pittapur* (1919) 42 Mad. 219, 49 I.C. 835 ('19) A.M. 871; *Madan Mohan Dhur* v. *Thakur Sree Sree Natai Gour Jew* (1933) 37 C.W.N. 801, 147 I.C. 1247, ('34) A.C. 30.

(*l*) *Desu Reddiar* v. *Srinivasa Reddi* (1936) 59 Mad. 1052, ('36) A.M. 605.

(*m*) *Saudagar Singh* v. *Pardip Singh* (1918) 45 I.A. 21, 45 Cal. 510, 43 I.C. 484, ('17) A.PC. 196.

(*n*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 433; *Kathama Natchiar* v. *Dorasinga* (1875) 2 I.A. 169, 191, 15 Beng. L.R. 83, 119; *Renka* v. *Bhola Nath* (1915) 37 All. 177, 28 I.C. 896, ('15) A.A. 207; *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.PC. 117. As to prospective waste, see *Gambhirmal* v. *Hamirmal* (1897) 21 Bom. 747, at p. 749. See Specific Relief Act, 1877, s. 54, ill. (m); *Kunjammal* v. *Malayappa* (1956) 2 Mad. L.J. 67 [Receiver of business—not appointed]; *Ramchandra* v. *Seeniathal*, I.L.R. (1955) Mad. 732, ('54) A.M. 1011. Reference may be made to *Kamalabala* v. *Jiban Krishna* (1946) 2 Cal. 32.

(*o*) *Venkanna* v. *Narasimham* (1921) 44 Mad. 984, 66 I.C. 10, ('21) A.M. 234.

(*p*) *Sheo Das Pandey* v. *Mst. Ram Kali* (1936) 11 Luck. 508, 158 I.C. 301, ('36) A.O. 4.

(*q*) *Isri Dut* v. *Hansbutti* (1884) 10 Cal. 324, 332, 10 I.A. 150.

declaration that the alienation is not binding on the reversion, and if the facts are proved, the Court may pass a decree declaring that the alienation is not valid beyond the lifetime of the limited heir (*r*) [§§ 175, 202]. As to limitation, see § 208.

The position and rights of the reversioners in such a case were summarised by the Supreme Court in the undermentioned decision (*r*1).

(2) The reversioners, however, are not bound to institute a *declaratory suit.* They are not obliged to take any action in the lifetime of the limited heir. They may wait until the estate vests in them on her death, and then sue the alienee for *possession* of the property (*s*). As to limitation, see § 209.

If a widow, without the consent of the reversioners, alienates her husband's property for purposes not sanctioned by law, the reversioners are entitled to bring a declaratory suit against her (*t*). See § 202 and notes. As to the effect of a decree in a declaratory suit, see § 210 below.

It was held by a Full Bench of the Andhra High Court (*u*) that a suit by a reversioner for a declaration of the invalidity of an alienation by a person claiming to be the adopted son of the last male owner is maintainable during the lifetime of the female limited owner. The omission to bring a declaratory suit, however, does not stand in the way of the nearest reversioner recovering possession of the property on the death of the female limited owner by a suit filed within the time prescribed by art. 141 of the Limitation Act.

**206. Will by widow of property inherited by her from her husband.**—The execution of a will by a widow or other limited heir purporting to dispose of property in which she takes a limited interest affords, as a general rule, no sufficient reason for granting a declaratory decree (*v*).

The reason is that a *will* made by a limited heir purporting to dispose of property inherited by her from a male does not operate as an *alienation* of the property. It is no more than an assertion, and a declaratory suit does not lie for the setting aside of a mere assertion (*w*). For the same reason, where a widow executes a deed by which she acknowledges that *A.B.* is the next reversioner, which in fact he is not, the Court will refuse to entertain a suit for a declaration by a person claiming to be the next reversioner that the deed is not binding on the estate (*x*). But where a widow claims property which really forms part of her husband's estate as her absolute property, alleging that she got it under a will of her husband's brother who had treated the property as his own, a suit will lie at the instance of the next reversioner for a declaration that the property belongs to the husband's estate and that she has no more than a widow's estate in it (*a*).

**207. Who may sue for injunction or for declaratory decree.**—It is not the law that any one who may have a possibility of succeeding on the death of a

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(*r*) *Goolab Singh* v. *Kurun Singh* (1871) 14 M.I.A. 176; *Jumoona* v. *Bamasoondari* (1876) 1 Cal. 289, 3 I.A. 72; *Isri Dut* v. *Hunsbutti* (1884) 10 Cal. 324, 10 I.A. 150; *Saudagar Singh* v. *Pardip Singh* (1918) 45 I.A. 21, 45 Cal. 510, 43 I.C. 484, ('17) A.PC. 196. Specific Relief Act, 1877, s. 42, ill. (e); *S. Ambalagaran* v. *Neelamegam* ('56) A.M. 160 [deed of settlement with a trespasser]; *Bhagwati Charan* v. *Hirday Singh* ('52) A.P. 160.

(*r*1) *Radha Rani* v. *Hanuman Prasad* ('66) A.S.C. 216.

(*s*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Mesraw* v. *Girjanundan* (1908) 12 C.W.N. 857; *Raghubir Singh* v. *Jethu* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130; *Anant Bahadur Singh* v. *Ashtabhuja Bux Singh* (1957) 55 All. L.J. 55; *Purna Chandra* v. *Gouri Pada* ('67) A.C. 512 (fraud and collusion).

(*t*) (1883) 10 Cal. 324, 332-333, 10 I.A. 150, 156, 157, *supra.*

(*u*) *Jainkamma* v. *Mattareddi* ('56) A. Andh. Pra. 141.

(*v*) *Thakurain Jaipal* v. *Bhaiya Indar* (1904) 31 I.A. 67, 26 All. 238; *Umrao Kunwar* v. *Badri* (1915) 37 All. 422, 29 I.C. 302, ('15) A.A. 252; *Ganga* v. *Kanhai Lal* (1919) 41 All. 154, 47 I.C. 222, ('18) A.A. 15; *Das Mal* v. *Ram Chand* (1923) 4 Lah. 116, 76 I.C. 946, ('23) A.L. 406.

(*w*) *Rajah Nilmoney Singh* v. *Kally Churn* (1874) 23 W.R. 150.

(*x*) *Das Mal* v. *Ram Chand* (1923) 4 Lah. 116, 76 I.C. 946, ('23) A.L. 406.

(*a*) *Surayya* v. *Subbamma* (1920) 43 Mad. 4, 53 I.C. 498, ('20) A.M. 361.

widow or other limited heir can maintain a suit for an injunction or for a declaratory decree; for otherwise every one in the line of succession, however remote, would have a right to sue. The right to sue rests in the first instance with the next reversioner.

The reversioner next after him is not entitled to sue (*b*), unless—

(i) The next reversioner refuses without sufficient cause to institute proceedings, or has concurred in the act alleged to be wrongful, or has colluded with the limited heir, or is precluded from suing by his own act or conduct (*c*), or is from poverty not in a position to sue (*d*); *or*

(ii) according to the Calcutta (*e*), Madras (*f*), and Patna (*g*) decisions, the next reversioner is herself a female and entitled to a limited interest only. The same view has been taken by the Allahabad High Court in some cases (*h*); in other cases it has been held that the mere fact that the next reversioner is a female does not give any right of suit to the more distant reversioner, unless it be shown that she was acting in collusion with the widow or other limited heir whose act is impeached (*i*).

*Parties to suit.*—Where the plaintiff brought the suit claiming to be the next reversioner and the whole case was tried by the lower courts which declared that the alienation by the widow was not valid beyond her lifetime and in Second Appeal the High Court found that on account of Act II of 1929, the plaintiff was not the nearest reversioner, a sister's son having come into existence after the institution of the suit, it was held that the suit ought not to be dismissed but the case should be sent back for disposal after making the sister's son a party and getting a proper guardian appointed for him (*j*). Reference may be made to the undermentioned cases (*k*).

Reference may also be made to the undermentioned decision of the Supreme Court (*k*1).

Where a suit is brought by the next reversioner, there is nothing to preclude a remote reversioner from joining or asking to be joined in the suit, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow (*l*), as for instance, an attempt to compromise the suit with the

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(*b*) *Rani Anand Kunwar* v. *The Court of Wards* (1881) 6 Cal. 746, 8 I.A. 14; *Meghu Rai* v. *Ram Khelawan* (1913) 35 All. 326, 9 I.C. 814; *Gumanan* v. *Jahangira* (1918) 40 All. 518, 46 I.C. 186, ('18) A.A. 393; *Abinash* v. *Harinath* (1905) 32 Cal. 62 [not good law on the point of limitation, see § 208]; *Mussammat Viranwali* v. *Kundan Lal* (1928) 9 Lah. 106, 112 I.C. 35, ('28) A.L. 267; *Shankar* v. *Raghoba* (1939) Nag. 383; *Matru Mal* v. *Mehri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311, (1940) A.L.J. 403, 13 I.R. 106; *Lalta Prasad* v. *Dwarka Prasad* (1941) All. 598, 195 I.C. 492, ('41) A.A. 313, (1941) A.L.J. 392; *Raja Seetla Baksh Singh* v. *Babu Surrendra Bikram Singh* (1943) 18 Luck. 521, 205 I.C. 585, ('43) A.O. 68.

(*c*) *Kooer Goolab Singh* v. *Rao Kurun Singh* (1871) 14 M.I.A. 176; *Rao Kurun Singh* v. *Nawab Mahomed* (1871) 14 M.I.A. 187, 193; *Bakhtawar* v. *Bhagwana* (1910) 32 All. 176, 5 I.C. 270 [gift with consent of next reversioner]; *Raja Dei* v. *Umed Singh* (1912) 34 All. 207, 13 I.C. 632; *Ghisiawan* v. *Mst. Raj Kumari* (1921) 43 All. 534, 63 I.C. 556, ('21) A.A. 33 [sale with consent of next reversioner]; *Bhikaji* v. *Jagannath* (1873) 10 Bom. H.C. 351 [waiver].

(*d*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272.

(*e*) *Abinash* v. *Harinath* (1905) 32 Cal. 62.

(*f*) *Chidambara* v. *Nallammal* (1910) 33 Mad. 410, 5 I.C. 164.

(*g*) *Ramyad* v. *Rambhilhara* (1919) 4 Pat. L.J. 734, 54 I.C. 357, ('20) A.P. 514; *Nathuni Missir* v. *Ratna Kuer* ('63) A.P. 337.

(*h*) *Balgobind* v. *Ramkumar* (1884) 6 All. 431; *Lakhpati* v. *Rambodh* (1915) 37 All. 350, 352, 29 I.C. 218, ('15) A.A. 255.

(*i*) *Ishwar* v. *Janki* (1893) 15 All. 132; *Madari* v. *Malki* (1884) 6 All. 429; *Gumanan* v. *Jahangira* (1918) 40 All. 518, 46 I.C. 186, ('18) A.A. 393. See also *Tekchand* v. *Soman Singh* (1916) Punj. Rec. No. 27, 34 I.C. 831, ('16) A.L. 265. Reference may, however, be made to *Deoki* v. *Jwala Prasad* (1928) 50 All. 678, 113 I.C. 737 ('28) A.A. 216.

(*j*) *Lakshmi* v. *Anantharama* (1937) Mad. 948, 171 I.C. 7, ('37) A.M. 699. Reference may also be made to *Kani Bewa* v. *Krushna* ('53) A. Orissa 39; *Shcodutta* v. *Akali Bhumijani* ('53) A.P. 374; *Bhagatram* v. *Bhakluram* ('63) A.M.P. 56.

(*k*) *Rani Anand Kunwar* v. *The Court of Wards* (1881) 6 Cal. 764, 772-773, 8 I.A. 14; *Meghu Raj* v. *Ram Khelawan* (1913) 35 All. 326, 19 I.C. 814; *Jhandu* v. *Tarif* (1915) 37 All. 45, 27 I.C. 892, ('14) A.PC. 34; *Sita Saran* v. *Jagat* (1927) 49 All. 815, 102 I.C. 296, ('27) A.A. 811; *Mussammat Viranwali* v. *Kundan Lal* (1928) 9 Lah. 106, 112 I.C. 35, ('28) A.L. 267; *Samanatha* v. *Luxman* ('62) A. Orissa 38. Reference may be made to *Sudehaiya* v. *Ram Dass* ('57) A.A. 270. Also see *Suraj Mal* v. *Nathwa* (1923) 45 All. 255, 76 I.C. 983, ('23) A.A. 161. As to minor who is the next reversioner see *Kali Charan* v. *Bageshra* (1925) 47 All. 929, 89 I.C. 374, ('25) A.A. 585.

(*k*1) *Radha Rani* v. *Hanuman Prasad* ('66) A.S.C. 216.

(*l*) *Venkatanarayana* v. *Subbammal* (1915) 42 I.A. 125, 38 Mad. 406, 29 I.C. 298, ('15) A.PC. 124.

widow in appeal after the lower court had passed a decree granting the declaration prayed for in the suit (*m*).

**208. Declaratory suits and limitation.**—(1) A suit by a reversioner for a declaration that an alienation made by a widow or other limited heir is void except for her life must be brought within 12 years from the date of the alienation [the Indian Limitation Act, 1908, Sch. I, art. 125] (*n*).

A distinction must be made in respect of other suits by a reversioner. It has been held by the Patna High Court that a suit by a Hindu for a declaration that the alienations made by a Hindu female who has a life estate by virtue of a transfer or grant *inter vivos* or by virtue of a bequest are void and are not binding on him as the next reversioner of the last male owner is governed by Art. 120 and not by Art. 125 (*o*).

(2) Such a suit is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have but a single cause of action, which arises on the date of the alienation. Hence if no suit is brought by the existing reversioners within 12 years, and their right to sue is barred by limitation, reversioners thereafter born are equally barred (*p*).

The ground of the decision was that the right of the next reversioner to bring a declaratory suit is based on the danger to the inheritance *common* to all the reversioners, presumptive and contingent alike, and there is therefore *one* cause of action common to them all (*q*). See § 202.

The High Court of Calcutta has held that what bars the next reversioner does not bar the contingent reversioner (*r*).

**209. Reversioner's suit for possession and limitation.**—A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of immovable property from an alienee from her must be brought within twelve years from her death [the Indian Limitation Act, 1908, Sch. I, art. 141], and of movable property, within six years from that date (*s*) [*ib.*, art. 120]. See § 205(2).

Now see Articles 65, 109 and 113 of the new Limitation Act, 1963.

The reversioner may sue for *possession* without suing to have the alienation set aside. The reason is that he is entitled to treat the unauthorized alienation as a *nullity* without the intervention of any Court (*t*).

Article 141 of Schedule I of the Indian Limitation Act, referred to in this section, provides, a period of 12 years for a suit for possession of immovable property by a Hindu entitled to possession of such property on the *death* of a Hindu female. In an award arising out of a dispute between a widow and her husband's brothers, certain properties

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(*m*) *Gokulananda Harichandan* v. *Iswar Chhotrai* (1936) 15 Pat. 379, 166 I.C. 342, ('37) A.P. 11.

(*n*) See *Yagnanarayana* v. *Lakshminarayana* (1951) 1 M.L.J. 502, (52) A.M. 495 and cases there cited. Also see *Venkayamma* v. *Veerayya* ('57) A. Andh. Pra. 280.

(*o*) *Kanhya Lal Missir* v. *Mst. Hira Bibi* (1936) 15 Pat. 151, 163 I.C. 940, ('36) A.P. 323 differing from *Mt. Nandan* v. *Wazira* (1927) 8 Lah. 215; *Mt. Widyavati* v. *Mt. Rahmat Bi* ('37) A. Lah. 760.

(*p*) *Varamma* v. *Gopaladasayya* (1918) 41 Mad. 659, 46 I.C. 202, ('19) A.M. 911 (F.B.), approved and *ratio decidendi* followed in *Kesho Prasad* v. *Sheo Pargash* (1922) 44 All. 19, 29, 64 I.C. 248, ('22) A.A. 301 (F.B.); *Chhaganram* v. *Bai Motigavri* (1890) 14 Bom. 1900; *Jamnabai* v. *Dharsey* (1902) 4 Bom. L.R. 893 [adoption]; *Chiragh Din* v. *Abdullah* (1925) 6 Lah. 405, 90 I.C. 1022, ('25) A.L. 654.

(*q*) *Mata Prasad* v. *Nageshar Sahai* (1925) 32 I.A. 398, 410-411, 47 All. 883, 893-894, 91 I.C. 370, ('25) A.PC. 272.

(*r*) *Abinash* v. *Harinath* (1905) 32 Cal. 62; *Das Ram* v. *Tirtha Nath* (1924) 51 Cal. 101, 108-109, 81 I.C. 522, ('24) A.C. 481.

(*s*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494; *Rakhmabai* v. *Keshav* (1907) 31 Bom. 1; *Mummareddi* v. *Pitti Durairaja* (1951) S.C.R. 655; *Govind Balkrishna* v. *Ramchandra* (1952) Bom. 621, (1952) 54 Bom. L.R. 263, ('52) A.B. 395; *Sitaram Singh* v. *Bhikhni Devi* ('60) A.P. 452 (defendant claimed to be adopted son).

(*t*) (1907) 34 Cal. 329, 34 I.A. 87, *supra*; *Obala Kondama* v. *Kandasami* (1923) 51 I.A. 145, 152, 47 Mad. 181, 189, 79 I.C. 961, ('24) A.PC. 56.

were given to her for maintenance and it was provided that she should forfeit her right to the properties if she became unchaste. The widow became unchaste in 1910 or 1912 and died in 1929. It was held that a suit brought in 1932, that is, within 12 years after her death was in time under art. 141 on the ground that the reversioners are entitled to waive the benefit of the forfeiture (*u*). For an application of this art. 141, see § 210. As to commencement of the period of limitation when there is surrender of the estate after alienation see the undermentioned case (*v*).

**210. Decree in suit between next reversioner and alienee and *res judicata*.**—A suit by the next reversioner against the widow or other limited heir and an alienee from her for a declaration that the alienation is not binding on the reversioner is a representative suit on behalf of all the reversioners, and a decree fairly and properly passed in such a suit, whether it is for or against the next reversioner, operates as *res judicata* between not only the next reversioner but *the whole body of reversioners* on the one hand and the alienee and his representatives on the other (*a*).

This principle applies also when a creditor obtains a decree against a widow and attaches properties inherited by her from her husband; in such a case if the reversioner brings a suit for the release of the property on the ground that debts were not incurred for legal necessity and therefore not binding on the reversion, a fresh suit by him for a declaration that the sale of the property in execution is not binding on him is *res judicata* (*b*).

*Illustrations*

(a) A Hindu dies leaving a widow, a brother, and a paternal uncle. The widow sells property inherited by her from her husband to *A*, and delivers possession of the property to him. The brother as next reversioner sues the widow and *A* for a declaration that the sale is not valid beyond the widow's lifetime, and a decree is passed in favour of the brother. After the decree the widow dies, and then the brother. The uncle demands possession of the property from *A*, but *A* fails to deliver possession. The uncle sues *A* for possession. *A* is precluded from contending that the sale was valid, and the uncle is entitled to possession.

(b) If in the case put in ill. (a) the brother's suit is dismissed and the alienation is upheld, the uncle will be precluded from bringing a fresh suit against *A* for a declaration that the alienation is not binding on him. The decree of dismissal operates as *res judicata* against the uncle, who is the ultimate reversioner, *though he was not a party eo nomine to the brother's suit*, and the alienee is entitled to the benefit of the decree. It may seem hard at first sight that a decree against the next reversioner, whose interest is merely presumptive and may never mature as when he dies before the widow, should operate as *res judicata* against the ultimate reversioner at the widow's death, for the decree might have been obtained by fraud or collusion. But the hardship is not real, for the decree in such a case may be set aside at the suit of the ultimate reversioner (*c*).

A decree against the next reversioner in respect of an alienation by the widow of property *X* to *A* does not bar a suit by the reversioner in respect of an alienation of property *Y* to *B* (*d*).

For the reason of the rule contained in this section, see § 202. The same principle applies to a suit by the next reversioner for a declaration that an *adoption* is invalid. If a decree is passed against him, it is binding on the *ultimate* reversioner (*e*). The matter is really governed by the Code of Civil Procedure, 1908, s. 11, Expln. 6, which relates to *res judicata* in a representative suit. As to decrees against limited heirs, see § 199.

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(*u*) *Rashik Lal* v. *Radha Dulaiya* (1937) All. 424, 169 I.C. 586, ('37) A.A. 268.

(*v*) *Veeraju* v. *Venkayya* ('60) A.A.P. 222.

(*a*) *Kesho Prasad* v. *Sheo Pragash* (1924) 51 I.A. 381, 46 All. 831, 82 I.C. 962, ('24) A.PC. 247, [decree for next reversioner] affg. (1922) 44 All. 19, 64 I.C. 248, ('22) A.A. 301 (F.B.); *Pramatha* v. *Bhuban* (1922) 49 Cal. 45, 64 I.C. 980, ('22) A.C. 321 [decree against next reversioner]; *Khair Muhammad* v. *Umar* (1924) 5 Lah. 421, 84 I.C. 477, ('25) A.L. 89 [decree against next reversioner].

(*b*) *Mst. Seethabai* v. *Hari* (1938) Nag. 498, ('38) A.N. 401.

(*c*) *Kesho Prasad* v. *Sheo Pragash* (1924) 51 I.A. 381, 46 All. 831, 82 I.C. 962, ('24) A.PC. 247.

(*d*) *Thakar Singh* v. *Mst. Uttam* (1929) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295.

(*e*) *Chiruvolu* v. *Chiruvolu* (1906) 29 Mad. 390 [F.B.]; *Gokulanand Harichandan* v. *Iswar Chhotrai* (1936) 15 Pat. 379, 166 I.C. 342, ('37) A.P. 11.

**211. Adverse possession by widow.**—(1) Property acquired by a Hindu widow or other limited heir by adverse possession [Indian Limitation Act, 1908, sch. I, art. 144], of which she took and retained possession absolutely in her own right, for twelve years or upwards is her stridhana, and she may dispose of it by deed or will; on her death intestate it descends to her stridhana heirs (*f*). But if the property acquired by adverse possession was claimed and held by her not in her own right, but as a widow representing her husband's estate, it is not her stridhana, but an accretion to her husband's estate, and in it she takes no more than a widow's estate, and it descends on her death to her husband's heirs (*g*).

The position would be the same even if she was under a mistaken belief that her husband was dead (*h*). The possession of a person who is not the widow of the last male owner but is the widow of another member of the family is *prima facie adverse* but if she claims the estate only by inheritance she must be deemed to be claiming only a limited estate (*i*). Thus, where a Hindu widow in the enjoyment of her husband's estate as heir remarried and had thereby forfeited her title to the estate, but continued in possession without asserting any change in the character of her possession, she acquires title by prescription only to a widow's estate and not to an absolute estate (*j*).

Now see Article 65 of the new Limitation Act, 1963.

It has accordingly been held that where a Hindu dies leaving a son and a widow and the widow who is entitled to maintenance only out of her husband's estate takes and retains possession of property belonging to her husband's estate adversely to the son, the property is her stridhana, unless it is clearly shown that when she took possession, she professed to do it as claiming only the limited estate of a widow. "The son having the title, she could not take possession excluding him, unless she intended to take an adverse possession, a possession to which she was not in any way entitled" (*k*). Similarly, where a widow takes possession of the estate of her husband's uncle to which her husband's grandsons are entitled (*l*), or takes possession of the estate of her husband's brother to which the brother's heirs are entitled (*m*), and holds it adversely against the rightful heirs, the property is her stridhana. In a Privy Council case where a Hindu widow executed a deed of gift of property which she held absolutely under a will from her husband in favour of her daughter, which gift was not valid as the deed was not registered, but the daughter remained in adverse possession of the property for upwards of 12 years, it was held that the property was her stridhana and that it did not pass on her death to her father's heirs (*n*). It has been held in a number of cases that where a Hindu female who has no right to a property obtains and holds possession of it for the requisite period, the presumption is that she intended to prescribe for an absolute title, unless it is shown that she wanted to hold it as a limited owner (*o*).

(2) The possession of a portion of the joint family estate by the widow of a member of a joint Hindu family governed by the Mitakshara law, as of right,

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(*f*) *Lachhan Kunwar* v. *Monorath Ram* (1895) 22 Cal. 445 [P.C.]; *Varada Pillai* v. *Jeevarathnammal* (1920) 43 Mad. 244, 46 I.A. 285, 53 I.C. 901, ('19) A.PC. 44; *Bansidhar* v. *Dulhatia* (1925) 47 All. 505, 87 I.C. 235, ('25) A.A. 483; *Rikhdeo* v. *Sukhdeo* (1927) 49 All. 713, 102 I.C. 175, ('28) A.A. 45; *Suraj Balli* v. *Tilakdhari* (1928) 7 Pat. 163, 107 I.C. 151 ('28) A.P. 220; *Musammat Muluka* v. *Pateshar* (1926) 1 Luck. 273, 295-296, 96 I.C. 672, ('26) A.O. 371; *Hira Mal* v. *Rongi Ram* I.L.R. (1955) Punj. 1120; *Satyanarayana* v. *Veerraju* ('59) A.A.P. 79 (F.B.); *Sampat* v. *Surajmat* ('59) A.B. 504; *Tilakdhari Rai* v. *Parma Rai* ('63) Pat. 356.

(*g*) *Lajwanti* v. *Safa Chand* (1924) 51 I.A. 171, 5 Lah. 192, 80 I.C. 788, ('24) A.PC. 121; *Patipal Singh* v. *Rampal Singh* (1940) 15 Luck. 112, 185 I.C. 157, ('40) A.O. 63; *Hiralal* v. *Rongiram* ('51) A. Simla 11; *Chattar Singh* v. *Roshan Singh* (1946) Nagpur 159; *Gaya Deen* v. *Amrauti*, I.L.R. (1956) 1 All. 193.

(*h*) *Bibhabati* v. *Ramendra* (1947) 1 Cal. 32 (P.C.).

(*i*) *Chandrabali Pathak* v. *Bhagwanprasad Pande* (1944) All. 533.

(*j*) *Parbati* v. *Ram Prasad* (1932) 7 Luck. 320, 141 I.C. 831, ('33) A.O. 92; *Bharmanna* v. *Shiragondappa* ('59) A. Mys. 81.

(*k*) *Lachhan Kunwar* v. *Manorath Ram* (1895) 22 Cal. 445, 449; (1925) 47 All. 505, 87 I.C. 235, ('25) A.A. 483, *supra.*

(*l*) *Rikhdeo* v. *Sukhdeo* (1927) 49 All. 713, 102 I.C. 175, ('28) A.A. 45.

(*m*) *Suraj Balli* v. *Tilakdhari* (1928) 7 Pat. 163, 107 I.C. 151, ('28) A.P. 220.

(*n*) *Varotha Pillai* v. *Jeevarathammal* (1920) 46 I.A. 285, 43 Mad. 244, 53 I.C. 901; *Mst. Maluka* v. *Pateshar* (1926) 1 Luck. 273, 96 I.C. 672, ('26) A.O. 371, *supra.*

(*o*) *Udai Pratap* v. *Narotam* (1946) 21 Luck. 143; *Thailambal Ammal* v. *Kesavan Nair* ('57) A. Kerala 86.

for twelve years or upwards, as for instance, where mutation has been effected in her name and she remains in continuous possession, bars the claims of the other members of the family (*p*).

The reason is that on the death of an undivided member of a joint family, the joint family property passes to the other members of the family by survivorship, and the widow is not entitled to anything more than maintenance out of the joint family property; her possession, therefore, would be adverse to the other members unless it was in lieu of maintenance under an arrangement with them (*q*). See § 133. But a widow having obtained possession of property under an arrangement with her husband's brothers granting her a widow's estate, cannot by any act or declaration of her own acquire title by prescription. *Cf.* § 176(7) (*r*).

(*p*) *Pandit Adya Shankar Tivari* v. *Mst. Chandrawat* (1935) 10 Luck. 35, 150 I.C. 519, ('34) A.O. 265; *Bhagwan Das* v. *Krishen Lal* ('56) A.J. & K. 36.

(*q*) *Sham Koer* v. *Dah Koer* (1902) 29 I.A. 132, 29 Cal. 664; *Satgur Prashad* v. *Kishore Lal* (1919) 46 I.A. 197, 42 All. 152, 55 I.C. 486, ('19) A.P.C. 60; *Uman Shankar* v. *Musammat Aisha* (1923) 45 All. 729, 74 I.C. 869, ('24) A.A. 88; *Kali Charan* v. *Piari* (1924) 46 All. 769, 83 I.C. 754, ('24) A.A. 740. Also see *Gaya Deen* v. *Amrauti* ('55) A.A. 630.

(*r*) *Rashik Lal* v. *Radha Dulaiya* (1937) All. 424, 169 I.C. 586, ('37) A.A. 268.

# CHAPTER XII

# COPARCENERS AND COPARCENARY PROPERTY—MITAKSHARA LAW

1. *Coparceners*—§§ 212-217.
2. *Coparcenary property*—§§ 218-234.
3. *Management and enjoyment of Coparcenary property*—§§ 235-254.
4. *Alienation of Coparcenary property*—§§ 255-257.
5. *Alienation of undivided coparcenary interest*—§§ 258-266.
6. *Setting aside alienations*—§§ 267-270.

*Note.*—The general effect of the Hindu Women's Rights to Property Act, 1937, in case of death of a coparcener in the joint family governed by the Mitakshara law has been pointed out under § 35. The Hindu Succession Act, 1956, has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. Speaking generally it does not interfere with the special rights of those who are members of a Mitakshara coparcenary but it is important to note that section 6 of that enactment recognises the rights upon the death of a coparcener of certain of his preferential heirs to claim an interest in the property that would have been allotted to him if there had in fact been a partition immediately before his death and the principle of devolution by survivorship considered in this Chapter is affected to that extent. The cardinal doctrine of the Mitakshara law that a coparcener in a joint family cannot make a valid gift or bequest of his interest in the coparcenary property so as to defeat the rights of the other members to take by survivorship is partly abolished to the extent that it is now competent to such a coparcener to dispose of by will (s. 30) his undivided interest in the coparcenary property. See sections 6 and 30 of that Act and Notes thereunder for the effect of the new legislation upon the rights of coparceners and the incidents of coparcenary property in case of the joint Hindu family governed by Mitakshara law.

## I.—COPARCENERS

**212. Joint Hindu family.**—(1) A Joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters (*s*). A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family.

Reference may be made to notes under sec. 6 of the Hindu Succession Act, 1956, and sec. 16 of the Hindu Marriage Act, 1955, for the position and rights in a joint Hindu family of a son or daughter born of a marriage which is void or voidable under the latter enactment and who is to be deemed to be a legitimate child of the parents.

(2) The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship (*t*). The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may nevertheless be joint (*u*). Where there is joint estate, and the members of the family become separate *in estate*, the family ceases to be joint. Mere 'severance in *food* and *worship* does not operate as a separation (*v*).

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(*s*) *Commissioner of Income Tax* v. *Luxminarayan* (1935) 59 Bom. 618, 37 Bom. L.R. 692, 159 I.C. 424, ('35) A.B. 412; *Melagiriyappa* v. *Lalithamma* ('61) A. Mys. 152.

(*t*) *Sri Raghunada* v. *Brozo Kishor* (1876) 1 Mad. 69, 89, 3 I.A. 154.

(*u*) *Janakiram* v. *Nagamony* (1926) 49 Mad. 98, 103, 115, 93 I.C. 662, ('26) A.M. 273; *Laldas* v. *Motibai* (1908) 10 Bom. L.R. 175; *Pandit Mohan Lal* v. *Pandit Ram Dayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*v*) *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 I.A. 10.

Possession of joint family property is not a necessary requisite for the constitution of a joint Hindu family. Hindus get a joint family status by birth, and the joint family property is only an adjunct of the joint family (*w*).

(3) A joint or undivided Hindu family may consist of a single male member and widows of deceased male members. The property of a joint family does not cease to be joint family property belonging to any such family merely because the family is represented by a single male member (coparcener) who possesses rights which an absolute owner of property may possess. Thus for instance a joint Hindu family may consist of a male Hindu, his wife and his unmarried daughter (*w*1). It may similarly consist of a male Hindu and the widow of his deceased brother (*w*2). The basis of this rule is that the joint family property does not cease to be such simply because of the "temporary reduction of the coparcenery unit to a single individual" the character of the property remains the same (*w*3).

**213. Hindu coparcenary.**—A Hindu coparcenary is a much *narrower* body than the joint family. It includes only those persons *who acquire by birth an interest in the joint or coparcenary property* (*x*). These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent. See §. 217.

To understand the formation of a coparcenary, it is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father or father's father's father, is *ancestral* property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owners with him. They become entitled to it by *reason of their birth* (*y*). Thus if *A*, who has a son *B*, inherits property from his father, it becomes ancestral in his hands, and though *A*, as the head of the family, is entitled to *hold and manage* the property, *B* is entitled to an equal interest in the property with his father *A*, and to enjoy it in common with him. *B* can therefore *restrain his father from alienating* it except in the special cases where such alienation is allowed by law, and he *can enforce partition* of it against his father. On his father's death, he takes the property by right of *survivorship* and not by *succession*. It is otherwise, however, as to *separate* property. A man is the absolute owner of property inherited by him from his brother, uncle, etc. His son does not acquire an interest in it by birth, and on his death it passes to the son not by *survivorship* but by *succession*. Thus if *A* inherits property from his brother, it is his separate property, and it is absolutely at his disposal. His son *B* acquires no interest in it by birth, and he cannot claim a partition of it, nor can he restrain *A* from alienating it. The same rule applies to the *self-acquired* property of a Hindu. But it is of the utmost importance to remember that separate or self-acquired property, *once it descends to the male issue of the owner*, becomes *ancestral* in the hands of the male issue who inherits it. Thus if *A* owns separate or self-acquired property, it will pass on his death to his son *B* as his *heir*. But in the hands of *B* it is *ancestral* property as regards his sons. The result is that if *B* has a son *C*, *C* takes an interest in it by reason of his birth, and he can restrain *B* from alienating it, and can enforce a partition of it as against *B*.

Ancestral property is a species of coparcenary property. We have stated above that if a Hindu *inherits* property from his father, it becomes ancestral in his hands as regards his son. In such a case it is said that the son becomes a coparcener with the father as

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(*w*) (1926) 49 Mad. 98, 103, 115, 93 I.C. 662, ('26) A.M. 273, *supra*.

(*w*1) *Gowli Buddanna* v. *C.I.T. Mysore* ('66) A.S.C. 1523; *Sitabai* v. *Ramchandra* ('70) A.S.C. 343; *Narendranath* v. *W.T. Commissioner* ('70) A.S.C. 14.

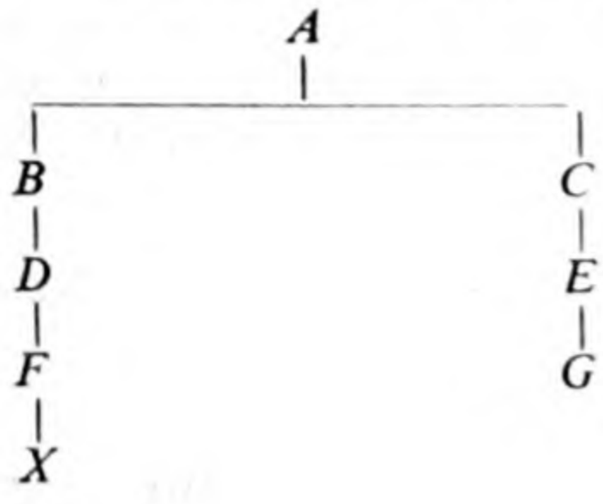
(*w*2) *Sitabai* v. *Ramchandra* ('70) A.S.C. 343.

(*w*3) *Attorney General of Ceylon* v. *A. R. Arunachalam Chettiar* (1957) A.C. 540 (P.C.); *Sitabai* v. *Ramchandra supra*.

(*x*) *Commissioner of Income Tax* v. *Luxminarayan* (1935) 59 Bom. 618, 37 Bom. L.R. 692, 159 I.C. 424, ('35) A.B. 412.

(*y*) *Sundar Lal* v. *Chhittar Mal* (1907) 29 All. 1; *Anandrao* v. *Vasantrao* (1907) 9 Bom. L.R. 595 [P.C.].

regards the property so inherited, and the coparcenary consists of the father and the son. But this does not mean that a coparcenary can consist only of a father and his sons. It is not only the sons but also the grandsons and great-grandsons who acquire an interest by birth in the coparcenary property. Thus if *A* inherits property from his father and he has two sons *B* and *C*, they both become coparceners with him as regards the ancestral property. *A*, as the head of the family, is entitled to hold the property and to manage it, and hence he is called the *manager* of the property. If *B* has a son *D*, and *C* has a son *E*, the coparcenary will consist of the father, sons and grand-sons, namely *A*, *B*, *C*, *D* and *E*, as shown in the accompanying diagram. Further, if *D* has a son *F*, and *E* has a son *G*, the coparcenary will consist of the father, sons, grandsons, and great-grandsons, in all it will consist of seven members. But if *F* has a son *X*, *X* does not become a coparcener, for a coparcenary is limited to the head of each stock, and his sons, grandsons, and great-grandsons. *X* being the *great-great-grandson of A* cannot be a member of the coparcenary so long as *A*, the holder of the joint property, is alive.



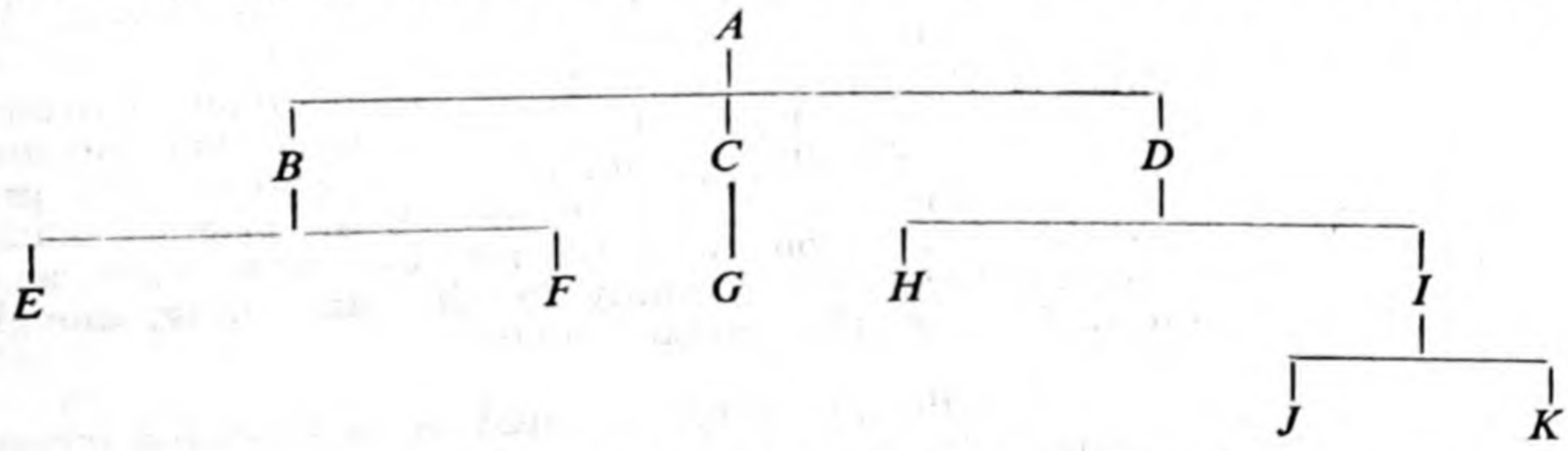

**214. Formation of coparcenary.**—(1) The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within *four* degrees *counting from and inclusive* of such ancestor (or *three* degrees *exclusive* of the ancestor). No coparcenary can commence without a common male ancestor, though after his death it may consist of *collaterals*, such as brothers, uncles and nephews, cousins, etc.

(2) A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof (*z*).

(3) No female can be a coparcener although a female can be a member of a joint Hindu family [see § 217].

*Illustration*

The following diagram shows a coparcenary consisting of several families, *A* with his three sons *B*, *C* and *D* and their sons and grandsons constitute the "main" family. *B* with his two sons *E* and *F*, *C* with his son *G*, *D* with his sons *H* and *I* and his grandsons *J* and *K*, and *I* with his sons *J* and *K*, constitute "branch" families. All the families have one common ancestor *A*. Each branch family has also its own head, namely *B*, *C*, *D* and *I*. On *A*'s death the coparcenary will consist of the three brothers, *B*, *C* and *D* and their male issue. On the death of *B* and *C*, the coparcenary will consist of *D*, his *nephews E*, *F* and *G* and his male issue *H*, *I*, *J* and *K* who stand in the relation of *cousins* to *E*, *F* and *G*.




*Genesis of coparcenary.*—A coparcenary is created in some such way as the following:—A Hindu male *A*, who has inherited no property at all from his father, grandfather,

(*z*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 154-157. Reference may also be made to *Bhagwan Dayal* v. *Reoti Devi* ('62) A.S.C. 287. Also see § 228A *infra*.

or great-grandfather, acquires property by his own exertions. *A* has a son *B*, *B* does not take any vested interest in the self-acquired property of *A* during *A*'s liftime, but on *A*'s death he *inherits* the self-acquired property of *A*. If *B* has a son *C*, *C* takes a vested interest in the property by reason of his birth, and the property inherited by *B* from his father *A* becomes ancestral property in his (*B*'s) hands, and *B* and *C* are coparceners as regards the property. If *B* and *C* continue joint, and a son *D* is born to *C*, he enters the coparcenary by the mere fact of his birth. And if a son *E* is subsequently born to *D*, he too becomes a coparcener.

*Composite family.*—As regards what is described in the South as a "composite family" reference may be made to the undernoted cases (*z*1).

**215. Coparcenary not limited to four degrees from common ancestor.**—Though every coparcenary must have a common ancestor to start with, it is not to be supposed that every extant coparcenary is limited to *four* degrees from the *common ancestor*. A member of a joint family may be removed *more than four* degrees from the common ancestor (*original* holder of coparcenary property), and yet he may be a coparcener. Whether he is so or not depends on the answer to the question whether he can *demand a partition* of the coparcenary property. If he can, he is a coparcener, but not otherwise. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the *last* holder, however, remote he may be from the common ancestor or *original* holder of the property.

When a member of a joint family is removed more than four degrees from the *last* holder, he cannot demand a partition, and therefore he is not a coparcener [ills. (a) and (b)]. On the death, however, of the last holder, he would become a member of the coparcenary, if he was *fifth* in descent from him, and would be entitled to a share on partition, *unless* his father, grandfather and great-grandfather had all predeceased the last holder. The reason is—and here we have another important rule bearing on the subject in hand—that whenever a break of more than three degrees occurs between any holder of property [*A* in ill. (d)] and the person who claims to enter the coparcenary after his death [*E* in ill. (d)], the line ceases in that direction [i.e., the direction of *C*, *D*1 and *E* in ill. (d)] and the survivorship is confined to those collaterals and descendants [*D* in ill. (d)] who are within the limit of four degrees (*a*) [ills. (c) and (d)].

*Illustrations*

(a) *A* inherits certain property from his father *X*. He has a son *B* and a grandson *C*, both members of an undivided family. *A*, *B* and *C* are coparceners. *A* son *D* is then born to *C*. *D* becomes a coparcener by birth with *A*, *B* and *C*. Subsequently a son *E* is born to *D*. *E* is not a coparcener, for being *fifth* in descent from *A*, he cannot demand a partition of the family property. On *A*'s death, however, *B* will become the head of the joint family and *E* will step into the coparcenary as the great-grandson of *B*, though he is *fifth* in descent from *A*, the *original* holder. Likewise, on *B*'s death, *F* (*E*'s son) will step into the coparcenary as great-grandson of *C*, the head of the family for the time being, though he is *sixth* in descent from *A*, the *original holder*.

*A*
|
*B*
|
*C*
|
*D*
|
*E*
|
*F*

Note that the property inherited by *A* from his *father* is ancestral in his hands. He is not the owner of the property: he is entitled merely to hold and manage the property as the head of the family for and on behalf of the family. The ownership of the property is in the joint family consisting of

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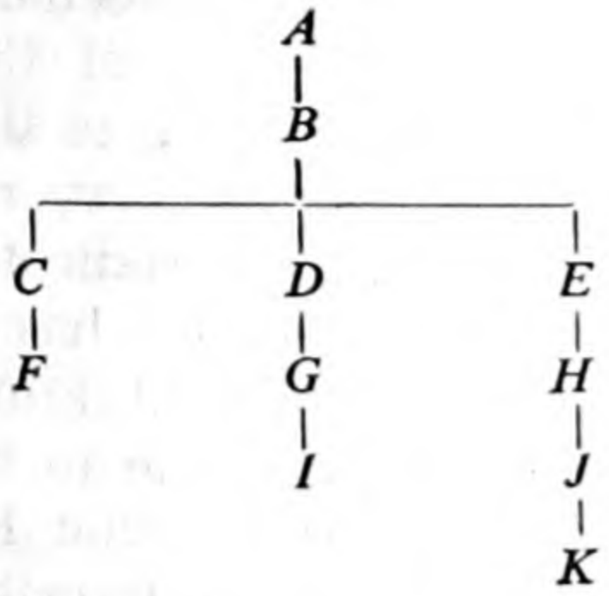
(*z*1) *Subbayya* v. *Sitaramamma* ('59) A.A.P. 86; *Venkatasubba Reddi* v. *Pitchamma* ('60) A.A.P. 263; *Veerapa Naidu* v. *Venkaiah* ('61) A.A.P. 534.

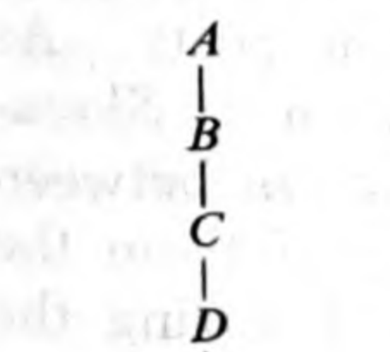
(*a*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444; *Yenumula* v. *Yenumula* (1870) 6 Mad. H.C. 93.




himself and his three descendants *B*, *C* and *D*. They are all co-owners, or, as the expression goes, coparceners.

(b) Suppose a coparcenary consisted originally of *A*, *B*, *C*, *D*, *E*. *F*, *G* and *H*, with *A* as the common ancestor.—Suppose *A* dies first, then *B*, then *C*, then *D*, and then *E*, and that *G* has then a son *I*, and *H* has a son *J*, and *J* has a son *K*. On *E*'s death the coparcenary will consist of *F*, *G*, *H*, *I*, *J* and *K*. Suppose that *G*, *H* and *J* die one after another, and the only survivors of the joint family are *F*, *I* and *K*. Are *I* and *K* coparceners with *F*? Yes, though *I* is *fifth* in descent from *A*, and *K* is *sixth* in descent from *A*. The reason is that either of them *can demand a partition* of the family property from *F*. Here the coparcenary consists of three *collaterals, namely, F, I* and *K* (*b*).

(c) *A* inherits certain property from his father *X*. *A* has a son *B*, a grandson *C*, a great-grandson *D*, and a great-great-grandson *E*. *A*, *B*, *C* and *D* are coparceners; *E* is not. On *A*'s death, however, *E* will step into the coparcenary of which *B* will become the head. On *B*'s death after *A*, the coparcenary will consist of *C*, *D* and *E* with *C* as the head. On *C*'s death after *A* and *B*, the coparcenary will consist of *D* and *E* with *D* as the head. *Suppose now that B, C* and *D all die in the lifetime of A*. Does *E* become a coparcener with *A*? The answer is, no; for *E* is *fifth* in descent from *A*. The result is that *A* becomes the sole coparcener, and on his death the coparcenary property will pass by *succession* to his *heirs* according to the order given in § 43. If *A* has left nearer heirs than *E*, the property will pass to them. If *E* is the nearest heir of *A* living at the time of *A*'s death, the coparcenary property held by *A* will go to him as his *heir*. The law is that property held by a sole surviving coparcener passes on his death by *succession* to his heirs.




(d) *A* inherits certain property from his father *X*. *A* has a son *B*, a grandson *C*, two great-grandson *D* and *D*1, and a great-great-grandson *E* by *D*1, all members of a joint family. Here *A*, *B*, *C*, *D* and *D*1 are coparceners, *E* is not, being more than four degrees removed from *A*. Suppose *B* dies first. The coparcenary will now consist of *A*, *C*, *D* and *D*1. The death of *B* does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *C* dies next. The coparcenary will now consist of *A*, *D* and *D*1. The death of *C* does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *D*1 dies next. The coparcenary will now consist of *A* and *D*. The death of *D*1 does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *A* dies next, *D* now becomes the sole surviving coparcener, and the joint family property will pass to *D* by survivorship. *The death of A does not introduce E into the coparcenary*. The reason is that at the time of *A*'s death, *E*'s father (*D*1), his grandfather (*C*) and his great-grandfather (*B*), were all dead.

The following passage from Mayne's "Hindu Law and Usage" (9th ed., s. 271) deals with coparceners:—

"The question in each case will be, who are the persons who have taken an interest in the property *by birth*. The answer will be, that they are the persons who offer the funeral cakes to the owner of the property, that is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single coparcenary with himself. Everyone of these descendants is entitled to offer the funeral cake to him, and therefore everyone of them obtains by birth an interest in his property. But the son of one of the great-grandsons would not offer the cake to him, and therefore is out of the coparcenary, *so long as the common ancestor is alive*. But while fresh links are continually being added to the chain of descendants by birth, so earlier links are being constantly removed from the upper end of the chain by death. So long as the principle of survivorship continues to operate, the right to the property will devolve from those who are higher in the line to those who are lower down. As each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth."

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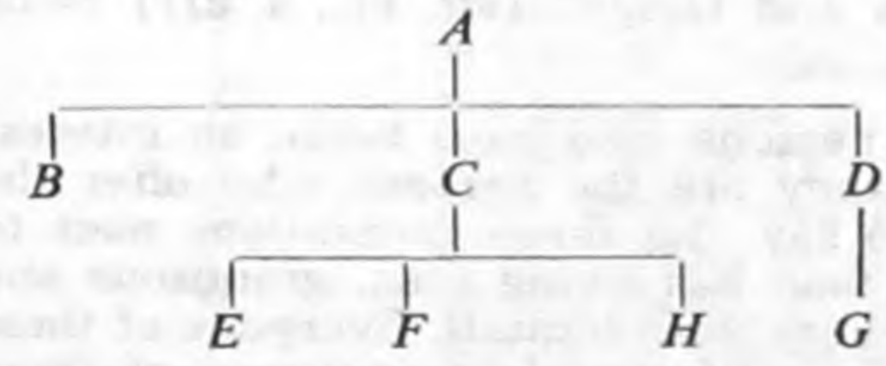
(*b*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444.

**216. Undivided coparcenary interest.**—The essence of a coparcenary under the Mitakshara law is *unity of ownership*. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth (*c*). His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family (*d*). It is only *on a partition* that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is "undivided coparcenary interest." The nature and extent of that interest is defined in § 235. The rights of each coparcener until a partition takes place consist in a *common possession and common enjoyment* of the coparcenary property. As observed by the Privy Council in *Katama Natchiar* v. *The Rajah of Shivagunga* (*e*), "there is *community of interest and unity of possession* between all the members of the family, and upon the death of any one of them the others may well *take by survivorship* that in which they had during the deceased's lifetime a common interest and a common possession." The latter part of this proposition must now be read in the context of sections 6 and 30 of the Hindu Succession Act, 1956, in cases where those sections are applicable.

In a recent decision the Supreme Court summarised the position and observed that the coparcenary property is held in collective ownership by all the coparceners in a quasi corporate capacity. The incidents of coparcenary are: first, the lineal male descendents of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendents can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it is for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member passes on his death to the surviving coparceners (*e*1).

*Illustration*

Suppose a family to consist of *A* and his sons *B* and *C*; on a partition each will take one-third. But if *D* was born while the family remained joint, each would take one-fourth. Suppose the family still to remain undivided; on the death of *A*, the possible shares of the three sons would be enlarged to one-third; and if *B* were subsequently to die without issue, the shares of *C* and *D* would be enlarged to one-half. As *C* and *D* married, their sons *E*, *F* and *G* would enter into the family, and acquire an interest in the property, but that interest again would be a shifting interest, depending on the state of the family. If *C* were to die leaving only two sons *E* and *F* and they claimed a partition against *D*, *E* and *F* would each take one-half of one-half, and *D* would take the other half. But if *H* had previously been born, *E*, *F* and *H* would each take one-third of one-half, that is, one-sixth each. If they put off their claim for a division till *D* and *G* had both died, *E*, *F* and *H* would each take one-third of the whole (*f*).




(*c*) *Appovier* v. *Rama Subba* (1886) 11 M.I.A. 75, 89.

(*d*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 154, 156.

(*e*) (1863) 9 M.I.A. 539, 543, 611.

(*e*1) *State Bank of India* v. *Ghamandi Ram* ('69) A.S.C. 1330, 1333.

(*f*) Mayne's "Hindu Law," 10th ed. 165A.

Note that on a partition between *C* and *D* after the death of *A* and *B*, *C* would take one-half and *D* would take the other half. If *C* is dead, his issue *E*, *F* and *H* will take *per stirpes* as regards *D*, that is, they will take the one-half share of *C*, and *D* will take the other half, but as regards each other they will take *per capita*, that is, each will take an equal one-sixth share

The interest of a coparcener in an undivided Mitakshara family *is not individual* property (*g*). But the interest of a coparcener in an undivided Dayabhaga family is individual property (*h*). See § 279.

**217. Females cannot be coparceners.**—No female can be a coparcener under the Mitakshara law (*h*1). Even a wife, though she is entitled to maintenance out of her husband's property and has to that extent an interest in his property, is not her husband's coparcener (*i*). Nor is a mother a coparcener with her sons (*j*) nor a mother-in-law with her daughter-in-law (*k*). There can be no coparcenary between a mother and daughter among devadasees (*l*). Nor can a widow succeeding under the Hindu Women's Rights to Property Act to her husband's share in a joint family be a coparcener (*m*). See Sec. 6 of the Hindu Succession Act, 1956.

## II.—COPARCENARY PROPERTY

**218. Obstructed and unobstructed heritage.**—(1) The Mitakshara divides property into two classes, namely, *apratibandha daya* or unobstructed heritage, and *sapratibandha daya* or obstructed heritage. Property in which a person acquires an interest *by birth* is called unobstructed heritage. It is called unobstructed, because the accrual of the right to it is not obstructed by the existence of the owner.

Thus property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather (*n*), is unobstructed heritage as regards his own male issue, that is, his son, grandson, and great-grandson (*o*). His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth. *Ancestral* property is unobstructed heritage.

Property, the right to which accrues *not by birth* but on the death of the last owner without leaving male issue, is called obstructed heritage. It is called obstructed, because the accrual of the right to it is obstructed by the existence of the owner.

Thus property which devolves on parents, brothers, nephews, uncles, etc., upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then they have a mere *spes successionis* or a bare chance of succession to the property, contingent upon their surviving the owner (*p*).

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(*g*) *Gharib Ullah* v. *Khalak Singh* (1903) 25 All. 407, 30 I.A. 165.

(*h*) *Sreemutty Soorjeemony Dossee* v. *Denobundoo* (1857) 6 M.I.A. 526, 553.

(*h*1) *Commissioner of Income Tax* v. *Mills* ('66) A.S.C. 240. Also see f.n. (*i*) below. Also see *Rajendra Nath* v. *Shiv Nath* ('71) A.A. 448; *Dasappa Setty* v. *Vedavathamma* ('72) A. Mys. 283.

(*i*) *Punna Bibee* v. *Radha Kissen Das* (1904) 31 Cal. 476; *Srimathi Sabitri* v. *Mrs. F. A. Savi* (1934) 13 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

(*j*) *Hira Singh* v. *Mst. Mangla* (1928) 9 Lah. 324, 330, 106 I.C. 877, ('28) A.L. 122; *Sital Prasad* v. *Sri Ram* (1944) Luck. 450.

(*k*) *The Commissioner of Income Tax* v. *Pannabai* (1943) Nag. 458, ('13) A.N. 160.

(*l*) *Gangamma* v. *Kuppammal* (1938) Mad. 789, ('39) A.M. 139.

(*m*) *Seetha Bai* v. *Narasimha* (1945) Mad. 568; *Maguni Padhano* v. *Lokananidhi* ('56) A. Orissa 1 [mother cannot act as a *de facto* manager or *Karta*]; *Radharam* v. *Jang Bahadur* (1945) 20 Luck. 305; *Seethamma* v. *Veerana* (1950) Mad. 1076.

(*n*) *Muhamad Husain* v. *Babu Kishva Nandan Sahai* (1937) 64 I.A. 250, (1937) All. 655, 39 Bom. L.R. 979, 169 I.C. 1, ('37) A.PC. 233.

(*o*) *Mst. Sirtaji* v. *Algu Upadhiya* (1937) 12 Luck. 273, 163 I.C. 935, ('36) A.O. 331.

(*p*) Mitakshara, Ch. I, s. 1, v. 3.

(2) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, some cases in which obstructed heritage also passes by survivorship. (Reference may be made to § 31 above and § 222 below and notes thereunder).

*Illustrations*

(a) *A* inherits certain property from his father. *A* has a son *B*. The property so inherited is unobstructed as regards *B*. That is to say, *B* becomes a coparcener *from his very birth* in the property with his father *A*, and on *A*'s death the property will pass to him by survivorship. The result would be the same if *A* had inherited the property from his paternal grandfather or great-grandfather.

(b) In the case put above, *A* has a grandson *C*, but no son. *C's* rights are the same as those of *B*.

(c) *A* inherits certain property from his brother. *A* has a son *B*. The property is *obstructed* in *A's* hands. *B* does not take any interest in it during *A's life*. After *A's* death, *B* will take it as *A's* heir by succession. The existence of *A* is an obstruction to the accrual of any rights in the property to *B*.

**219. Unobstructed heritage not recognized by the Dayabhaga.**—The distinction between obstructed and unobstructed heritage is peculiar only to the Mitakshara School. According to the Dayabhaga, all heritage is obstructed, for, according to the doctrines of that school, no person, not even a son, takes an interest by birth in the property of another. The Dayabhaga does not recognize the principle of survivorship. It recognizes only the right of succession and this right accrues for the first time on the death of the last owner. The Privy Council, however, has applied the doctrine of survivorship to property jointly inherited by two or more widows and two or more daughters even in cases arising under the Dayabhaga law [§ 31].

**220. Classification of property.**—Property, according to the Hindu law, may be divided into two classes, namely, (1) joint family property, and (2) separate property.

Joint family property may be divided, according to the source from which it comes, into—

(1) ancestral property [§§ 223-225]; and

(2) separate property of coparceners thrown into the common coparcenary stock [§ 227].

Property jointly acquired by the members of a joint family *with* the aid of ancestral property is joint family property. Property jointly acquired by the members of a joint family *without* the aid of ancestral property may or may not be joint family property; whether it is so or not is a question of fact in each case [§ 228].

The term "joint family property" is synonymous with "coparcenary property."

"Separate" property includes "self-acquired" property [§§ 222, 231].

**221. Incidents of joint family or coparcenary property.**—Joint family or coparcenary property is that in which every coparcener has a joint interest

and a joint possession (*q*). The incidents of a coparcenary were summarised in the undermentioned decision of the Supreme Court (*q*1). [See § 216 *supra*]. The following are the main incidents of joint family or coparcenary property:—

(a) it devolves by survivorship, not by succession [§ 229]: This proposition must now be read in the context of sections 6 and 30 of the Hindu Succession Act, 1956, in cases where those sections are applicable;

(b) it is property in which the male issue of the coparceners acquire an interest by birth.

The *joint family property* must be distinguished from the joint *property* of the English law. The joint property of the English law devolves like joint family property by survivorship. But the male issue of the joint tenants do not acquire any interest in it by birth. Two complete strangers may be joint tenants according to English law, but in no conceivable circumstance could they constitute a joint Hindu family, or hold property as a joint Hindu family. The fundamental principle of a joint Hindu family is the tie of sapindaship without which it is impossible to form a joint Hindu family (*r*).

Joint family property is purely a creature of Hindu law, and those who own it are called coparceners. The rights of coparceners are set forth in § 235 below. The distinction between joint family property and joint property comes into prominence only in two kinds of cases, namely, the case dealt with in § 223, sub-§ (2) [property inherited from maternal grandfather], and that dealt with in § 228 [joint acquisitions]. After leaving § 228 we shall use the expression "joint property" as equivalent to "joint family property."

**222. Incidents of separate or self-acquired property.**—A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sell it (*s*), or he may make a gift of it, or bequeath it by will, to any person he likes (*t*). It is not liable to partition (*u*), and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners (*v*).

*Explanation.*—The expression "male issue" in this and subsequent sections means and includes sons, sons' sons, and sons' sons' sons.

It is stated in some decisions of Courts that in the separate or self-acquired property of a Hindu, even if he be joint, no other coparcener, not even his male issue, acquires any interest by birth. The statement, so far as it reaches his coparceners other than his male issue, is unexceptionable. And so far as it relates to his absolute right to deal with such property it does not create any misconception. But some misconception does arise as to the incidents of such property in the hands of his male issue after his death. Although it is at times said that such property passes to the undivided sons by succession, the statement would not be quite accurate. The property would be unobstructed heritage. According to the Mitakshara "property in the paternal or grandpaternal estate is by birth" and the strict legal view is that the undivided sons take a right vested by birth both in the paternal grandfather's property as well as in the separate or self-acquired property of the father. But distinction is drawn between these two by the Mitakshara itself.

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(*q*) *Katama Natchiar* v. *The Raja of Shivagunga* (1863) 9 M.I.A. 539, 543, 611.

(*q*1) *State Bank of India* v. *Ghamandi Ram* ('69) A.S.C. 1330.

(*r*) *Karsandas* v. *Gangabai* (1908) 10 Bom. L.R. 184.

(*s*) *Muddun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71.

(*t*) *Rao Balwant Singh* v. *Rani Kishori* (1898) 20 All. 267, 25 I.A. 54 (gift); *Nagalingam* v. *Ramachandra* (1901) 24 Mad. 429; *Subbaya* v. *Surayya* (1887) 10 Mad. 251; *Somasundara* v. *Ganga* (1904) 28 Mad. 386; *Bawa Misser* v. *Raja Bishen* (1868) 10 W.R. 287, s.c. in app. 20 W.R. 137; *Sital* v. *Madho* (1877) 1 All. 394; *Baboo Beer Pertap* v. *Rajender* (1867) 12 M.I.A. 1, 39; *Nana Narain* v. *Huree Punth* (1862) 9 M.I.A. 96; *Purshotam* v. *Vesudeo* (1871) 8 Bom. H.C.O.C. 196.

(*u*) *Lochun Singh* v. *Nemdharee Singh* (1873) 20 W.R. 170; *Yamunabai* v. *Manubai* (1899) 23 Bom. 608.

(*v*) *Katama Natchiar* v. *Rajah of Sivagunga* (1863) 9 M.I.A. 539, 543, 613.

In case of ancestral property the son can assert an equal right with the father; while in case of his separate or self-acquired property the father has the unqualified right to deal with it as he pleases and in a manner which denies any right of interference by the son either to enforce partition or interdict an alienation (*x*). It would not be strictly accurate, therefore, to say that the undivided male issue does not take any interest by birth in the separate or self-acquired property of the father. It would be more appropriate to say that when the separate or self-acquired property of a Hindu father passes to his sons, living as members of a joint family, they take it as unobstructed heritage and by virtue of the texts to which reference has been made in f.n. (*x*) below.

It is now settled law that a father who is joint with his sons may sell his self-acquired property even though such property may be *immovable*. The father may sell such property without the concurrence of the sons (*z*). He may make an unequal distribution of such property among his sons (*a*), and he may make a gift of it to one son to the entire exclusion of the other son (*b*).

**223. Ancestral property.**—(1) *Property inherited from paternal ancestor.*—All property inherited by a male Hindu from his father (*c*), father's father, or father's father's father, is *ancestral* property. The essential feature of *ancestral* property according to the Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest in it *by birth*. Their rights attach to it *at the moment of their birth*. Thus if *A* inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property *as regards his male issue* (*d*). If *A* has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. But if he has sons, sons' sons, or sons' sons' sons in existence at the time, or if a son, son's son or son's son's son is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and A cannot claim to hold the property as absolute owner nor can he deal with the property as he likes (*e*).

A father cannot change the character of joint family property into absolute property of his son by merely making a will and bequeathing it or part of it to the son as if it was the self-acquired property of the father. In the hands of the son the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship as joint family property (*e*1).

It is important to note that the only property that can be *ancestral* is property inherited by a male Hindu from any one of his three immediate paternal ancestors, namely, his father, father's father, and father's father's father, and the only persons who are entitled to an interest in it by birth are the sons, sons' sons, and sons' sons' sons, of the inheritor. No other relation is entitled to any interest in such property *by birth*. A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons, and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property. The result is that if a person inheriting property from any one of his three immediate paternal ancestors has no son, son's son, or son's son's son, the property is his absolute property, and no relations of his are entitled to any interest in it in his lifetime (*f*).

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(*x*) Mitakshara Placitum 27, Ch. I, sec. 1; Placitum 9, Ch. I, sec. 5. These texts were recently considered by the Supreme Court in *Arunachala Mudaliar* v. *Muruganatha* [1954] S.C.R. 243, ('53) A.SC. 495

(*z*) *Muldun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71.

(*a*) *Bawa Misser* v. *Raja Bishen*, *supra*.

(*b*) *Sital* v. *Madho* (1877) 1 All. 394.

(*c*) *Kundanbai* v. *Satya Narayen* (1950) Nag. 491.

(*d*) *Mst. Sirtaji* v. *Algu Upadiya* (1937) 12 Luck. 273, 163 I.C. 935, ('36) A.O. 331.

(*e*) *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528; *Raja Ram Narain* v. *Pertum Singh* (1873) 11 Beng. L.R. 397; *Chuttan Lal* v. *Kallu* (1911) 33 All. 283, 8 I.C. 719 [alienation before birth].

(*e*1) *Valliammai Achi* v. *Naguppa Chettiar* ('67) A.S.C. 1153.

(*f*) *Ajoodhia* v. *Kasee* (1872) 4 N.W.P. 31; *Janki* v. *Nand Ram* (1889) 11 All. 194-197, 198 [F.B.]. See *Bejai Bahadur* v. *Bhupindar* (1895) 17 All. 456, 22 I.A. 139.

Property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue, even though it was inherited by him after the death of a life-tenant (*g*). Thus if a Hindu settles the income of his property on his wife for her life, and the property after her death passes to his son as his heir, it is ancestral property in the hands of the son as regards the male issue of such son.

*Illustrations*

(a) *A* inherits certain property from his father. *A* has a son *B*. The property so inherited is ancestral in *A*'s hands, and it must be held by him in coparcenary with *B*. *B* can enforce partition of it against *A*, in which event he will be entitled to one-half. If *B* continues joint with his father, the whole property will pass to him by survivorship on the father's death.

(b) *A* inherits two immovable properties from his father. *A* has no son, son's son, or son's son's son in existence at the time. *A* can alienate the properties at his pleasure. Suppose *A* alienates one of the properties, and a son, *B*, is subsequently born to him. *B* cannot claim any interest in the property alienated by *A* before his birth, but as regards the other property which still remains with *A*, *B* acquires an interest in it by birth, and *A* must thenceforth hold it in coparcenary with *B*.

(c) *A* inherits certain property from his father. *A* has no son, grandson or great-grandson, but he has a brother (or a paternal uncle). The brother (or uncle) does not take any interest in the property by birth. As regards the brother or uncle the property inherited by *A* is his separate property. *A* may therefore sell or mortgage (*h*) it, or make a gift of it to any one he likes, or he may dispose of it by will.

Where a number of sons inherit their father's self-acquired property; they hold it as joint family property (*i*). But now see sec. 19(b) of the Hindu Succession Act, 1956.

(2) *Property inherited from maternal grandfather.*—In *Venkayyamma* v. *Venkataramanayamma* (*j*), two brothers who *were living as members of a joint family* inherited certain property from their maternal grandfather. On the death of one of them leaving a widow, the question arose whether his share in the property so inherited passed to his widow by succession or to his brother by survivorship. Their Lordships of the Privy Council held that the property inherited by the two brothers was *joint property* in their hands, and that the undivided interest of the deceased passed on his death by survivorship to his brother, and not by succession to his widow. The effect of this decision is that the sons of a daughter inheriting to their maternal grandfather take as joint-tenants with benefit of survivorship and not as tenants-in-common. The Privy Council have now held that such property is not ancestral property (*k*).

The Privy Council explained their former decision thus: "The brothers took the estate of their maternal grandfather at the same time and by the same title and there was apparently no reason why they should not hold that estate in the same manner as they held other joint property. The rule of survivorship which admittedly governed their other property was held to apply also to the estate which had come to them from their maternal grandfather" (*l*). Their Lordships pointed out further that "it was not contended in that case that the estate was ancestral in the restricted sense in which the term is used in Hindu Law." It is submitted that the decision in the earlier case must

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(*g*) *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122, 133; *Beni Parshad* v. *Puran* (1896) 23 Cal. 262, 273.

(*h*) *Baijnath* v. *Maharaj Bahadur* (1933) 8 Luck. 28, 137 I.C. 814, ('32) A.O. 158.

(*i*) *Shyam Behari Singh* v. *Rameshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208, ('42) A.P. 213; *Mst. Ram Dei* v. *Mst. Gyarse* (1949) All. 160 (F.B.).

(*j*) (1902) 25 Mad. 678, 29 I.A. 156.

(*k*) *Muhammad Husain Khan* v. *Babu Kishya Nandan Sahai* (1937) 64 I.A. 250, (1937) All. 655, 39 Bom. L.R. 979, 169 I.C. 1, ('37) A.PC. 233. The decision in *Vythinatha Ayyar* v. *Yeggia Narayana* (1903) 27 Mad. 382 must be regarded as overruled, and those in *Jamna Prasad* v. *Ram Partab* (1907) 29 All. 677 and *Bishwanath* v. *Ganjadhar* (1918) 3 Pat. L.J. 168, 43 I.C. 370, ('17) A.P. 146 must be regarded as approved. *Seri Ram* v. *Chandramma* ('52) A. Hyd. 45.

(*l*) The father of the two brothers was living when they inherited their maternal grandfather's estate and the 'other property' was being enjoyed by three persons.

be confined to its own facts, and it was not necessary there to decide, nor was any opinion expressed on the precise question whether the property which a Hindu inherits from his maternal grandfather is ancestral property in the technical sense. Should this question arise hereafter it will have to be answered in accordance with the decision in the later case (*m*). A maternal *uncle*, however, is *not an ancestor*, and it has accordingly been held by the Madras High Court that property inherited from a maternal uncle is not ancestral property (*n*).

No such question can arise if the daughter takes an *absolute* estate as in Bombay, for her sons would then succeed to that property not as the heirs of their maternal grandfather, but as the stridhana heirs of their mother (*o*). See § 147(2) and § 151(11). Such question is also now not likely to arise in future inasmuch as now a daughter inherits absolutely all over India and her sons will succeed to that property as her stridhana heirs and not as the heirs of their maternal grandfather. See secs. 14, 15 and 16 of the Hindu Succession Act, 1956.

(3) *Property inherited from collaterals—property inherited from females.*—Excluding the case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father, or father's father's father. Property inherited by a person from any other relation is his separate property, and his male issue do not take any interest in it by birth. Thus property inherited by a person from collaterals, such as a brother, uncle, etc., or property inherited by him from a female, *e.g.*, his mother, is his separate property (*p*).

(4) *Share allotted on partition.*—The share which a coparcener obtains on partition of ancestral property is ancestral property *as regards his male issue.* They take an interest in it by birth (*q*), whether they are in existence at the time of partition or are born subsequently (*r*). Such share, however, is ancestral property only as regards his male issue. *As regards other relations*, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (*s*).

When the share allotted to a coparcener on partition consists of property which is subject to a mortgage, the fact that he subsequently clears it from the mortgage by his own self-acquisitions, does not alter the character of the property. The unencumbered property still remains ancestral, and his male issue acquires an interest in it by birth (*t*). It is otherwise where the mortgage has been *foreclosed*, and the mortgaged property is subsequently purchased by the coparcener with his own self-acquisitions (*u*).

(5) *Property obtained by a gift or will from paternal ancestor.*—Where a Hindu, instead of allowing his self-acquired or separate property to go by descent, makes a gift of it to his son, or bequeaths it to him by will, the question arises whether such property is the separate property of the son, or whether it is ancestral in the hands of the son as regards his (son's) male issue. This question had been answered in different ways by the different High Courts with the result that there was a considerable diversity of judicial

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(*m*) *Pandit Mohan Lal* v. *Pandit Ram Dayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*n*) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300.

(*o*) *Manibhai* v. *Shankerlal* (1930) 54 Bom. 323, 125 I.C. 433, ('30) A.B. 296.

(*p*) *Baboo Nund Coomar* v. *Razeeooddeen* (1873) 10 Beng. L.R. 183; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636.

(*q*) *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65; *Chatturbhooj* v. *Dharamsi* (1885) 9 Bom. 438; *Lakshmibai* v. *Ganpat* (1868) 5 Bom. H.C.O.C.J. 128.

(*r*) *Adurmoni* v. *Chowdhry* (1878) 3 Cal. 1, 8, where the son was born after partition.

(*s*) See *Bejai Bahadur* v. *Bhupindar* (1895) 17 All. 456, 22 I.A. 139.

(*t*) *Visalatchi* v. *Annasamy* (1871) 5 Mad. H.C. 150.

(*u*) *Balwant Singh* v. *Rani Kishori* (1898) 20 All. 267, 25 I.A. 54.

opinion. The question was considered by the Supreme Court in *Arunachala Mudaliar* v. *Muruganatha* (*v*).

In Calcutta (*w*) it had been held that such property would be ancestral. In Madras (*x*), upon the whole, the view seems to have been taken that the father can determine whether the property which he has so given shall be ancestral or self-acquired on the principle of "*cujus est dare ejus est disponere*," but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. In Bombay (*y*), on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention, it is deemed self-acquired. In Allahabad (*z*), the decision was that such property was self-acquired. In Oudh (*a*), it has been held that in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that such property is self-acquired. The question was left open by the Judicial Committee in the under-mentioned case (*b*). In one case in Patna where the donor stated that though the son may be malik after his death he wished to make the son malik in his presence, it was held by a Full Bench that the donee gets the property as ancestral property (*c*). A Full Bench of the Mysore High Court held that when a father bequeaths his self-acquired property to his son to be enjoyed by the latter exclusively as he likes after the testator's death, it does not become ancestral property in the hands of the son, and his sons cannot acquire any interest in such property by birth (*d*).

In *Arunachala Mudaliar* v. *Muruganatha* (*e*) the Supreme Court after a consideration of the texts on the subject and the variant opinions of the High Courts took the view that the question was primarily one of the intention of the donor or the testator to be gathered from the terms of the deed of gift or will. If there are no clear words describing the kind of interest intended to be given the Court would have to collect the intention from the language of the document taken along with the surrounding circumstances in accordance with the established canons of construction. The material question in such cases would be whether the grantor really wanted to make a gift of the property to his son or the apparent gift was only an integral part of a scheme to partition the same. There is no presumption that he intended the one or the other [Illus. (a)].

*Illustrations*

(a) *A* who had three sons, after giving certain properties to his wife and other relations, provided that the properties in Schedules *A*, *B* and *C* of the will which were his self-acquired properties shall be taken by his eldest, second and third sons respectively, and that the sons shall enjoy the properties allotted to them with absolute rights and with powers of alienation such as gift, exchange, sale, etc. from son to grandson hereditarily. It was held that the property bequeathed to the sons was not ancestral property in their hands *vis-a-vis* their own male issue: *Arunachala Mudaliar* v. *Muruganatha* (1954) S.C.R. 243, ('53) A.SC. 495.

(b) *A*, by his will, bequeathed the residue of his property to his three sons in the following terms: "My three sons aforesaid who are now alive, together with all the sons who may be born to me hereafter, shall divide all my properties into as many equal shares [as there be sons], and each son should take one share." The will contained a direction that the family house should not be divided between the sons until after the

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(*v*) (1954) S.C.R. 243, ('53) A.SC. 495; *Parthasarathi* v. *I.T. Commissioner* ('67) A.M. 227.

(*w*) *Muddun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71 [gift]; *Hazari Mall* v. *Abaninath* (1912) 17 C.W.N. 280, 18 I.C. 625. But see *Mukti Prokash* v. *Sm. Iswari* ('20) A.C. 746.

(*x*) *Tara Chand* v. *Reeb Ram* (1866) 3 Mad. H.C. 50 [will]; *Nagalingam* v. *Ramchandra* (1910) 24 Mad. 429 [will]; *Velayudhan* v. *Commissioner of Income-tax, Madras* (1945) Mad. 549; *Seeyali Achari* v. *Doraiswami* (1947) 2 M.L.J. 49, ('48) A.M. 46; *K. Venkatappayya* v. *K. Raghavayya* ('51) A.M. 318.

(*y*) *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 579 [will]; *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122.

(*z*) *Parsotam* v. *Janki Bai* (1907) 29 All. 354 [will].

(*a*) *Rameshar* v. *Rukmini* (1909) 14 Oudh Cases 244, 12 I.C. 770; *Musammat Brij Kunwar* v. *Rai Bahadur Pandit Sankata Prasad* (1929) 5 Luck. 400, 123 I.C. 849, ('30) A.O. 39; *Megh Raj* v. *Relu* ('51) A. Pepsu 138.

(*b*) *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1923) 50 I.A. 265, 45 All. 596, 76 I.C. 922, ('23) A.PC. 160.

(*c*) *Bhagwat Shukul* v. *Mt. Kaporni* (1944) 23 Pat. 599.

(*d*) *Syed Abdul Wajid* v. *Vishwanathan* ('50) A. Mysore 33.

(*e*) (1954) S.C.R. 243, ('53) A.SC. 495; *Sidramappa* v. *Babajappa* ('62) A. Mys. 38 [insurance policy—premiums paid by father]; *Penukka* v. *Kelukutty* ('59) A. Kerala 212, *Srinath Tewary* v. *Ramsurat Devi* ('59) A.P. 116. Also see *Karuppa Gounder* v. *Palaniammal* ('63) A.M. 245 (1963) Mad. 434. Reference may also be made to *Ram Parkash* v. *Radhe Shyam* ('63) A. Punj. 338.

death of *A*'s wives. *Held* by the High Court of Madras, that *there were no express words in the will indicating an intention* that the share bequeathed to each son should be held by him *as his self-acquired property*: therefore, the share bequeathed to each son was ancestral property in his hands, and the male issue of each son acquired an interest in it by birth: *Nagalingam* v. *Ramchandra* (1901) 24 Mad. 429.

(c) *A*, by his will, bequeathed the residue of his property to his son in the following terms: "After my death my son Mangaldas is the master [owner] of my estate. He is not to dispose of the estate, nor is he to give it in mortgage, but from the produce of rent thereof all the charges of the estate and of the family are to be disbursed, and the balance placed at interest at some proper place, but it is to belong to my son Mangaldas. Should he be under the necessity of giving the estate away by way of mortgage or selling them, he may do so on consulting the herein mentioned executors." *Held* by the High Court of Bombay, that *there were no words in the will indicating an intention* that the property should be held by him *as ancestral property;* therefore, the son took the property as his self-acquired property, and his male issue did not acquire any interest in it by birth: *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528.

The text of the Mitakshara referred to above is as follows:—"Whatever else is acquired by the coparcener himself without detriment to his father's estate, or as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs": Mitakshara, Chapter I, sec. 4, para 1.

The words "does not appertain to the co-heirs" mean "does not belong to the coparceners." In *Muddun Gopal* v. *Ram Buksh* (*f*), the Calcutta High Court held that the property given by a father to his sons cannot be said to have been acquired by them "without detriment" to their father's estate within the meaning of the above text, because it is not only given out of that estate, but in substitution for the undivided share of that estate: that the son is only getting by his father's gift that which, but for the gift, he would have received by descent; had he received it by descent, it would have been ancestral property in his hands; the character of the property is not changed because he receives it by way of gift.

A gift of property made by a father to his son *on the occasion of the son's marriage* is not ancestral property in the hands of the son. It comes within the words "gift at nuptials" in the above text, and it is his separate property (*g*).

(6) *Accretions.*—Accumulations of income of ancestral property (*h*), property purchased or acquired out of the income or with assistance of ancestral property (*i*), the proceeds of sale of ancestral property, and property purchased out of such proceeds (*j*), or obtained in lieu of such property (*j*1), are ancestral property.

It is well established that sons, grandsons and great-grandsons acquire a vested interest not only in the income and accretions of ancestral property which accrued after their birth, but also in the income and accretions which accrued prior to their birth (*k*).

**224. Character of father's and son's interest in ancestral property.**—Under the Mitakshara law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is *wholly independent of his father*. He does not claim through the father, and, therefore, a transfer by a father of his own interest in the ancestral property, where such transfer is allowed by law

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(*f*) (1863) 6 W.R. 71, 73.

(*g*) (1863) 6 W.R. 71, 73, supra. See also *Adhar Chandra* v. *Nobin Chandra* (1907) 12 C.W.N. 103.

(*h*) *Ramanna* v. *Venkata* (1888) 11 Mad. 246. Dissented from, in *Sivaramakrishnan* v. *Kaveri Ammal*, ('55) A. Mad. 705, I.L.R. 1956 Mad. 649.

(*i*) *Lal Bahadur* v. *Kanhaia Lal* (1907) 29 All. 244, 34 I.A. 65; *Umrithnath* v. *Goureenath* (1870) 13 M.I.A. 542; *Venkataramayya* v. *Krishna Rao* ('63) A.A.P. 305.

(*j*) *Krishnasami* v. *Rajagopala* (1895) 18 Mad. 73, 83.

(*j*1) *Maya Ram* v. *Satnam Singh* ('67) A. Punj. 353.

(*k*) *Isree Pershad* v. *Nasib Kooer* (1884) 10 Cal. 1017, 1021; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 581; *Ramanna* v. *Venkata* (1881) 11 Mad. 246.

[§ 257], cannot affect the interest of the son in the property (*l*). But the father has a *special* power of disposal of *ancestral* property for certain purposes specified in §§ 225, 226 and 295.

*Authority of father.*—There is under the Mitakshara law no distinction between the rights of a father and his sons as regards *ancestral* property, except that the father can dispose of (1) ancestral property, whether movable or immovable, for the payment of his debts, (2) ancestral *movable* property for the purposes specified in § 225, and (3) ancestral *immovable* property for the purposes specified in § 226. Further, the father so long as he is capable is the head and manager of the family. He is entitled to the possession of the joint property. He directs the concerns of the family within itself and represents it to the world. But as regards substantial *proprietorship*, he has no greater interest in the joint property than any of his sons. If the property is ancestral each son by birth acquires an interest equal to that of the father. And in the same manner his grandsons and great-grandsons take an interest on their respective births in the rights of their fathers who represent them, and therefore in unascertained shares of the entire property.

**225. Gift by father within reasonable limits of ancestral movables.**—Although sons acquire by birth rights equal to those of a father in ancestral property both movable and immovable, the father has the power of making *within reasonable limits* gifts of ancestral movable property without the consent of his sons for the purpose of performing "indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth" (*m*).

A "gift of affection" may be made to a wife, to a daughter, and even to a son. But the gift must be of property within reasonable limits. A gift of the whole, or almost the whole, of the ancestral movable property to one son to the exclusion of the other sons, cannot be upheld as a "gift through affection" prescribed by the text of law (*n*).

In Madras it has been held that a disposition may be made of a small portion of the property in favour of a daughter or other female member *even by will*, provided the father obtains the consent of his sons to such disposition (*o*). But the correctness of this decision is open to question, for no member of a joint family not even a father, can dispose of even his own coparcenary interest *by will* though the other coparceners may consent to the disposition [§ 256]. The soundness of the decision was questioned in the later Madras case of *Subbarami* v. *Ramamma* (*p*). In that case a father who was joint with his minor son bequeathed by his will certain family properties to his wife for her maintenance. There was no question of consent, the son being a minor. It was held that the will was invalid and inoperative as against the son, although it would have been a proper provision if made by the father by a *gift* during his lifetime. But now see sec. 30 of the Hindu Succession Act, 1956.

**226. Gift by father or other managing member of ancestral immovable property within reasonable limits.**—A Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immovable property for "pious purposes." But the alienation must be by an act *inter*

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(*l*) *Anandrao* v. *Vasantrao* (1907) 9 Bom. L.R. 595, at p. 597 [P.C.], affirming (1904) 6 Bom. L.R. 925.

(*m*) Mitakshara, Chap. I, sec. 1, para 27.

(*n*) *Lakshman* v. *Ramchandra* (1881) 5 Bom. 48, 7 I.A. 181, affirming (1876) 1 Bom. 561 [gift to son set aside]; *Nand Ram* v. *Mangal* (1909) 31 All. 359, 1 I.C. 797 [gift to son set aside]; *Bachoo* v. *Mankorebai* (1907) 31 Bom. 373, 34 I.A. 107, affirming (1905) 29 Bom. 51 [gift to daughter of Rs. 20,000 made out of income, *upheld*, the total value of the property being from Rs. 10 to 15 lacs]; *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.PC. 201 [gift to only daughter who was looking after the father]; *Kamakshi* v. *Chakrapany* (1907) 30 Mad. 452 [gift to daughter set aside as it was a *considerable* portion of the property]; *Hanmantappa* v. *Jivubai* (1900) 24 Bom. 547, 552, 555 [gift to daughter-in-law upheld]; *Madhusudan* v. *Ramji* (1920) 5 Pat. L.J. 516, 57 I.C. 341, ('20) A.P. 114 [provision before marriage for maintenance of son-in-law and, therefore, also of the daughter, upheld].

(*o*) *Appan Patra* v. *Srinivasa* (1917) 40 Mad. 1122, 40 I.C. 118, ('18) A.M. 531.

(*p*) *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637.

*vivos*, and not by will (*q*). A member of a joint family cannot dispose of by will any portion of the property even for charitable purposes and even if the portion bears a small proportion to the entire estate (*r*). But now see sec. 30 of the Hindu Succession Act, 1956.

In the undermentioned case (*s*) the Supreme Court examined the whole question and held that it was competent to a father to make a gift of immovable property to a daughter if the gift is of a reasonable extent having regard to the properties held by the family. In another decision the Supreme Court considered the question of the extended meaning given in numerous decisions to the expression "pious purposes" (*s*1). In a more recent decision the Supreme Court observed: "We see no reason to extend the scope of the words "pious purposes" beyond what has already been done in the two decisions of this Court" and rejected the contention that a husband could make any such gift of ancestral property to his wife out of affection on the principle of pious purposes (*s*2).

It has been held by the High Court of Madras that a father has no power to make a gift of ancestral *immovable* property to his wife to the prejudice of his minor sons (*t*). But it has been held by the same Court (*u*) and the High Court of Orissa (*u*1) that he can make a gift of a small portion of ancestral *immovable* property to his daughter at or after her marriage if the extent of the gift is reasonable and particularly if she is in poor circumstances. In Bombay, it has been held that a father cannot make a gift of even a small portion of the joint family immovable property to his daughter, though it be on the ground that she was looking after him in his old age (*v*). This decision was overruled by the Supreme Court in the case mentioned above (*v*1). In an Allahabad case (*w*) the Court refused to uphold a gift by a father to his daughter's father-in-law of a share in a village, though it was transferred to him as the marriage portion of the daughter. A gift to a stranger is equally invalid and the other members of the family, while in possession, need not sue to set it aside (*x*). A father has no power to make a gift of even his undivided interest in the joint family property to his concubine and such a gift would not become validated by the subsequent disruption of the family (*x*1).

**227. Property thrown into common stock.**—(1) Property which was originally the separate or self-acquired property of a member of a joint family may, by operation of the doctrine of blending, become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established (*y*), and it will not be inferred

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(*q*) *Gangi Raddi* v. *Tammi Raddi* (1927) 54 I.A. 136, 140, 50 Mad. 421, 425, 101 I.C. 79, ('27) A.P.C. 80; *Gopal Chand* v. *Babu Kunwar* (1843) 5 S.D.A. p. 24; *Raghunath* v. *Gobind* (1886) 8 All. 76 [provision for family idol]; *Ramalinga* v. *Sivachidambara* (1919) 42 Mad. 440, 49 I.C. 742, ('19) A.M. 809 [gift to an idol of a temple on the occasion of the donor's father's funeral], doubting *Rathnam* v. *Sivasubramania* (1893) 16 Mad. 353 [gift of a silver vehicle to a temple]; *Palwanna Nadar* v. *Annamalai Ammal* ('57) A.M. 330; *Rathinasabapathy* v. *Saraswathi* ('54) A.M. 307, (1953) 2 M.L.J. 459; *Sri Thakurji* v. *Nanda* (1921) 43 All. 560, 63 I.C. 546, ('21) A.A. 333 [gift to an idol]; *Kalu* v. *Barsu* (1895) 19 Bom. 803 [gift to plaintiff as worshipper of a deity—gift not upheld]; *Tatoba* v. *Tarabai* (1957) 59 Bom. L.R. 633; *Amar Chandra* v. *Saradamayee* (1930) 57 Cal. 39, 123 I.C. 660, ('29) A.C. 787. See also West and Buhler, 4th ed., p. 204, note (*l*), and p. 686, note (g), and *Haridas* v. *Devkuvarbai* (1926) 50 Bom. 443, 449, 97 I.C. 820, ('26) A.B. 408 [gift to daughter upheld on the ground that the son had consented to it]; *Dhondiram* v. *Bhagubai* ('56) A. Hyd. 118. Also see *Lalta Prasad* v. *Sri Mahadeoji* (1920) 42 All. 461, 58 I.C. 667, ('20) A.A. 116.

(*r*) *Jawahar Lal* v. *Shri Thakur Radha Gopalji Maharaj* (1945) All. 177.

(*s*) *Guramma* v. *Mallappa* (1964) A.SC. 5, 10, 66 Bom. L.R. 284.

(*s*1) *Kamla Devi* v. *Bachulal Gupta* ('57) A.S.C. 434 (see § 181 B at p. 220) *supra*.

(*s*2) *Perumalakkal* v. *Kumaresan* ('67) A.S.C. 569.

(*t*) *Rayakkal* v. *Subbanna* (1892) 16 Mad. 84; *Sivagnana* v. *Udayar* ('61) A.M. 356 [marriage gift to second wife].

(*u*) *Sundaramayya* v. *Sitamma* (1912) 35 Mad. 628, 10 I.C. 56 [gift of 8 out of 200 acres upheld].

(*u*1) *Tara Sahuani* v. *Raghunath* ('63) A. Orissa 50.

(*v*) *Jinnappa Mahadevappa* v. *Chimmava Krishnappa* (1935) 59 Bom. 459, ('35) A.B. 324; *Jagat Krishna* v. *Ajit Kumar* ('64) A. Orissa 76.

(*v*1) See f.n. (*s*) above.

(*w*) *Ganga* v. *Pirthi Pal* (1880) 2 All. 635.

(*x*) *Riasat Ali* v. *Iqbal Rai* (1935) 16 Lah. 659, 157 I.C. 75, ('35) A.L. 827.

(*x*1) *Nagaratnamba* v. *Kunuku Ramayya* ('68) A.S.C. 253.

(*y*) *Venkata Reddi* v. *Lakshmama* ('63) S.C. 1601, (1964) 1 S.C.J. 45; *Narayana Raju* v. *Chamaraju* ('68) A.S.C. 1276; *Raj Kishore* v.

from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son (*z*) nor from the mere failure of a member to keep separate accounts of his earnings (*a*). So also acts of generosity or kindness should not be construed as admissions of legal obligation (*b*). Separate property thrown into the common stock is subject to all the incidents of joint family property (*c*).

(2) Similarly, where members of a joint family, who have control over the joint estate, blend with that estate property in which they have separate interests, the effect is that all the property so blended becomes joint family property (*d*).

(2a) The basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener. The doctrine cannot be applied to the case of a Hindu female who has acquired immovable property from her father for she is not a coparcener (*d*1).

(2b) The act by which the coparcener throws his separate property into the common stock is a unilateral act and a matter of individual volition. As soon as he declares his intention to treat his self acquired property as that of the joint family the property assumes the character of joint family property (*d*2).

When a coparcener throws his separate property into the common stock he makes no gift under the law relating to transfer of property for in such a case there is no donor or donee and no question of acceptance of the property thrown into the common stock arises. It was on the basis of these considerations that the Supreme Court held that such an unilateral act of throwing property into the common stock does not invite the operation of gift tax (*d*2).

(3) The above rules apply also to brothers living together and forming a joint family governed by the Dayabhaga (*e*).

(4) The doctrine of blending on which this paragraph is founded cannot be involved in regard to property held by a Hindu female as a limited owner (*e*1).

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*Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249 ('32) A.L. 636; *Chinna Venkata* v. *Venkata Rama* ('57) A. Andh. Pra. 93; *D. Sadasiva* v. *B. Rattain* ('58) A. Andh. Pra. 145; *Venkataraju* v. *Yedukondalu* ('58) A. Andh. Pra. 147 (the burden of proving such blending is a heavy one); *Subramania* v. *Commissioner of Income-tax* ('55) A.M. 623; *Bipra Charan* v. *Mohan Sundar* ('60) A. Orissa 109; *Mulam Chand* v. *Kanchhendilall* ('58) A.M.P. 304; *Pratap Kishore* v. *Gyanendranath* ('51) A. Orissa 313; *Narayanan* v. *Krishnan* ('55) A. Tr. Co. 199; *Venkatasubramania* v. *Easwara Iyer* ('66) A.M. 266; *Mahalaxmiamma* v. *Radhakrishna Rao* ('68) A. Mys. 229; *Mohan Rao* v. *Satyanarayana* ('72) A.A.P. 233 [self-acquired property shown by manager as of joint family—no explanation].

(*z*) *Gopal* v. *Kesheosa* (1936) Mad. 65, 165 I.C. 350, ('36) A.M. 185.

(*a*) *Vythianatha* v. *Varadaraja* (1938) Mad. 696, ('38) A.M. 841.

(*b*) *Appalaswami* v. *Suryanarayanamurti* (1948) Mad. 440 (P.C.).

(*c*) *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65; *Suraj Narain* v. *Ratan Lal* (1917) 44 I.A. 201, 40 All. 159, 40 I.C. 988, ('17) A.PC. 12; *Radhakant Lal* v. *Nazma Begum* (1918) 45 Cal. 733, 45 I.C. 806, ('17) A.PC. 128 [property inherited from brother thrown into common stock]; *Lala Muddun Gopal* v. *Khikhinda Koer* (1891) 18 Cal. 341, 18 I.A. 9; *Krishnaji* v. *Moro Mahadeo* (1891) 15 Bom. 32, 39-40; *Tribhovandas* v. *Yorke Smith* (1897) 21 Bom. 349; *Gopalsami* v. *Chinnasami* (1884) 7 Mad. 458 [property inherited from maternal grandfather thrown into common stock]; *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228; *Rampershad* v. *Sheochurn* (1866) 10 M.I.A. 490, 505. See also *Hurpurshad* v. *Sheo Dyal* (1876) 3 I.A. 259, 26 W.R. 55; *Shanker Bakhsh* v. *Hardeo Baksh* (1889) 16 Cal. 397, 16 I.A. 71.

(*d*) *Rajani Kant Pal* v. *Jaga Mohan Pal* (1923) 50 I.A. 173, 50 Cal. 439, 73 I.C. 252, ('23) A.PC. 57.

(*d*1) *Mallesappa* v. *Mallappa* ('61) A.SC. 1268.

(*d*2) *Goli Eswariah* v. *Commissioner of Gift Tax* ('70) A.SC. 1722.

(*e*) (1923) 50 I.A. 173, 50 Cal. 439, 73 I.C. 252, ('23) A.PC. 57, *supra*.

(*e*1) *Mallesappa* v. *Mallappa* ('61) A.SC. 1268.

*Illustrations*

(a) Three Hindu brothers, *A*, *B* and *C*, lived together as members of a joint family in their ancestral house at Nagothna, the house being the only property left by the father. Subsequently *A* and *B* went to Baroda and got employment there as clerks. *C* remained at home to look after the family affairs. Both *A* and *B* remitted money from time to time to *C* for the support of the family living at Nagothna. *C* applied the income towards the support of the family, and with the savings from such remittances he purchased certain immovable property in his own name. *A* and *B* sued *C* to recover possession of the property from *C*, alleging that it was their self-acquired property. *Held*, that the property was the self-acquired property of *A* and *B*, and they were entitled to it to the exclusion of *C*, unless it appeared that the property had been treated by *A* and *B* as joint family property. As there was no finding on the point, the High Court referred the following issue to the lower Court, namely, whether as a fact *A* and *B* had voluntarily thrown the property into the joint stock with the intention of abandoning all separate claims upon it: *Krishnaji* v. *Moro Mahadev* (1890) 15 Bom. 32.

(b) A joint Hindu family, consisting of a father and his three sons, owns certain villages which are the joint property of the family. The father as the head of the family opens an account with a banker with whom he deposits from time to time the income arising from the villages. The father also earns a large sum of money every year, and these earnings also are deposited by him with the banker in the *same* account. There is nothing to show that he discriminated between the income of the joint properties and his personal income. On the other hand the evidence shows that he blended them both in one general account. Upon these facts it was held by the Privy Council that the self-acquisitions of the father must be treated as joint family property, and that he had no power, therefore, to dispose of them by his will: *Lal Bahadur* v. *Kanhaiya Lal* (1906) 29 All. 244, 34 I.A. 65.

*Separate property and limitation.*—Where a coparcener discontinues his possession of property belonging to him separately in favour of the joint estate, his right to claim the property as separate may be barred by limitation (*f*).

*House built on ancestral land with separate funds.*—If a member of a joint family builds a house on ancestral land with his own moneys, the other members have a claim on him only for compensation for their share of the land (*g*).

**228. Property jointly acquired.**—(1) Where property has been acquired in business by *persons constituting a joint Hindu family* by their joint labour, the question arises whether the property so acquired is joint family property, or whether it is merely the joint property of the joint acquirers, or whether it is ordinary partnership property. If it is *joint family property*, the male issue of the acquirers take an interest in it by birth [§ 221, Sub-§ (1)]. If it is the *joint property* of the acquirers, it will pass by survivorship, but the male issue of the acquirers do not take interest in it by birth [§ 221, sub-§ (2)]. If it is *partnership property*, it is governed by the provisions of the Indian Partnership Act, 1932, so that the share of each of the joint acquirers will pass on his death to his heirs, and not by survivorship.

(2) If the property so acquired is acquired *with* the aid of joint family property, it becomes *joint family property* (*h*).

(3) If the property so acquired is acquired *without* the aid of joint family property, the presumption is that it is the *joint property* of the joint acquirers (*i*), but this presumption may be rebutted by proof that the persons

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(*f*) *Vasudeva* v. *Maguni* (1901) 24 Mad. 387, 28 I.A. 81; *Babaji* v. *Jivaji* (1930) 32 Bom. L.R. 314, 127 I.C. 204, ('30) A.B. 333.

(*g*) *Vithoba* v. *Hariba* (1869) 6 Bom. H.C. (A.C.) 54; *Periakaruppan* v. *Arunachelam* (1927) 50 Mad. 582, 102 I.C. 290, ('27) A.M. 676 [house built by sole surviving coparcener—subsequent adoption by him—adopted son held entitled to one-half share in the land].

(*h*) *Umrithnath* v. *Goureenath* (1870) 13 M.I.A. 542; *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65; *Krishnan* v. *Rangachari* ('65) A.M. 340.

(*i*) *Chandrabhaga* v. *Anandrao* (1939) Nag. 293.

constituting the joint family acquired the property not as members of a joint family, but as members of an ordinary trade partnership resting on contract, in which case the property will be deemed to be *partnership property* (*j*).

In the absence of any proof of partnership, property jointly acquired by the members of a joint family *without* the aid of joint family property is, as stated above, to be presumed to be *joint*. But is it also to be presumed to be *joint family property*? It was at one time held by the High Court of Bombay that property jointly acquired without the aid of joint family property was not joint family property and that the male issue of the joint acquirers did not acquire an interest in it by birth, *unless* it was thrown into the common stock (*k*). In later cases, however, it has been held that such property must be presumed to be *joint family property* (*l*), and this has been followed in Lahore (*m*), Nagpur (*n*) and Oudh (*o*). In Madras it has been held that property so acquired must be presumed to be joint family property (*p*) unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property (*q*).

**228A. Joint acquisitions by some members.**—So long as a family remains an undivided family, two or more members of it, whether they are members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit; but all the members of a branch or of a sub-branch, can form a distinct and separate corporate unit within the larger corporate family and hold property as such. But the law does not recognize some of the members of a joint family belonging to different branches or even to a single branch, as a corporate unit. Any acquisition of property by some such persons could be held by them only as co-sharers or co-tenants and the property would pass by inheritance and not survivorship (*q*1).

**229. Survivorship—Devolution of deceased coparcener's interest.**—(1) On the death of a coparcener, his interest in the coparcenary property does not pass by succession to his heirs. It passes by survivorship to the other coparceners, subject to the rule that where the deceased coparcener leaves male issue, they represent his rights to a share on partition (*r*), and are his sole legal representatives for purposes of execution of money decrees passed against him (*s*). The rule of survivorship here stated was modified by the Hindu Women's Rights to Property Act, 1937. It is now subject to the provisions of sections 6 and 30 of the Act of 1956 in cases where those sections are applicable. See § 35 *ante* and sections 6 and 30 of the Act of 1956 and Notes thereunder for their effect upon the rights of coparceners and coparcenary property.

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(*i*) *Rampershad* v. *Sheo Churn* (1866) 10 M.I.A. 490, 506; *Gopalasami* v. *Arunachelam* (1904) 27 Mad. 32; *Chatturbhooj* v. *Dharamsi* (1885) 9 Bom. 438, 445; *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

(*k*) *Chatturbhooj* v. *Dharamsi* (1885) 9 Bom. 438, 445.

(*l*) *Laldas* v. *Motibai* (1908) 10 Bom. L.R. 175; *Haridas* v. *Devkuvarbai* (1926) 50 Bom. 443, 97 I.C. 820, ('26) A.B. 408 [property jointly acquired by father and sons]. See also *Karsondas* v. *Gangabai* (1908) 32 Bom. 479.

(*m*) *Sanwal Das* v. *Kure Mal* (1928) 9 Lah. 470, 109 I.C. 779, ('28) A.L. 224.

(*n*) *Sitalprasad* v. *Ramprasad* (1944) Nag. 17.

(*o*) *Lachmi Narain* v. *Musaddi Lal* (1942) 17 Luck. 327, 197 I.C. 247, ('42) A.O. 155.

(*p*) No such presumption arises where the business is carried on by *some* only of the members of the joint family; *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149.

(*q*) (1902) 25 Mad. 149, 155-156, *supra*.

(*q*1) *Bhagwan Dayal* v. *Reoti Devi* ('62) A.SC. 287, 304.

(*r*) *Katama Natchiar* v. *The Rajah of Shivagunga* (1863) 9 M.I.A. 539, 543, 615; *Musammat Lakhpati* v. *Parmeshwar* (1930) 5 Luck. 631, 125 I.C. 414, ('31) A.O. 108.

(*s*) *Sheo Gopal* v. *Firm Ganesh Das Ram Gopal* (1938) 13 Luck. 241, 168 I.C. 268, ('31) A.O. 327.

(2) The right of a coparcener to take by survivorship is defeated in the following cases:—

(i) Where the deceased coparcener has sold or mortgaged his interest, in States where such sale or mortgage is allowed by law [§ 259]:

(ii) Where the interest of the deceased coparcener has been *attached in his lifetime* in execution of a decree against him. A mere decree obtained by a creditor, not followed up by an attachment in the lifetime of the debtor, will not defeat the right of survivorship, unless the judgment-debtor stood in the relation of father, paternal grandfather or great-grandfather to the surviving coparceners [§§ 289, 292 (4)]: This rule must be read subject to the provisions of sections 6 and 30 of the Hindu Succession Act, 1956, in cases where those sections are applicable:

(iii) Where the interest of the deceased coparcener has vested in the Official Assignee or Receiver on his insolvency (*t*) [§§ 265]. On the annulment of insolvency the interest which vested in the Official Receiver revests under sec. 37 of the Provincial Insolvency Act in the insolvent and if on that date he is not alive, it goes to his heirs under the law (*u*).

*Sub*-§ (*1*).—What passes to the male issue is not a share, but the right to have a share on partition. Suppose *A* and *B* are two brothers, and that *A* has a son *C* and *B* has a son *D*. On *A*'s death, his undivided interest will pass to the surviving coparceners, *B*, *C* and *D*. *C* cannot, while the family remains joint, claim for himself a moiety of the *income* alleging that it represents his father's share. But if the family come to a partition, *C* will take one-half of the property, that being his father's share, and *B* and *D* will take the other half: see § 321 below.

*Sub*-§ (2), *clause* (*i*).—According to the Mitakshara law as applied in the Bombay and Madras States, a coparcener can sell or mortgage his interest in the coparcenary property, but not according to that law as applied in Bengal and the Uttar Pradesh (§ 260). Therefore, in Bombay and Madras, if a coparcenary consists of *A* and *B*, and *A* sells his interest to *X*, and then dies, *B* cannot claim *A*'s interest by survivorship. That interest has passed to *X* by purchase. But no Hindu governed by the Mitakshara law can dispose of by *gift* his undivided interest in coparcenary property in any part of India [§ 258].

*Clause* (*ii*).—*A* and *B* are coparceners. *C* obtains a decree against *A* and *attaches* *A*'s interest in the coparcenary property. *A* then dies. *A*'s interest having been attached in his lifetime *B* is not entitled to that interest by survivorship, see § 289. *C* is entitled to have *A*'s interest sold in execution even after *A*'s death. But if *C* had merely obtained a decree against *A*, and no attachment had been levied on *A*'s interest in *A*'s *lifetime*, *A*'s interest would pass to *B* by survivorship unless *A* happened to be *B*'s father or grandfather or great-grandfather in which case *C* could attach *A*'s interest even after *A*'s death. [The Code of Civil Procedure, 1908. secs. 50 and 53]. See § 289 below.

**230. Separate property.**—Property acquired in any of the following ways is the separate property of the acquirer; it is called "self-acquired" property, and is subject to the incidents mentioned in § 222 above:—

(1) *Obstructed heritage.*—Property inherited as obstructed heritage (*sapratibandha daya*), that is, property inherited by a Hindu from a

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(*t*) *Fakirchand* v. *Motichand* (1883) 7 Bom. 438. (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131.
(*u*) *Lakshmanan Chettiar* v. *Srinivasa Iyengar*

person other than his father, father's father, or father's father's father [see §§ 218, 222 and 223 sub-§ (2)].

(2) *Gift.*—A gift of a *small* portion of ancestral movable made through affection by a father to his male issue is his separate property (*v*) [§ 225].

As to gifts and bequests of *separate* property by a father to his sons see § 223 sub-§ (5).

(3) *Government grant.*—Property granted by Government to a member of a joint family is the separate property of the donee (*w*), unless it appears from the grant that it was intended for the benefit of the family (*x*).

(4) *Property lost to family.*—Ancestral property lost to the family, and recovered by a member without the assistance of joint family property. See § 232 below.

(5) *Income of separate property.*—The income of separate property, and purchases made with such income (*y*).

(6) *Share on partition.*—Property obtained as his share on partition by a coparcener who has no male issue. See § 223 (4) above.

(7) *Property held by sole surviving coparcener.*—Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt (*z*).

(8) *Separate earnings.*—Separate earnings of a member of the joint family [§ 231].

(9) *Gains of learning.*—All acquisitions made by means of learning are now declared by the Hindu Gains of Learning Act, 1930, to be the separate property of the acquirer [§ 231A].

*Separate property is also called self-acquired property.* Self-acquired property, in its technical sense, means property obtained by a Hindu *without any detriment to ancestral property.* As to property described in cls. (1), (2), (3) and (5) of this section it is clear that it cannot be said to be acquired at the expense of the patrimony or ancestral estate. Such property is, therefore, self-acquired in the technical sense of the term. As to property described in cl (4), it is a question of fact as to whether it constitutes self-acquired property or not. In practice the expression "self-acquired" property is used as referring to property acquired by a Hindu by his own exertions without the assistance of family funds.

Question sometimes arises whether the proceeds of a life insurance policy effected by a coparcener on his life is joint family property or separate property of the coparcener. The test to be applied in any such case is not whether the policy was taken out by the coparcener for the benefit of his wife and children but whether he did so without detriment to the joint family funds (*z*1). If, however, there are indications that the policy was intended to be the separate asset of the insuring coparcener and treated by the coparceners as such different considerations may arise and this apart from any general presumption which may or may not be permissible in such cases.

**231. Separate earnings—gains of science.**—The income of a member of a joint family is his separate property, if it has been obtained—

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(*v*) See § 225, and the cases there cited.

(*w*) *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 543, 610.

(*x*) *Sri Mahant Govind* v. *Sitaram* (1899) 21 All. 53, 20 I.A. 195.

(*y*) *Krishnaji* v. *Moro Mahadev* (1891) 15 Bom. 373, 34 I.A. 107.

(*z*) See *Bachoo* v. *Mankorebai* (1907) 31 Bom. 32.

(*z*1) *Parbati Kuer* v. *Sarangdhar* ('60) A.SC. 403. Reference may be made to *Venkata Subbarao* v. *Lakshminarasamma* ('54) A.M. 222 and the observations of the Supreme Court on the same in the abovementioned case. Reference may also be made to *Karuppa Gounder* v. *Palaniammal* (1963) 1 M.L.J. 86; (1963) Mad. 434; ('63) A.M. 245; and f.n. (*b*) below. Also see *Narayanlal* v. *Controller Estate Duty* ('69) A.A. Pra. 188.

(a) by his own exertions, *and*

(b) without "any detriment to the father's estate," that is, without the aid of joint family property (*a*).

But it is joint family property if it has been earned at the expense of joint family property (*b*).

Reference may be made to the undermentioned decisions of the Supreme Court (*b*1).

For instance, gifts to a Purohit for private services rendered by him are his separate property (*c*). When a member of the joint family educates himself with the help of Government stipend and earns money by his own exertion, the fact that money so earned is utilised by him for meeting the necessaries of the joint family would not give rise to any presumption either that the acquisitions were out of the income of the joint property or that he intended to throw all his earnings into the joint stock (*d*).

A member of a joint family can pre-empt the property of the family sold by the manager provided he does it out of his separate funds and intends to keep it as his separate property (*e*).

The consent by a member of a joint family to the sale of family property by the manager does not make him vendor and he can pre-empt the property (*f*).

As to property acquired by a member out of his self-acquired fund and also with aid of some ancestral property see the undermentioned (*f*1).

**231A. Gains of learning—gains of science.**—By the Hindu Gains of Learning Act it is provided that notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the member of the joint family who acquires them merely by reason of—

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of joint funds of his family, or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring such learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

"Learning" is defined in the Act as meaning education, whether elementary, technical, scientific, special or general, and training of every kind which

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(*a*) *Somasundara* v. *Ganga* (1904) 28 Mad. 386; *Rajamma* v. *Ramakrishnayya* (1905) 29 Mad. 121 [insurance premium paid out of self-acquired property—insurance money held to be separate property]. Also see *Sivaramakrishnan* v. *Kaveri Ammal* ('55) A.M. 705, I.L.R. (1956) Mad. 649. In *Mangal Singh* v. *Harkesh* ('58) A.A. 42 the Allahabad High Court has taken the extreme view that however small the aid of the joint family property may be property acquired by a member becomes joint family property. Also see *Venkatasubramania* v. *Eswara Iyer* ('66) A.M. 266; *Mahalaxmiamma* v. *Radha Krishna Rao* ('68) A. Mys. 229.

(*b*) *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228; *Somasundara* v. *Ganga* (1904) 28 Mad. 386; *Rajamma* v. *Ramakrishnayya* (1906) 29 Mad. 121 [insurance premium paid out of self-acquired property—insurance money held to be separate property]. *Manicka Mudaliar* v. *Thangavelu* (1963) Mad. 955; ('64) A.M. 33 [managing agency given in view of holding of shares in company acquired from family funds]. See f.n. (*z*1) above.

(*b*1) *Dhanwatey* v. *C.I.T.* ('68) A.S.C. 683; *Commissioner of I.T.* v. *Kalu Babu* ('59) A.S.C. 1289.

(*c*) *Hanso Pathak* v. *Harmandit Pathak* (1934) 56 All. 1026, 151 I.C. 11, ('34) A.A. 851.

(*d*) *Subramonia Pillai* v. *Padmanabha* ('50) A. Tr.-Cochin 52 (F.B.).

(*e*) *Ram Naresh* v. *Mst. Ganga Dei* (1944) Luck. 257.

(*f*) *Hewanchal Singh* v. *Ajodhiya Singh* (1929) 4 Luck. 370 (F.B.).

(*f*1) *Mangal Singh* v. *Harkesh* ('58) A. All. 42. Also see *Bhagwant Singh* v. *I.T. Commissioner* ('59) A. Punj. 594.

is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

"Gains of learning" are defined as meaning all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of the Act, and whether such acquisitions be the ordinary or the extraordinary result of such learning.

The Act came into force on the 25th July, 1930. It is set out in Appendix IV, below. Under the Act all gains of learning, *whether made before or after the commencement of the Act* constitute the self-acquired property of the acquirer.

Before the Hindu Gains of Learning Act, 1930, two propositions were well established, namely, (1) that income earned by a member of a joint family by the practice of a profession or occupation requiring *special* training was joint family property, if such training was imparted *at the expense of joint family property;* and (2) that gains made by personal labour and without the aid of joint family funds by a member of a joint family, who was maintained out of joint family funds and received no more than an *ordinary* education suitable to his position as a member of the family, were the self-acquired property of such member (*g*).

**232. Recovery of ancestral property lost to the family.**—Where the members of a joint family have been wrongfully dispossessed or adversely kept out of possession of joint property for a long time, and such property is subsequently recovered by an individual member of the family without the assistance of joint funds, then, if the property is recovered by the father, he takes the whole as his separate or self-acquired property, whether it be movable or immovable; but if it is recovered by any other member of the family, then, if the property be movable, he takes the whole as his separate or self-acquired property, but if it be immovable, he takes one-fourth first as reward for the recovery, and the remainder has to be equally divided among all the coparceners including the recoverer (*h*).

**233. Presumption as to coparcenary and coparcenary property.**—Where a suit is brought by a Hindu to recover property, alleging that it is his self-acquired property, and the defendant contends that it is joint family property, or where a suit is brought by a Hindu for partition of property alleging that it is joint family property and the defendant contends that it is his self-acquired property, the question arises upon whom the burden of proof lies. The following are the leading rules on the subject:—

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(*g*) *Metharam* v. *Rewachand* (1918) 45 I.A. 41, 45 Cal. 666, 44 I.C. 269, ('17) A.PC. 105 [broker and money-lender]; *Gokal Chand* v. *Hukum Chand —Nath Mal* (1921) 48 I.A. 162, 2 Lah. 40, 60 I.C. 379, ('21) A.PC. 35 [Indian Civil Service]; *Laximon Row* v. *Muller Row* (1831) 21 Knapp. 60 [Prime Minister]; *Lakshman* v. *Jamnabai* (1882) 6 Bom. 225 [pleader and Sub-Judge]; *Pauliem* v. *Pauliem* (1877) 1 Mad. 252, 4 I.A. 109; *Chalakonda* v. *Chalakonda* (1864) 2 Mad. H.C. 56 [dancing girl]; *Durvasula* v. *Durvasula* (1872) 7 Mad. H.C. 47 [pleader]; *Boologam* v. *Swornam* (1882) 4 Mad. 330 [dancing girl]; *Bai Manchha* v. *Narotamdas* (1868) 6 Bom. H.C.A. 1 [vakil]; *Dhunookdharee* v. *Gunput* (1868) 11 Beng. L.R. 201, 10 W.R. 122; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 555-559 [mill manager]; *Krishnaji* v. *Moro Mahadev* (1891) 15 Bom. 32 [karkun]; *Lachmin Kuar* v. *Debi Prasad* (1898) 20 All. 435 [army contractor]; *Durga Dat* v. *Ganesh Dat* (1910) 32 All. 305, 5 I.C. 400 [astrologer].

(*h*) *Bajaba* v. *Trimbak* (1910) 34 Bom. 106, 4 I.C. 255; *Visalatchi* v. *Annasamy* (1870) 5 Mad. H.C. 150; *Bissessur* v. *Seetul Chunder* (1868) 9 W.R. 69 s.c., 8 W.R. 13; *Sham Narain* v. *Rughoo-burdyal* (1878) 3 Cal. 508, 511; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 551; *Bolakee* v. *Court of Wards* (1870) 14 W.R. 34; *Naraganti* v. *Venkatachalapati* (1882) 4 Mad. 250, 259.

(*i*) *Neelkisto Deb* v. *Beerchunder* (1869) 12 M.I.A. 523, 540; *Naragunty* v. *Vengama* (1861) 9 M.I.A. 66, 92; *Rewun Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168. See also *Mst. Cheetha* v. *Miheen Lall* (1867) 11 M.I.A. 369; *Mst. Bhagwani* v. *Mohan Singh* (1925) 29 C.W.N. 1037, 88 I.C. 385, ('25) A.PC. 132 [P.C.].

(1) *Presumption that a joint family continues joint.*—Generally speaking, "the normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption" (*j*). In other words, "given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint" (*k*). The presumption of union is the greatest in the case of father and sons (*l*). The strength of the presumption necessarily varies in every case.

The presumption is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker (*m*). The reason is that "brothers are for the most part undivided; second cousins are generally separated" (*n*); and third cousins are for the most part separated (*o*).

*In what cases does the above presumption apply*?—The presumption that a Hindu family continues to be joint is mainly available when the question arises whether a specific property *which was admittedly joint at one time* has continued to be joint or it has ceased to be joint *by virtue of a separation.* If a joint family possessed property which was admittedly joint, the *presumption* would be that the property continues to be joint, and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition (*p*). The presumption is peculiarly strong in the case of brothers (*q*), but almost nil in the case of third and fourth cousins (*r*).

Mutation entries may not by themselves be evidence of severance (*r*1).

Even when a Hindu undivided family has ceased to be such in law, it may be deemed to be an undivided family for the purposes of the Income Tax Act of 1922 under sec. 25A of that Act (*t*). [Now see sec. 171 of the Income Tax Act 43 of 1961.]

(2) *No presumption that a joint family possesses joint property.*—There is *no presumption* that a family, because it is joint, possesses joint property or any property (*u*). When in a suit for partition, a party claims that any particular item of the property is joint family property (*v*), or when in a suit on a mortgage, a party contends that the property mortgaged is joint family property (*w*), the burden of proving that it is so rests on the party asserting it.

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(*k*) *Nageshar Baksh Singh* v. *Ganesha* (1920) 47 I.A. 57, 70, 42 All. 368, 381, 56 I.C. 306, ('20) A.PC. 46; *Raghubardayal* v. *Ramdulare* (1928) 6 Rang 367, 111 I.C. 839, ('28) A.R. 206; *Pandit Mohan Lal* v. *Pandit Ram Dayal* (1941) 16 Luck. 708, 194 I.C. 661, ('41) A.O. 331.

(*l*) *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, (35) A.O. 510. Reference may be made to *Indranarayan* v. *Roop Narayan* ('71) A.S.C. 1962, 1967.

(*m*) *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 19, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*n*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444, 468.

(*o*) *Yellappa* v. *Tippanna, supra.*

(*p*) See *Prit Koer* v. *Mahadeo Pershad* (1895) 22 Cal. 85, 21 I.A. 134.

(*q*) *Nageshar Baksh Singh* v. *Ganesha* (1920) 47 I.A. 57, 42 All. 368, 381, 56 I.C. 306, ('20) A.PC. 46.

(*r*) *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*r*1) *Bharat Singh* v. *Bhagirathi* ('66) A.SC. 405.

(*t*) *Sardar Bahadur Sardar Indra Singh* v. *The Commissioner of Income-tax, Bihar & Orissa* (1943) 22 Pat. 55, 206 I.C. 609, ('43) A.P. 169.

(*u*) *Shrinivas* v. *Narayan* (1955) S.C.R. 1, 57 Bom. L.R. 678, ('54) A.SC. 379; *Kamalakant Gopalji* v. *Madhavji Meghji* (1935) 59 Bom. 573, 37 Bom. L.R. 405, 158 I.C. 145, ('35) A.B. 343.

(*v*) *Annamalai Chetty* v. *Subramanian Chetty* (1929) 31 Bom. L.R. 280, 113 I.C. 897 ('29) A.PC. 1; *Jogi Reddi* v. *Chinnabbi Reddi* (1929) 56 I.A. 6, 52 Mad. 83, 114 I.C. 5, ('29) A.PC. 13, is not an authority for the proposition in the text. The suit was by the plaintiff against his brothers and his sister's son who was a Christian, and the contest was as to certain property standing in the name of the sister's son. *Krishna Kumar* v. *Kayastha Pathshala* ('66) A.A. 570.

(*w*) *Rai Shadi Lal* v. *Lal Bahadur* (1933) 35 Bom. L.R. 308, 142 I.C. 739, ('33) A.P.C. 85.

To render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired (*x*) or from which the presumption could be drawn that all the property possessed by the family is joint family property (*y*) or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property (*z*) or by joint labour. *None of these alternatives is a matter of legal presumption.* It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence (*a*). There is at times undiscriminated use of the expression 'presumption' in this context. It is to be understood to indicate those presumptions of fact which may be said to arise in considering whether the burden of proof has or has not been discharged by a party. It is not as if there is any general solvent for all cases.

Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired. Whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and extent of the nucleus. An important element for consideration is the income which the nucleus yielded. A family house in the occupation of the members and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law but questions of fact to be determined on the evidence in the case (*b*). The wide proposition that once the ancestral nucleus is proved or admitted the onus on a member to prove that the property acquired was his self-acquisition cannot be accepted as correct. The existence of some nucleus is not the sole criterion to impress the subsequent acquisitions with family character. What is to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made. Or this may be shown from the nature and relative value of the nucleus itself. This is the second phase in the onus of proof which lies on the person who sets up the family character of the property (*c*).

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(*x*) *Venktaramayya* v. *Seshamma* (1937) Mad. 1012, 170 I.C. 107, ('37) A.M. 538; *Vythianatha* v. *Varadaraja* (1938) Mad. 696, ('38) A.M. 841; *Janakiamma* v. *Chinnarao* (1945) Mad. 378; *Chanderdeb* v. *Nandji* ('50) A. Pat. 33.

(*y*) *Kamala Kant Gopalji* v. *Madhavji Meghji supra.*

(*z*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 [F.B.], 155 I.C. 132, ('35) A.A. 221.

(*a*) *Shiu Golam* v. *Baran* (1868) 1 Beng. L.R.A.C. 164; *Moolji* v. *Gokuldas* (1884) 8 Bom. 154; *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122 [no presumption that property is ancestral]; *Toolseydas* v. *Premji* (1889) 13 Bom. 61; *Dwarkaprasad* v. *Jamnadas* (1911) 13 Bom. L.R. 133, 9 I.C. 948; *Ram Kishan* v. *Tunda Mal* (1911) 33 All. 677, 10 I.C. 543; *Daji* v. *Laxman* (1927) 29 Bom. L.R. 122, 100 I.C. 937, ('27) A.B. 110; *Sanwal Das* v. *Kure Mal* (1928) 9 Lah. 470, 109 I.C. 779, ('28) A.L. 224; *Musammat Brij Kunwar* v. *Rai Bahadur Pandit Sankata Prasad* (1929) 5 Luck. 400, 123 I.C. 849, ('30) A.O. 39 [no presumption that property ancestral].

(*b*) *Shrinivas Krishnarao* v. *Narayan* (1955) S.C.R. 1, 8; *Narayanaswami* v. *Ramakrishna* ('65) A.SC. 289; *Venkatasubramania* v. *Easwara Iyer* ('66) A.M. 266.

(*c*) *Shrinivas* v. *Narayan* (1955) S.C.R. 1; *Mudigowda* v. *Ramchandra* ('69) A.S.C. 1076; *Ramakrishna* v. *Vishnumoorthi* ('57) A.M. 86; *Babubhai*

Where, however, the existence of the nucleus is shown and no other source of income is disclosed, the presumption may be made that the nucleus was sufficient to enable the property to be acquired (*d*). Such being the presumption, if any member of the family claims any portion of the property, as his separate property, the burden lies upon him in any such case to show that it was acquired by him in circumstances which would constitute it his separate property.

He may do so by showing that the income of the existing ancestral property was employed in other ways (*e*), or was kept intact (*f*). If he adduces no evidence, the presumption that the property was joint family property, must prevail (*g*). The mere fact that it was purchased in his name and that there are receipts in his name respecting it does not render the property his separate property, for all that is perfectly consistent with the notion of its being joint property. But if, in addition to the fact that certain property stands in the name of one of the members, *A.B.*, there be these further facts, namely, that some other members of the family had acquired separate property with their own moneys and dealt with it as their own without reference to the rest of the family, and that *A.B.* was allowed by the family to appear to the world to be the sole owner, the presumption that the property is joint is weakened, and the burden of proving that it is joint will lie on those who allege that it is joint (*h*). There is no presumption in case of property standing in the name of female members (*h*1).

*A* and his two sons *B* and *C* live as members of a joint family. *It is proved that* in the year 1890 the father had in his hands a considerable *nucleus of ancestral property.* In the year 1895 the father purchases certain immovable property in his own name, and bequeaths it by his will to *B*, alleging in the will that it was his self-acquired property. Upon these facts the presumption is that the property was purchased by the father out of the income of ancestral property, and the property is therefore joint. The burden of proving that the subsequently acquired property was the separate property of the father lies on him who alleges that it was his separate property, that is it lies on *B* (*i*). The statement in the father's will that the property was his self-acquired property is not evidence upon the question whether the property was joint or self-acquired (*j*).

(3) A member of a joint family who engages in trade can make separate acquisitions of property for his own benefit; and unless it can be shown that the business grew from a nucleus of joint family property, or that the earnings were blended with joint family estate, they remain his self-acquired property (*k*). See § 234(4). Once however it is proved that the old family

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*Girdharlal* v. *Ujamlal Hargovandas* (1937) Bom. 708, 39 Bom. L.R. 846, 171 I.C. 623, ('37) A.B. 446; *Karoo Singh* v. *Ujagir Singh* ('54) A.P. 524; *Rajmal Mishrimal* v. *Rajmal Khemchand* ('54) A.M.B. 28; *Charandasi* v. *Kanai Lal* ('55) A.C. 206, 58 C.W.N. 980; *Kameshwar Nath* v. *Raghubir* ('64) A.P. 290; *Jagat Krishna* v. *Ajit Kumar* ('64) A. Orissa 76; *Tribeni Mishra* v. *Rampujan* ('70) A.P. 13.

(*d*) *Shrinivas* v. *Narayan* (1955) 1 S.C.R. 1, ('54) A.SC. 379; *Mallappa Girimallappa* v. *R. Yellappagouda* ('59) A.S.C. 906; *Bhagwant Kishore* v. *Bishambhar* ('50) A.A. 54; *Darshan Singh* v. *Parbhu Singh* (1946) All. 130.

(*e*) *Sher Muhammad Khan* v. *Ramratan* (1938) Nag. 233, 172 I.C. 572, ('38) A.N. 87.

(*f*) *Appalaswami* v. *Suryanarayanamurti* (1948) Mad. 440 (P.C.), 52 C.W.N. 505.

(*g*) *Madho Tewari* v. *Mata Din Tewari* (1935) 10 Luck. 61, 149 I.C. 244, ('34) A.O. 293.

(*h*) *Dhurm Das* v. *Shama Soondri* (1843) 3 M.I.A. 229, 240; *Gopeekrist* v. *Gungapersaud* (1854) 6 M.I.A. 53 [purchase in name of son], *Prankishen* v. *Mothooramohun* (1865) 10 M.I.A. 403, 411-412: *Umrithnath* v. *Goureenath* (1870) 13 M.I.A. 542; *Stree Raja Yanumula* v. *Yanumula* (1870) 13 M.I.A. 533; *Bodh Singh* v. *Gunesh Chunder* (1874) 12 Beng. L.R. (P.C.) 317; *Bissessur Lall* v. *Luchmussur Singh* (1879) 5 Cal. L.R. 477, 479, 6 I.A. 233, 236; *Gajendar* v. *Sardar Singh* (1896) 18 All. 176; *Abhaidat Singh* v. *Ragho* (1926) 1 Luck. 1, 91 I.C. 976, ('26) A. O. 77; *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 555-556, 133 I.C. 628, ('31) A.L. 419. See also *Atar Singh* v. *Thakar Singh* (1908) 35 I.A. 206, 35 Cal. 1039.

(*h*1) See *Nagayasami* v. *Kochadai* ('69) A.M. 329 and cases there cited.

(*i*) *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65.

(*j*) *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228; *Venkata Chenchayya* v. *Ramalingam* ('57) A. Andh. Pra. 744.

(*k*) *Annamalai Chetty* v. *Subramanian Chetty* (1929) 31 Bom. L.R. 280, 113 I.C. 897, ('29) A.PC. 1; *Jagmohan* v. *Ranchhoddas* (1945) Nag. 892; *Venkataramayya* v. *Venkataramappa* (1953) 1 M.L.J. 508, ('53) A.M. 723 (financial assistance from joint family funds for starting independent business not regarded as nucleus); *Naim Singh* v. *Tikam Singh* ('55) A.A. 388; *S. Anup Singh* v. *Sardarni Hanbans Kaur* ('58) A. Punj. 116; *Mallakarjuniah* v. *Kanniah* ('61) A. Mys. 64. Reference may also be made to cases in *Syed Abdul Wajid* v. *R. Vishwanathan* (1950) A. Mysore 33 (F.B.). See also *Official Assignee* v. *Neelambal* (1933) A.M. 920: *Deonarain* v. *Agyan Ram* (1927) 31 C.W.N. 533, 101 I.C. 249, ('27) A.PC. 52.

firm was joint or started with a nucleus of joint property, it is for the plaintiff who alleges it to be separate to prove it (*l*).

(4) Where it is proved or admitted that a partition has already taken place, the burden lies upon him who alleges that a portion of the family property is still joint property (*o*). There is no presumption that property which is acquired by a member after severance must be regarded as acquired for the family even if he has been in possession of family property. If rents and profits of such property are received by him he would be liable to account for the same but the funds do not become impressed with any trust in favour of the other members (*p*).

(5) Onus, however, as a determining factor *of the whole case,* can only arise if the Court finds the evidence pro and con so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. But if the Court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise (*q*). In other words, the question of onus, at the close of a case, only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it (*r*).

**234. Ancestral business and its incidents.**—(1) In Hindu law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In the hands of the male issue it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a *contract,* but a family partnership created *by the operation of law* (*s*). Therefore, the rights and liabilities of the coparceners constituting the family firm are not to be determined by exclusive reference to the provisions of the Indian Partnership Act, 1932, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of joint families (*t*).

A Hindu joint family business does not cease to be so if in addition to the heirs of the deceased owner, it is also owned by his daughter married to a Gharjamai and by other members and relations who are *de facto* members of the family, provided the proceeds of such business are utilised for the legitimate expenses of the family (*u*).

The following are the points of distinction between a partnership and a joint Hindu family firm:—

(i) *Dissolution by death.*—A joint family firm is not dissolved by the death of a coparcener (*v*). An ordinary partnership is dissolved by the death of a partner.

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(*l*) *Durga Prasad* v. *Ghanshiam Das,* 53 C.W.N. 118 (P.C.).

(*o*) *Vinayak* v. *Dattoo* (1901) 25 Bom. 367.

(*p*) *Aryamurthi* v. *Subbaraya* ('72) A.S.C. 1279.

(*q*) *Robins* v. *National Trust Co.* (1927) App. Cas. 515, 520.

(*r*) *Sime Darby & Co.* v. *Official Assignee* (1928) 30 Bom. L.R. 290, 107 I.C. 233 ('28) A.PC. 77; *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*s*) *Lala Baij Nath Prasad* v. *Ram Gopal Lachmi Narayan* (1938) 1 Cal. 369; *Gulab Chand Lala* v. *Manni Lal Lala* (1941) 16 Luck. 302, 192 I.C. 643, ('43) A.O. 230.

(*t*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li; *Nachiappa* v. *Muthukaruppan* (1946) Mad. 858.

(*u*) *Nibaran Chandra Shaha* v. *Lalit Mohan Brindaban Shaha* (1938) 2 Cal. 368.

(*v*) *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Haroon Mahomed in the matter of* (1890) 14 Bom. 189, 194; *Lala Baij Nath Prasad* v. *Ram Gopal Lachhmi Narayan* (1938) 1 Cal. 369.

(ii) *Right to accounts.*—A coparcener is not entitled, on severing his connection with the family firm, to ask for accounts of past profits and losses (*w*) [§ 238]. It is otherwise in the case of a partner.

(iii) *Power to contract debts.*—The manager of a joint family has an *implied* authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business (*x*). Such debts, if incurred in the ordinary course of business, are binding on the family property including the interest of the minor coparceners therein (*y*). But the manager alone has such authority; no other coparcener has it (*z*). In the case of an ordinary partnership, *any* partner can bind his coparceners by debts incurred in the ordinary course of the partnership business (the Indian Partnership Act, 1932, s. 19). See § 240.

(iv) *Extent of liability for debts.*—In the case of an ordinary partnership, it is not only the share of each partner in the partnership property which is liable for the payment of the partnership debts, but the separate property of each partner is also liable. In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his coparceners. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other coparceners, they are liable only to the extent of their interest in the family property, *unless*, in the case of adult coparceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified (*a*); and, in the case of minor coparceners, unless the contract has been ratified by them on attaining majority (*b*). See cl. v. below, and § 240(4).

*Liability for torts.*—The sons who inherited a mining lease from their father were held liable for damages to the buildings above the mine caused by the working of the mine by the father, but only to the extent of the effects of the joint family in their hands (*c*).

(v) *Minors.*—In the case of an ordinary partnership where a partner is a *minor*, his share (*d*) alone in the partnership property is liable for the partnership debts. His separate property is not liable, unless he accepts the partnership on attaining the age of majority. [Indian Partnership Act, 1932, s. 30]. The same rule applies to the case of minor coparceners. That is to say, the manager can pledge the family property *including the minor's interest therein* for the purposes of the family business (*e*). But the minor is liable to the extent only of his interest in the family property (*f*); his separate pro-

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(*w*) 5 Bom. 38, *supra*; *Ganpat* v. *Annaji* (1899) 23 Bom. 144. As to the rights of a minor coparcener, see *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 279.

(*x*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li; *Bemola* v. *Mohun* (1880) 5 Cal. 792; *Rampartab* v. *Foolibai* (1896) 20 Bom. 767, 777-779; *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206, 215; *Morrison* v. *Verschayle* (1901) 6 C.W.N. 429; *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136; *Bishen Singh* v. *Kidar Nath* (1921) 2 Lah. 159, 62 I.C. 800 ('21) A.L. 61; *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901.

(*y*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 (F.B.), 155 I.C. 136, ('35) A.A. 221.

(*z*) *Krishna* v. *Krishnasami* (1900) 23 Mad. 597, 600.

(*a*) *Gokal Chand* v. *Hukam Chand—Nath Mal* 1921) 48 I.A. 162, 174, 2 Lah. 40, 52, 60 I.C. 379, ('21) A.PC. 35; *Chalamayya* v. *Varadayya* (1899) 22 Mad. 166; *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206 at p. 215 [F.B.]; *Baldeo* v. *Mobarak* (1902) 29 Cal. 583; *Gokal* v. *Amarchand* (1907) 9 Bom. L.R. 1289; *Joharmal* v. *Chetram* (1915) 39 Bom. 715, 28 I.C. 538, ('15) A.B. 115; *Shiv Bhagwan* v. *Onkarmal* (1952) 54 Bom. L.R. 330, ('52) A.B. 365; *Shamrao* v. *Saraswatibai* ('54) A.N. 38, (1953) Nag. 364; *Shiv Charan Das* v. *Hari Ram* (1936) 17 Lah. 395, 170 I.C. 418, ('37) A.L. 247; *V.R.C.T.V.R. Chettiar* v. *C.A.P.C. Chettiar* (1936) 14 Rang. 122, 162 I.C. 184, ('36) A.R. 160; *Rm. L.M.L.U. Alagammal Ashi & Ors.* v. *Vr. P.L.M. Palaniappa Chettiar & Ors.* (1940) Mad. 1012, ('40) A.M. 580; *Kishan Gopal* v. *Suraj Mal* ('64) A. Raj. 218.

(*b*) *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189; *Official Assignee* v. *Palaniappa* (1918) 41 Mad. 824, 49 I.C. 220, ('19) A.M. 690. See also cases cited in the preceding note.

(*c*) *Ambalal Khora* v. *Bihar Hosiery Mills, Ltd.* (1937) 16 Pat. 545, 172 I.C. 19, ('37) A.P. 657.

(*d*) The share of which s. 247 of the Contract Act speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied; *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.P.C. 237.

(*e*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li; *Ragunathji* v. *The Bank of Bombay* (1910) 34 Bom. 72, 2 I.C. 173; *Sanka* v. *The Bank of Burmah* (1911) 35 Mad. 692, 694-696, 11 I.C. 79; *Sanyasi Charan* v. *Asutosh* (1915) 42 Cal. 225, 233, 26 I.C. 836, ('16) A.C. 482.

(*f*) *Chockalingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 849.

perty is not liable for the payment of debts contracted by the manager, unless the minor accepts the partnership on attaining majority (*g*). See note below, "Minor's share."

(2) *New Business.*—In *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (*h*), a Dayabhaga case, the Judicial Committee held that the manager of a joint family cannot impose upon a minor member of the family the risk and liability of a *new* business started by himself and the other adult members. On the ground that the reasons for the decision equally govern Mitakshara families also, this principle has been applied to them by the Indian High Courts (*i*) and in *Benares Bank Ltd.* v. *Hari Narain* (*j*) by the Judicial Committee. Where a father was carrying on brokerage business in agricultural commodities and the son was doing similar business though the commodities were not exactly identical, it was held that the latter business was not a new business (*k*). The extension of a joint family business for the manufacture of articles, *ejusdem generis* with the articles previously manufactured, *i.e.*, when the class of persons who manufacture the one usually manufacture the other is not a new business (*l*). A family carrying on trade in a particular commodity may legitimately extend it to another commodity, and whether such extension would amount to a new business or not depends upon the nature or type of the extended business and not on the particular commodities it deals with. If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business (*m*). Even where the father is the manager, he is not entitled to mortgage the joint family estate in order to provide money for one of his sons to start a new business. Such a mortgage is wholly invalid against minor coparceners (*n*).

Some of the senior members of a joint family took a lease of some lands and later on executed a mortgage as security for the payment of the rent. Default having been made in the payment of rent, the mortgagee brought a suit on the mortgage and in execution of the decree made in the suit, some of the property was purchased by an auction purchaser. The latter having sued for possession it was held that as the transaction was a prudent venture and for the benefit of the family, the mortgage was binding on the family (*o*).

As regards adult members it has been held in India that the manager cannot impose even upon them the risk and liability of a new business started by him (*p*), unless the business is started or carried on with their consent,

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(*g*) *Bishambhar* v. *Sheo Narain* (1907) 29 All. 166; *Bishambhar* v. *Fatch Lal* (1907) 29 All. 176; *Joykisto* v. *Nittyanund* (1878) 3 Cal. 738; *Rampartab* v. *Foolibai* (1896) 20 Bom. 767, 777-779 [business inherited by a minor carried on by his guardian]; *Lutchmanen* v. *Siva* (1899) 26 Cal. 349; *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214.

(*h*) (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.PC. 237.

(*i*) *Vithal* v. *Shivappa* (1923) 47 Bom. 637, 72 I.C. 659, ('23) A.B. 265; *Inspector Singh* v. *Kharak Singh* (1928) 50 All. 776, 112 I.C. 881, ('28) A.A. 403, commented upon in *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454; *Biswanath Singh* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422. But see *Official Assignee* v. *Palaniappa* (1918) 41 Mad. 824, 835, 49 I.C. 220, ('19) A.M. 690; *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221; *Jagmohan* v. *Ranchhoddas* (1945) Nag. 892.

(*j*) *Benares Bank Ltd.* v. *Hari Narain* (1932) 54 All. 564, 59 I.A. 300, 137 I.C. 781, ('32) A.PC. 182. See also *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136.

(*k*) *Bhagwan Singh* v. *Beharilal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*l*) *Bahadursingh* v. *Girdharlal* (1942) Nag. 543, 200 I.C. 166, ('42) A.N. 39. But starting of a flour mill cannot be regarded as extension of an old money lending business; *Makhanlal* v. *Harnarain* ('60) A.MP. 56.

(*m*) *Desu Rattamma* v. *Narayanarao*, (1947) Mad. 567, ('47) A.M. 232; *Angney Lal* v. *Angney Lal* ('51) A.A. 400.

(*n*) *Gurmukh Singh* v. *Shiv Ram* (1936) 17 Lah. 53, 157 I.C. 416, ('35) A.L. 482; *Ganesh Prasad Singh* v. *Sheogobind Sahoo* (1937) 16 Pat. 719, 173 I.C. 242, ('38) A.P. 40.

(*o*) *Chhotey Lal Chaudhury* v. *Dalip Narain Singh* (1938) 17 Pat. 386, ('38) A.P. 562.

(*p*) *Babu Lal* v. *Babu Lal* (1941) All. 343, 193 I.C. 571, ('41) A.A. 194, (1941) A.L.J. 217.

express (*q*) or implied (*r*) or though started by the manager only, joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family (*s*) or it was adopted as a family business by the other members who continued to enjoy the benefits of the same (*t*).

The rule of law laid down in *Benares Bank Ltd.* v. *Hari Narain* (*u*) and in other cases of a like nature cannot apply to a new business started by the sole surviving coparcener of a Mitakshara family. Such business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk of the new business cannot be imposed on them. The risk and liability having been already taken by the family the new comers must share them along with other assets and liabilities of the family (*v*).

It has been held in Madras (*w*) that where a joint family consists of a father and sons, and the *father* starts a new trading business, the business must be deemed to be ancestral, and the sons whether they be adults or minors are liable for debts incurred in the business to the extent of their shares in the joint family property; and, further, that even if such business be not regarded as ancestral, the sons shares are liable for the debts incurred by the father in the business, and this liability arises out of the pious obligation of the sons to pay their father's debts. If this decision is deemed to be authority for the proposition that a *new* business started by a father is ancestral for all purposes as regards his sons, then, it is submitted it is no longer good law (*x*). When the sons merely give some help to the father in business, it does not become joint family business but after the sons grow up the father and sons by their conduct may make it apparent that it has become a joint family business (*y*). See note below, "New business."

(3) *Partnership with outsiders.*—The principle is now well established that a joint Hindu family as such cannot be a partner in a firm but it is competent to the manager or Karta acting on behalf of the family to enter into a valid partnership with a stranger or with the Karta of another family (*z*). In *Kshetra Mohan* v. *E. P. T. Commissioner* (*z*1) the Supreme Court pointed out that when two Kartas of different families constituted a partnership the other members of the families do not become partners though the Kartas are accountable to their families. Not all members of the joint family, but only such of its members as have, in fact, entered into partnership with the stranger, become partners (*a*). The manager, no doubt, is accountable to the family, but the partnership is exclusively one between the contracting members including the manager and the stranger. Such a partnership would be governed by the provisions of the Indian Partnership Act, 1932, with the result that if the manager died, the partnership would be dissolved on his death. The surviving members of the family cannot claim to continue as

(*q*) *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236; *Nathubhai* v. *Chhotubhai* ('62) A. Guj. 68.

(*r*) *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 364, 79 I.C. 517, ('24) A.A. 379; [consent of adults to be presumed if family maintained out of the profits].

(*s*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221.

(*t*) *Budh Karam Chaukhani* v. *Thakur Prasad Shah* (1942) 1 Cal. 19, ('42) A.C. 311.

(*u*) *Supra.*

(*v*) *Angney Lal* v. *Angney Lal* ('51) A.A. 400; *Canara Banking Corp. Ltd.* v. *S.I. Bank* ('58) A.M. 132; *Sreeramaraju* v. *Pullam Raju* ('63) A.A.P. 403.

(*w*) *Venkatasami* v. *Palaniappa* (1929) 52 Mad. 227, 117 I.C. 716, ('29) A.M. 153 [suit on mortgage and as to a portion of the amount there was no antecedent debt].

(*x*) *Benares Bank Ltd.* v. *Hari Narain* (1932) 59 I.A. 300, 54 All. 564, 137 I.C. 781, ('32) A.PC. 182.

(*y*) *Kailashi* v. *Shanker* (1945) All. 135.

(*z*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li; *Bhagwan Singh* v. *Beharilal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*z*1) See f.n. (*a*) below; *Commissioner of I.T.* v. *Govindram Sugar Mills* ('66) A.SC. 24.

(*a*) *Pichappa Chettiar* v. *Chockalingam Pillai* (1934) 36 Bom. L.R. 976 (P.C.), 150 I.C. 802, ('34) A.PC. 192; *Kshetra Mohan* v. *E.P.T. Commissioner* (1954) S.C.R. 268, ('53) A.SC. 516; *Nawaneetdas* v. *Gordhandas* ('55) A.M.B. 113, 116. Also see *Ramakrishna Transports* v. *C.I.T.* ('68) A.A.P. 34.

partners with the stranger (*b*), nor can they institute a suit for a dissolution of the partnership their position being no higher than that of sub-partners (*c*). Nor can the stranger partner sue the surviving members as partners for the manager's share of the loss. His only remedy is to proceed against the manager's estate, if any (*d*).

When a manager of a trading joint family enters into a partnership with strangers for the purpose of carrying on the same kind of business the other members are liable to the extent of their interest in the family property (*e*). On a partition between the members of a joint family of which the manager is a partner with a stranger, the manager is bound to realize his share of the partnership assets for the benefit of the family, and for distribution among the members thereof (*f*). But this, it is conceived, he cannot do until the term of the partnership has expired.

There can be a valid partnership between the Karta of a Joint Hindu family, as representing the undivided family on the one hand, and a member of the family in his individual capacity on the other. In such a case the individual member retains his interest in the family property, and at the same time enjoys the fruits of his investment and the benefit of his separate property, and for this purpose it is not necessary for him to separate himself from the family (*g*).

(4) *Presumption as to business carried on by a member.*—There is no presumption that a business carried on by a member of a joint family, is joint family business (*h*). Nor is there any presumption that a business carried on by such a member in partnership with a stranger is joint family business (*i*). There is no presumption that a business standing in the name of or started by even a manager is joint family business (*j*), but if the joint family funds are utilised in opening a new branch then the new branch will be regarded as part of the old business (*k*).

See § 240 below and notes thereto.

*Minor's share.*—The reason why even a minor's share is liable for payment of debts contracted by a manager in the course of the family business is that, if it were otherwise property in a family firm which is recognized by the Hindu law to be a valuable inheritance would become practically valueless to the family wherever a minor was concerned, for no one would deal with a manager if the minor were to be at liberty on coming of age to challenge the trade transactions which took place during his minority (*l*).

*New business.*—The first proposition in sub-§ (2) is based on the decision of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (*m*). That was a Dayabhaga case. In that case the joint family consisted of *brothers* and the new business was started by the adult brothers. In the course of the judgment, their Lordships said: "The

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(*b*) *Sokkanadha* v. *Sokkanadha* (1903) 28 Mad. 344. Reference may be made to *Commissioner of I.T.* v. *Govindram Sugar Mills supra.*

(*c*) *Gangayya* v. *Venkataramaih* (1918) 41 Mad. 451, 43 I.C. 9, ('18) A.M. 37. As to the rights of the surviving coparceners in case of death of the *Karta* partner as his representatives to recover the share of the deceased see *Gopi Nath* v. *Satish Chandra* ('64) A. All. 53.

(*d*) See *Kharidar Kapra Co.* v. *Daya Kishan* (1921) 43 All. 116, 58 I.C. 765, ('21) A.A. 306.

(*e*) *Chocklingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 849; *Tulsiram* v. *Anni Bai* ('63) A. Orissa 11.

(*f*) 41 Mad. 454, 43 I C. 9 ('18) A.M. 37, *supra*; *Krishnan* v. *Rangachari* ('65) A.M. 340 [modus operandi of granting relief].

(*g*) *Lala Lachhman Das* v. *Commissioner of Income-tax* (1947) 74 I.A. 277.

(*h*) *Vadilal* v. *Shah Khushal* (1903) 27 Bom. 157. See also *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189. See *Grey* v. *Walker* (1913) 40 Cal. 523, 18 I.C. 753; *Gokal Chand* v. *Hukum Chand —Nath Mal* (1921) 48 I.A. 162, 171, 2 Lah. 40, 49, 60 I.C. 379, ('21) A.PC. 35; *Chattanatha* v. *Ramchandra* ('55) A.S.C. 799; *Srinibas* v. *Hariran* ('50) A. Assam 195; *Parikshita* v. *Sita Dei* ('71) A. Orissa 204.

(*i*) *Mirza Mal* v. *Rameshar* (1929) 51 All. 827, 118 I.C. 145, ('29) A.A. 536; *Mangilal* v. *I.T. Commissioner* ('55) A.P. 366.

(*j*) *Chattanatha* v. *Ramchandra* (1952) 2 S.C.R. 477, ( 55) A.SC. 799 [it makes no difference in this respect that the manager is the father]; *Naim Singh* v. *Tikam Singh* ('55) A.A. 388. Also see *Narayana Raju* v. *Chamaraj* ('68) A.SC. 1276.

(*k*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221.

(*l*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li, lxxii, lxxiii.

(*m*) (1922) 49 I.A. 108 114-115, 49 Cal. 560, 567-568, 67 I.C. 124, ('72) A.PC. 237.

distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and obligations. In the other they rest ultimately on *contractual* arrangement between the parties." The decision proceeds on the ground that a minor could not become a partner by contract [Indian Contract Act, 1872, s. 11], though he might be "admitted to the benefits of the partnership" [Indian Partnership Act, 1932, s. 30]; and since a *new* business could rest only on *contractual* arrangement, a minor could not be a *partner* in such business.

Whether a business is a new business is in each case a question of fact. The fact that it had ceased to be carried on for a few years in the grandfather's lifetime does not make it a new business if it is started by the father again (*n*). Where a joint family carries on business in partnership with a stranger in a particular name, and the stranger retires, and on his retirement the family carries on the same business in another name, it does not make it a new business (*o*). Where the family never exported any commodity to foreign countries, the starting of a business for exporting goods to foreign countries like America was held to be a new business and not an extension of the existing one (*p*). Where, however, the father carried on business in money lending, cloth and corn, and on his death the business was discontinued for a while, and later on the guardian of the infant son started business in cloth and kirana on behalf of the minor, it was held that the family being a trading family this could be regarded as an extension of the existing business and not the starting of a new one (*q*).

*Trading family: Kulachara.*—A distinction has to be drawn between a trading and a non-trading family. In the former case where the business started by a member is not speculative then the shares of his sons will be liable for the debts incurred by their father. Heredity in business is the touchstone and not necessarily the difference or novelty in the nature of the commercial undertaking (*r*).

**234A. Notice of severance in status.**—*Prima facie*, when there is a division in status of members of a joint Hindu family, no matter how brought about, there is no obligation on any member to publish a notice of such division. A person dealing with the manager of a joint family does so with the knowledge of the limitations on his powers. But where the members of a joint Hindu family business appear to have taken active part in it or been associated in conducting it, their liability is analogous to that of partners and arises from their conduct. They would in such a case be estopped from denying the character assumed by them and on the faith of which third parties may be presumed to have acted, so that persons dealing with such a firm will not be affected by a separation of which no notice has been given. It may be doubted whether in such a case the members of the joint family who have done nothing to invite the operation of the rule of estoppel can also be held liable on the ground that the ordinary presumption of continuity casts on them the duty or obligation to inform the outside creditors who had dealings with the joint family through the Karta, that there has been a severance of the joint status (*s*).

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(*n*) *Damodaram* v. *Bansilal* (1928) 51 Mad. 711, 111 I.C. 297, ('28) A.M. 566.

(*o*) *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136.

(*p*) *Desu Rattamma* v. *Narayanarao* (1947) Mad. 567, ('47) A.M. 252. For other instances see *Shivramsa* v. *Gurunathsa* (1956) 58 Bom. L.R. 239 and cases in f.n. (*q*) and (*r*) below.

(*q*) *Angney Lal* v. *Angney Lal* ('51) A.A. 400. For a discussion of the case-law on the subject see *Kulitalai Bank* v. *Nagamanickam* ('55) A.M. 670, 673-675 and the case cited in f.n. (*r*) below.

(*r*) *Kumbakonam Bank* v. *Shanmugam* ('56) A.M. 306, 308, 309; *Canara Banking Corporation Ltd.* v. *South Indian Bank Ltd.* ('58) A.M. 132; *Purnachandrarao* v. *Mallikharjuna Rao* ('61) A.A.P. 247. Also see *Debilal* v. *Damodar Das* ('63) A.P. 270.

(*s*) *Pramod Kumar* v. *Damodar Sahu*, A.I.R. (1953) Orissa 179; *Ramaswami* v. *Srinivasa* A.I.R. (1936) Mad. 94, Cf. *Kashiram* v. *Bhaga* (1945) 47 Bom. L.R. 470, (1945) Bom. 976, ('45) A.B. 511.

## III.—MANAGEMENT AND ENJOYMENT OF COPARCENARY PROPERTY

**235. Rights of coparceners.**—(1) *Community of interest and unity of possession.*—No coparcener is entitled to any special interest in the coparcenary property, nor is he entitled to *exclusive* possession of any part of the property (*t*). As observed by their Lordships of the Privy Council, "there is community of interest and unity of possession between all the members of the family" (*u*).

(2) *Share of income.*—A member of a joint Mitakshara family cannot predicate at any given moment what his share in the joint family property is. His share becomes defined only when a partition takes place (*v*). As no member, while the family continues joint, is entitled to any definite share of the joint property, it follows that no member is entitled to any definite share of the income of the property (*w*). The whole income of the joint family property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of an undivided family (*x*).

It is competent to the manager to allot to any individual member a portion of the family property to enable him to maintain himself out of its income. Any savings out of the income and investments of such savings will be the separate property of the member (*y*).

(2a) *Joint possession and enjoyment.*—Each coparcener is entitled to joint possession and enjoyment of the family property. If any coparcener is excluded from joint possession or enjoyment, he is entitled to enforce his right by a suit. He is not bound to sue for *partition.*

There is no reason why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparceners and against his will to break up the joint family by bringing a suit for partition (*a*). Where a coparcener is excluded from joint possession, the proper decree to pass is to declare his right to joint possession, and, *further,* to direct that he be put into joint possession. A mere declaratory decree is of no use (*b*).

*Unauthorized acts.*—A coparcener has no right without the consent of the other coparceners, to erect a building on land belonging to the joint family or any portion thereof, so as to alter materially the condition of the property or to do anything with the property which would interfere with the joint enjoyment thereof. If he does so, he may be restrained by an injunction (*g*). But the remedy by way of injunction is not appropriate, if the act done is of such a character that the condition of the property is not materially altered thereby as where a well is erected which does not interfere with the enjoyment of the property (*h*). A contract of suretyship entered into by a coparcener other than the manager is void and cannot be ratified (*f*).

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(*t*) *Naranbhai* v. *Ranchod* (1902) 26 Bom. 141, 144.

(*u*) *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 543, 615.

(*v*) *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75, 89.

(*w*) *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

(*x*) (1866) 11 M.I.A. 75, 89, *supra.*

(*y*) *Bengal Insurance and Real Property Co. Ltd.* v. *Velayammal* (1937) Mad. 990, ('37) A.M. 571, 170 I.C. 279; *Ramayya Goundan* v. *Kolanda Goundan & Ors.* (1940) Mad. 322, ('39) A.M. 911, (1939) 2 M.L.J. 639; *Latchandhora* v. *Chinnavadu* ('63) A.A.P. 31 [income from property allotted to branches of the family for maintenance].

(*a*) (1902) 26 Bom. 141; *supra; Ramchandra* v. *Damodhar* (1896) 20 Bom. 467.

(*b*) (1902) 26 Bom. 141, 145, *supra.*

(*g*) *Sheopersad* v. *Leela Singh* (1874) 12 Beng. L.R. 188; *Guru Das* v. *Bijaya* (1898) 1 Beng. L.R.A.C. 108; *Vithoba* v. *Hariba* (1869) 6 Bom. H.C.A. 54. See also *Shadi* v. *Anup Singh* (1890) 12 All. 436; *Najju Khan* v. *Imtiaz-ud-din* (1896) 18 All. 115.

(*h*) *Biswambhar* v. *Rajaram* (1869) 3 Beng. L.R. Ap. 67.

(*f*) *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

(3) *Exclusion from joint family property.*—Where a coparcener is excluded by other coparceners from the use or enjoyment of the joint property or any portion thereof, and the act of the defendants amounts to an ouster of the plaintiff from his enjoyment of the property, the Court may by an injunction restrain the defendants from obstructing the plaintiff in the enjoyment of the property (*c*). Clear and strong evidence would be required before a person can be said to have suffered his own exclusion and acquiesced in the continuation of it without asserting his rights. Once a party establishes his claim to a share in the joint family property the onus is on the opposite party to establish exclusion to the knowledge of the claimant for the requisite period of limitation (*c*1).

Article 127 of the Indian Limitation Act, 1908, provides a period of twelve years for a suit by a person excluded from joint family property to enforce a right to share therein from the date when the *exclusion* becomes known to the plaintiff. The fact that a coparcener voluntarily resides separately from the family and does not ask to be maintained by the family, does not amount to an exclusion from the joint family property (*d*). Nor does a refusal to partition, where there is no denial of the right to a partition (*e*).

Now see Article 110 of the new Limitation Act, 1963.

*Illustrations*

(a) *A* and *B* are members of a joint family. *A* prevents *B* from using a door or a staircase, which is the only means of access to the rooms in *B*'s occupation. *A*'s act amounts to ouster. He may, therefore, be restrained by an injunction from disturbing *B* in the use of the door or staircase: *Anant* v. *Gopal* (1895) 19 Bom. 269; *Soshi* v. *Ganesh* (1902) 29 Cal. 500.

(b) *A* and *B* are members of a joint family which owns a shop in Poona. *A* prevents *B* from entering the shop, inspecting the account books, and taking part in the management of the shop. *A* may be restrained by an injunction from excluding *B* from the joint possession and management of the shop: *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

(4) Every coparcener in an undivided family is entitled to be maintained out of the family estate. See further § 543.

(5) *Right to enforce partition.*—Subject to the provisions of § 307, every adult coparcener is entitled to enforce a partition of the coparcenary property.

(6) *Alienation of undivided interest.*—No coparcener can dispose of his undivided interest in coparcenary property by gift [§ 258]. Nor can he alienate such interest even for value except in Bombay, Madras and Madhya Pradesh [§§ 259, 260].

(7) *Right of survivorship.*—Where a coparcener dies before partition of the coparcenary property, his undivided interest in the property devolves, not by succession upon his heirs, but by survivorship upon the surviving coparceners (*i*) [§ 229]. The modifications engrafted on this rule have been indicated in § 229 *ante* and the Note at the beginning of this Chapter.

(8) *Manager.*—A coparcener who is a manager has certain special powers of disposition over the coparcenary property which no other coparcener has [§§ 237-251].

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(*c*) *Anant* v. *Gopal* (1895) 19 Bom. 269; *Soshi* v. *Ganesh* (1902) 29 Cal. 500, (1899) 23 Bom. 144, *supra*.

(*c*1) See *Marudanayagam* v. *Sola Pillai* ('63) A.M. 200 and the cases there cited.

(*d*) *Sitalprasad* v. *Ramprasad* (1944) Nag. 17.

(*e*) *Radhoba* v. *Aburao* (1929) 56 I.A. 316, 53 Bom. 699, 118 I.C. 1, ('29) A.P.C. 231.

(*i*) *Katama Natchiar* v. *Raja of Shivagunga* (1863) 9 M.I.A. 539, 543, 615.

(9) *Father.*—A father has certain special powers of disposing of coparcenary property which no other coparcener has [§ 256].

*Partition and survivorship.*—The right to enforce a partition and the right to take by survivorship go hand in hand. In fact, as observed by the Privy Council, "it is the right to partition which determines the right to take by survivorship" (*j*).

*Injunction.*—In disputes between members of a joint Hindu family relating to joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the joint property and acts amounting to ouster (*k*).

*Joint possession.*—The members of a joint family may agree between themselves without coming to a partition, to occupy for their convenience separate portions of the joint property. In fact, this is the general practice. It amounts to exclusive possession of the separate portion enjoyed by each member by the consent of all; it may be terminated and a completely new arrangement may be made, at any time, by the members of the family, if they think fit to do so (*l*).

**236. Manager.**—Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The manager of a joint family is called *karta.*

The father is in all cases naturally, and in the case of minor sons necessarily, the manager of the joint family property (*m*).

In the undermentioned case (*m*1) the Supreme Court observed: "We are not prepared to express any definite opinion on the question whether there can be two kartas of a joint Hindu family." It was also observed that the very idea of there being two kartas did not appear, *prima facie,* consistent with the concept of a karta. Two persons may look after the affairs of the joint family on the basis of the members of the family clothing them with authority to represent the family but that would not make them kartas of the family. Their power to represent the family would depend on the terms of the authority conferred on them.

It was held by the Nagpur High Court, that a mother though not a coparcener in the joint family was in the absence of adult male members competent to act as manager of the family. Her acts as manager if they are for legal necessity or benefit to estate, would be binding on the joint family (*n*). The Madras High Court and some other High Courts did not agree with the view that the mother can be regarded as a *Karta* (*o*). A wife cannot act as *karta* of the joint family on the ground of her husband's absence (*o*1).

The Supreme Court has now held that only a coparcener can be the karta or manager of a joint family. Since a widow or a mother is not a coparcener she cannot be the manager of a joint family (*o*2).

A minor can act as a karta of the joint family through his natural guardian, his mother, where father's whereabouts are not known at the time (*o*3).

"The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members

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(*j*) *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 687.

(*k*) *Anant* v. *Gopal* (1895) 19 Bom. 269.

(*l*) *Sheopersad* v. *Leela Singh* (1874) 12 Beng. L.R. 188, 195.

(*m*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 165, 6 I.A. 88.

(*m*1) *Union of India* v. *Shree Ram* ('65) A.SC. 1531.

(*n*) *Pandurang* v. *Pandurang* (1947) Nag. 299; *Commissioner of Income-tax* v. *Luxminarayan* (1948) Nagpur 775.

(*o*) *Radha Ammal* v. *I.T. Commissioner* (1930) 1 M.L.J. 399, ('30) A.M. 538; *Rakhmabai* v. *Sitabai* (1932) Bom. 455, ('32) A.B. 160, (1932) 54 Bom. L.R. 55; *Maguni Padhano* v. *Lokananidhi* ('56) A. Orissa 1. In a later case it has been held by the Orissa High Court that under certain circumstances a mother can exercise the powers of a manager, *Budhi Jena* v. *Dhobai Naik* ('58) A. Orissa 7.

(*o*1) *Sheogulam* v. *Kishun Chaudhuri* ('61) A.P 212. But see *Budhi Jena* v. *Dhobai Naik* ('58) A. Orissa 7 and also see *Trutia* v. *Basudev Singh* ('64) A. Orissa 123.

(*o*2) *Commissioner of Income Tax* v. *Govindram Sugar Mills* ('66) A.SC. 24.

(*o*3) *Jaggernath Singh* v. *Narayan* ('65) A.P. 300.

or by the *manager* to whom they have expressly or by implication delegated the task of regulation" (*p*).

"So long as the members of a family remain undivided, the *senior* member of the family is entitled to manage the family properties," including even charitable properties (*q*); and is presumed to be the manager until the contrary is shown (*r*). But the senior member may give up his right of management, and a junior member may be appointed manager (*s*).

Though a son acquires by birth an interest equal to that of the father in ancestral property, yet the father by reason of his paternal relation and his position as the head of the family and its manager, is entitled to make lawful disposition of the family property in the interest of the family. Therefore, a son has no right against the will of his father to occupy any specific portion of the family property and if he does so the father may sue to eject him from it (*t*). If the son does not approve of the management of the family property by the father, his remedy is to ask for a partition of the property against the father.

It is not to be supposed that a member of a joint family who is a manager has a larger proprietary interest or has larger rights to enjoy the joint property than any other member. The only respect in which he has a superior right is that he has a power of disposition for causes recognised as just and proper under Hindu law of the whole family property, including the interest of the junior members (*u*) [§ 242].

It is well-established that at times the other members of the family participate in the management of a joint family business. In any such case it may be said that there can be more than one manager and the acts of each of them would be binding on the joint family including the minor members (*u*1).

**237. Manager's power over income.**—The manager, as the head of the family, has control over the income and expenditure, and he is the custodian of the surplus, if any. So long as he spends the income for the purposes of the family, he is not under the same obligation to economise or save as a paid agent or trustee would be. If he spends more than the other members approve, their remedy is to demand a partition (*v*). On the other hand, he is liable to make good to them their shares of all sums which he has misappropriated or which he has spent for purposes other than those in which the joint family was interested (*w*).

The family purposes referred to above are the maintenance, education, marriage, *shraddh* and other religious ceremonies of the coparceners and of the members of their respective families. In taking accounts at the time of partition, no charge is to be made against any coparcener, because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family. Such expenditure is considered to be the legitimate expenditure of the whole family (*x*).

*Manager not an Agent.*—A manager is not an agent within the meaning of Chapter X of the Indian Contract Act, 1872 (*y*), or of cl. 12 of the Letters Patent (*z*). His position is more like that of a trustee (*z*). But it is not precisely the same as that of a trustee, for if it were so, he would be bound to economise and save, as a trustee is, which, it has been held, he is not (*a*).

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(*p*) *Sri Raghunada* v. *Sri Brozo Kishoro* (1876) 1 Mad. 69, 81, 3 I.A. 154, 191.

(*q*) *Thandavaroya* v. *Shunmugam* (1909) 32 Mad. 167, 169, 2 I.C. 34.

(*r*) *Varada Bhaktavatsaludu & another* v. *Domojipurapu Venkata Narasimha Rao* (1940) Mad. 752, 191 I.C. 369, ('40) A.M. 530.

(*s*) *Mudit* v. *Ranglal* (1902) 29 Cal. 797.

(*t*) *Baldeo Das* v. *Sham Lal* (1876) 1 All. 77.

(*u*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, 221; *Chidambaram* v. *Subramanian* ('53) A.M. 492, (1952) 2 M.L.J. 524.

(*u*1) *Chunnilal* v. *Kalu* ('66) A. Raj. 208.

(*v*) *Bhowani* v. *Juggernath* (1909) 13 C.W.N. 309, 3 I.C. 241; *Tara Chand* v. *Reeb Ram* (1866) 3 Mad. H.C. 177.

(*w*) *Abhaychandra* v. *Pyari Mohan* (1870) 5 Beng. L.R. 347, 349.

(*x*) (1870) 5 Beng. L.R. 347, 349, *supra*.

(*y*) *Muhammad* v. *Radhe Ram* (1900) 22 All. 307, 317; *Sirkant Lal* v. *Sidheshwari Prasad* (1937) 16 Pat. 441, 170 I.C. 367, ('37) A.P. 455.

(*z*) *Annamalai* v. *Murugesa* (1903) 26 Mad. 544, 553, 30 I.A. 220, 228.

(*a*) *Perrazu* v. *Subbarayadu* (1921) 48 I.A. 280, 287-288, 44 Mad. 656, 663, 61 I.C. 690, ('22) A.P.C. 71.

**238. Manager's liability to account on partition.**—(1) In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate he is liable to account on partition only for assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with (*b*). Further, in the absence of any such proof, a coparcener seeking partition is not entitled to require the manager to account for his *past* dealings with the family property (*c*). All that he is entitled to is an account of the family property as it exists at the time he demands a partition (*d*). But it is open to him to show that the expenditure which the manager alleges he has incurred has not in fact been incurred, or that more properties are available for partition than those disclosed by him (*e*). See § 305 below.

(2) Since the institution of a suit for partition amounts to a severance of joint status, the manager is, *from and after* the date of such a suit, strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deducting such expenses is to be divided among the coparceners according to their shares (*f*).

*Form of decree.*—As to the form of the decree, see the undermentioned case (*g*).

*Minor coparceners and accounts.*—A distinction has been drawn in some cases between the rights of those members who were adults and those who were minors during the management, and it has been held that since minors could not be deemed to have *consented* to the management, they are entitled when they attain majority, to hold the manager liable not only for acts amounting to fraud, *but also where the management has been grossly negligent and prejudicial to their interest,* the presumption, however, being that in the absence of evidence the property available for partition is such as exists at the date of the suit for partition (*h*). This distinction, it is submitted, cannot be sustained on principle. The liability to account must be the same whether the other coparceners were minors or adults during the management (*i*)

*Special Agreement.*—By a special agreement between the coparceners, the manager may be rendered liable to account on the footing of an ordinary agent (*j*).

**239. Manager's liability to account otherwise than in a partition suit.**—It has been held in Bengal that any coparcener may, *without bringing a suit for partition,* require the manager to account for his dealings with the copar-

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(*b*) (1921) 48 I.A. 280, 287-288, 44 Mad. 656, 663, 61 I.C. 690, ('22) A.PC. 71, *supra; Laxminarayan* v. *Dinker* (1943) Nag. 390, 205 I.C. 279, ('43) A.N. 101; *Ramanathan* v. *Narayanan* (1955) 2 M.L.J. 414, ('55) A.M. 629; *Nepur Kuer* v. *Shivchand* ('61) A.P. 57. Also see *Narayanaswami* v. *Ramakrishna* ('65) A.SC. 289; *Appalanarasimha* v. *Mahadevalla* ('67) A.A.P. 247 case law discussed [specific allegations should be made and proved before accounts can be reopened].

(*c*) *Sukhdeo* v. *Basdeo* (1935) 57 All. 949, 157 I.C. 1013 ('35) A.A. 594; *Bappu Ayyar* v. *Renganayaki* (1955) 2 M.L.J. 302, ('55) A.M. 394 (onus of proof); *Manikrao* v. *Deorao* (1954) Nag. 709, ('55) A.N. 290. Also see *Narayanaswami supra*; *Damodar* v. *Banamali* ('67) A. Orissa 61.

(*d*) *Parmeshwar* v. *Gobind* (1916) 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500; *Balakrishna* v. *Muthusami* (1909) 32 Mad. 271, 3 I.C. 878; *Damodardas* v. *Uttamram* (1893) 17 Bom. 271; *Narayan* v. *Nathaji* (1904) 28 Bom. 201, 208; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 560-562, 581; *Konerrat* v. *Gurrat* (1881) 5 Bom. 589, 595; *Ramnath* v. *Goturam* (1920) 44 Bom. 179-183, 54 I.C. 115, ('20) A.B. 236; *Jyotibati* v. *Lakshmeshwar* (1929) 8 Pat. 818, 120 I.C. 770, ('30) A.P. 1; *Nepur Kuer* v. *Shivchand* ('61) A.P. 57; *Gopal* v. *Trimbak* ('53) A.N. 195, (1953) Nag. 130; [Manager liable to account as a trustee from date of severance]. *Ramanathan* v. *Narayanan supra.*

(*e*) *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236; (1916) 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500; *supra*; *Manharanlal* v. *Jagjiwanlal* (1951) Nag. 937, ('52) A.N. 73.

(*f*) *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 866, 873-874, 104 I.C. 472, ('27) A.M. 801; *Gopal* v. *Trimbak*, ('53) A.N. 195.

(*g*) (1886) 10 Bom. 528, at pp. 562, 581, *supra.*

(*h*) *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 278-279; *Chuckun* v. *Poran* (1868) 9 W.R. 483.

(*i*) See *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 866, 873-874, 104 I.C. 472, ('27) A.M. 801.

(*j*) *Raja Setrucherla* v. *Raja Setrucherla* (1899) 22 Mad. 470, 26 I.A. 167.

cenary property and the income thereof. If the manager refuses to render the account he may be compelled by suit to render such account (*k*).

**240. Power of manager to contract debts for family purposes and family business.**—(1) *Implied authority to borrow money for family business* [*vide* § 234, (1) (iii), (iv), (v) and § 270 below].

(2) *Implied authority to borrow money for family purposes.*—A joint Hindu family may have no business at all, and yet debts may be contracted by the manager for a joint family purpose [§ 243]. Such debts also are binding on the other coparceners to the extent mentioned in the section referred to in sub-§ (1) (*m*). The liability of a coparcener in such a case does not cease by subsequent partition (*n*).

When a sole surviving coparcener incurs a debt, he must be deemed to have done so in a representative capacity, that is to say, as representing a potential joint family, which is capable by expansion of comprising more than one member (*o*).

(3) *Burden of proof of necessity for a loan for a family purpose or for family business.*—Where money has been borrowed by the manager on the representation that it is required for a family purpose (*p*), or for family business (*q*) and the lender seeks to render the whole family property including the shares of other members of the family liable for the debt, he is not entitled to a decree against the whole family property, unless he shows that there was a necessity for the loan, *or* that he made reasonable inquiry as to the necessity for the loan (*r*) the mere existence of the business not being enough or that it is for the benefit of the family (*s*).

(4) *Promissory note passed by manager for family business in his own name.*—It has been held in several cases that where the manager of a joint family borrows money on a promissory note for a joint family business or to meet a joint family necessity, the other members of the joint family may be sued on *the note*, though they are not parties to the note, but their liability is limited to their share in the joint family property (*t*), unless they can be

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(*k*) *Abhaychandra* v. *Pyari Mohan* (1870) 5 Beng. L.R. 347 [a Mitakshara case]; *Benoy Krishna Ghosh Chaudhuri* v. *Amarendra Krishna Ghosh Choudhri* (1940) 1 Cal. 183, 186 I.C. 546, ('40) A.C. 51 [a Dayabhaga case]. See also (1857) 6 M.I.A. 526, 539-540, *supra* [a Dayabhaga case]. *Satish Chandra* v. *Binapani* ('64) A.P. 473.

(*m*) *Gharibillah* v. *Khalak Singh* (1903) 25 All. 407, 414-415, 30 I.A. '165; *Dwarka Nath* v. *Bungshi* (1905) 9 C.W.N. 879 [a case under the Dayabhaga law]; *Chalamayya* v. *Varadayya* (1899) 22 Mad. 166.

(*n*) *Bankey Lal* v. *Durga Prasad* (1931) 53 All. 868 [F.B.], 135 I.C. 139, ('31) A.A. 512.

(*o*) *Ramanathan Chettiar* v. *S.R.M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 734, ('37) A.M. 345. See also *Maharaja of Bobbili* v. *Zamindar of Chundi* (1912) 35 Mad. 108. Both are cases of adoption.

(*p*) *Soiru Padmanabh* v. *Narayanrao* (1894) 18 Bom. 520; *Krishna* v. *Vasudeo* (1897) 21 Bom. 808, 815; *Sukur* v. *Goury Pershad* (1880) 5 Cal. 321; *Mela Mal* v. *Gori* (1922) 3 Lah. 288, 66 I.C. 485, ('22) A.L. 200; *Khazana Mal* v. *Jagan Nath* (1923) 4 Lah. 200, 74 I.C. 484, ('24) A.L. 44; *Sotam Ram* v. *Pardhuman Ram* (1927) 8 Lah. 673, 105 I.C. 785, ('28) A.L. 103.

(*q*) *Ram Krishna* v. *Ratanchand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.P.C. 136; following *Hunooman Persuad* v. *Musammat Babooee* (1856) 6 M.I.A. 393; *Nagendra* v. *Amar Chandra* (1903) 7 C.W.N. 725; *Ganpat Rai* v. *Munni Lal* (1912) 34 All. 135, 13 I.C. 34, (1923) 4 Lah. 200, 74 I.C. 484, ('24) A.L. 44, *supra*; *Girdhari Lal* v. *Kishen Chand* (1924) 5 Lah. 511, 85 I.C. 463, ('25) A.L. 240; *Vithal* v. *Shivappa* (1923) 47 Bom. 637, 72 I.C. 659, ('23) A.B. 265, dissenting from *Raghunathji* v. *Bank of Bombay* (1910) 34 Bom. 72, 2 I.C. 173.

(*r*) *Mussammat Mauli* v. *Brij Lal & Ors.* (1942) Lah. 345, 205 I.C. 37, ('43) A.L. 33 (F.B.).

(*s*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 [F.B.], 155 I.C. 136, ('35) A.A. 221; *Mutsaddi Lal* v. *Sakhir Chand* (1936) 17 Lah. 311, ('35) A.L. 735; *Pramod Kumar* v. *Damodar* ('53) A. Orissa 179.

(*t*) *Krishna* v. *Krishnasami* (1900) 23 Mad. 597; *Krishi-Baisnab* v. *Ramdhon* (1906) 11 C.W.N. 139; *Krishnanand* v. *Raja Ram Singh* (1922) 44 All. 393, 66 I.C. 150, ('22) A.A. 116; *Raghunath* v. *Sri Narain* (1923) 45 All. 434, 73 I.C. 1018, ('23) A.A. 424.

treated as contracting parties (*u*). If the suit is filed before partition, the creditor may sue the manager only and seek for a declaration that the whole joint family property is liable or he may implead the other members also. After partition, he must implead the other members in order to enable him to proceed against the portions allotted to them (*v*). In such cases there is no presumption that the borrowing was for the purposes of the joint family business and the lender must prove it (*w*). In Bombay it has been held that the proper course in such a case is to sue the manager on the *note* and the other members on the *pre-existing debt*, the defences open to the parties being distinct (*x*).

Where the suit is by the endorsee of a promissory note his remedy is against the maker only unless the endorsement is so worded as to transfer the debt also and complies with the stamp law (*y*). A decree passed against the manager of a joint family (who is not the father) on a promissory note executed by him, in his personal capacity, containing no direction that it shall be granted out of family property cannot be executed against the family property (*z*).

It has been held that where a decree has been obtained on such a *note* against the manager and a minor coparcener, it cannot be executed against the minor *personally*, his liability in law being confined only to his *share in the joint family property*, and that he cannot be arrested under such a decree either before or after he has attained majority (*a*).

In a Patna case, there was a suit upon a handnote executed by the father as Karta of a family. His sons and grandsons were made parties to the suit, and a decree obtained against all of them. In the execution proceedings, only some of the sons were made parties. The other sons were left out and so also were all the grandsons. It was held that on sale of a property in execution of the decree, the interest of the grandsons and those of the sons who were not made parties could not pass, for it could not be said that in such cases the decree was against the father in his representative capacity (*b*).

(5) *New business.*—As to the power of a manager to start a new business, see § 234 (2).

*Illustration*

Three brothers *A*, *B* and *C*, managing members of a joint Hindu family, borrow money from *D* for purposes of the joint family business, and execute a promissory note in favour of *D*. After the death of *B* and *C*, *D* sues *A* and the sons of *A*, *B* and *C* *on the note*. *D* is entitled to a decree enabling him to recover the money *from the joint family property*. He is also entitled to a *personal* decree against *A*, *A* being a contracting party, so as to enable him to proceed against the separate property of *A*. But he is not entitled to a personal decree against the sons of *A*, *B* or *C* for they are *not parties to the note*.

As to ancestral business and its incidents see §§ 234 and 240.

*Contribution.*—A manager has power to borrow money for a joint family purpose on the security of the family property. But he may also borrow on his personal security. When he borrows money on his personal security, but for a family purpose *and spends it for the benefit of the family*, he is entitled to contribution from the other members.

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(*u*) *Sirikant Lal* v. *Sidheshwari Prasad* (1937) 16 Pat. 411, 170 I.C. 357, ('37) A.P. 455; *Mutsaddi Lal* v. *Sakhir Chand* (1936) 17 Lah. 311, ('35) A.L. 735.

(*v*) *Pangudaya* v. *Uthandiya* (1938) Mad. 968, 177 I.C. 188, ('38) A.M. 774. See *Gendulal* v. *Jangli* (1947) Nagpur 604.

(*w*) *Abdul Majid Khan* v. *Saraswatnibai* (1934) 61 I.A. 90, 36 Bom. L.R. 225, 147 I.C. 1, ('34) A.PC. 4; *Shamrao* v. *Rajaram* ('56) A.N. 285.

(*x*) *Vithalrao* v. *Vithalrao* (1923) 25 Bom. L.R. 151, 72 I.C. 242, ('23) A.B. 244. The point was not raised in *Krishnashet* v. *Hari* (1896) 20 Bom. 488.

(*y*) *Marutamuthu* v. *Kadir Badsha* (1938) Mad. 568, ('38) A.M. 377; *Ramanathan Chettiar* v. *Muthuraman Naidu & Ors.* (1942) Mad. 204, 210 I.C. 3, ('42) A.M. 161, (1941) 2 M.L.J. 816; *Ramakrishna* v. *Sitaram* ('62) A.A.P. 255. But see *Sreenivasan* v. *Rangachari* ('53) A.M. 815, (1953) 1 M.L.J. 595.

(*z*) *Chippagiri Nagireddi* v. *Venkadari Somappa* (1943) Mad. 248, 204 I.C. 198, ('43) A.M. 1, (1942) 2 M.L.J. 691. But see *Shanker Rao* v. *Vinayak* ('51) A.N. 307, (1950) Nag. 806; *Phool Chand* v. *Lalit Kishore* ('69) A.A. 155.

(*a*) *Bishen Singh* v. *Kidar Nath* (1921) 2 Lah. 159, 62 I.C. 800, ('21) A.L. 61; *Jwala Prasad* v. *Bhuda Ram* (1931) 10 Pat. 503, 134 I.C. 420, ('31) A.P. 328.

(*b*) *Deo Narain* v. *Bibikhaton* ('49) A.P. 401.

The right to contribution arises when he *expends* the money, and not on the date on which he repays the loan. Therefore limitation runs against his claim from the former, and not from the latter, date (c).

*Extent of liability of other members.*—It is an elementary proposition of law that *A* is not bound to pay a debt contracted by *B*, unless *B* has been authorised by *A* to incur the debt. In the case of a manager of a joint Hindu family, the manager has an *implied* authority to bind the *other members* by debts contracted by him, provided that in the case of a family business, the debts have been contracted by him for the ordinary purposes of the business, and, in other cases, the debts have been contracted for a family purpose. The authority of the manager, however, extends only to the family property; that is to say, if the manager borrows money within the scope of his authority, and the loan is not repaid, the creditor can proceed only against the family property including the shares of the other members in the property, but the other members are not bound personally so as to entitle the creditor to proceed against their separate property. The creditor can, of course, proceed against the *separate property* of the *manager*, for the manager is a party to the contract. Likewise he can proceed against the separate property of any other member if he is a party to the contract, or if he subsequently ratifies the contract.

**241. General powers of manager of joint family business.**—Besides the power to contract debts for the family business [§ 240], the manager has the power of making contracts, giving receipts, and compromising (§ 248) or discharging claims ordinarily incidental to the business. Without a general power of that kind, it would be impossible for the business to be carried on at all (*d*).

It was so laid down by the Judicial Committee in a case in which the business was a money-lending business. The principal question in that case was whether the managing members who had entered into ordinary business contracts *in their own names* on behalf of the family were entitled to sue in their own names or whether the other members were necessary parties. It was held that they could sue in their own names (*e*). The refusal by the manager of a joint family to purchase properties sought to be preempted binds the coparceners (*f*).

**242. Alienation by manager of coparcenary property for legal necessity.**—(1) The power of the manager of a joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Persaud* v. *Musummat Babooee* (1856) 6 Moo I.A. 393 [see note (1) below].

(2) The manager of a joint Hindu family has power to alienate for value joint family property, so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity (*h*) [§ 243], or for the benefit of the estate [§ 243A]. A manager (not being the father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grandfather) when there is no other reasonable course open to him (*i*). It is not necessary to validate the alienation that the express consent of the adult members should have been obtained (*j*). See § 528 and notes,

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(*c*) *Aghore Nath* v. *Grish Chunder* (1893) 20 Cal. 18.

(*d*) *Kishan Prasad* v. *Har Narain Singh* (1911) 33 All. 272, 38 I.A. 45, 9 I.C. 739.

(*e*) (1911) 33 All. 272, 38 I.A. 45, 9 I.C. 739, *supra*.

(*f*) *Kanshi Ram* v. *Lahori Ram* (1939) Lah. 246.

(*h*) *Doulat Ram* v. *Mehr Chand* (1887) 14 I.A. 187, 196, 15 Cal. 70; *Sham Sunder* v. *Achhan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83; *Gharibullah* v. *Khalak Singh* (1903) 25 All. 407, 415-416, 30 I.A. 165-169; *Biswanath* v. *Jagdip* (1913) 40 Cal. 342, 17 I.C. 577; *Hunooman Persaud* v. *Mussumat Babooee* (1856) 6 M.I.A. 393; *Soorendro* v. *Nundun* (1874) 21 W.R. 196; *Sadhu Saran* v. *Brahmdeo* (1921) 6 Pat. L.J. 256, 61 I.C. 20, ('21) A.P. 99 [taking a lease of property for the family].

(*i*) *Dharmarajsingh* v. *Chandrasekhar Rao* (1942) Nag. 214, 200 I.C. 595, ('42) A.N. 66 (F.B.).

(*j*) *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 130, 39 All. 437, 443, 39 I.C. 280, ('17) A.PC.

In *Suraj Bunsi Koer* v. *Sheo Proshad* (*k*), the Judicial Committee stated that it was not clearly settled whether where an alienation is made by a manager for a legal necessity, but without the express consent of the adult coparceners, the alienation is binding on them. But in later decisions of the same tribunal, the view taken is that if legal necessity is established, the express consent of the adult coparceners is not necessary (*l*).

As to alienation by manager for joint family business, see § 246 below.

Where any such transaction has been entered into for legal necessity by a manager it would be deemed to be on behalf of the family and would bind it. The position is not worsened by the fact that a junior member joins the transaction and the joining by him is abortive by reason of his minority (*l*1).

A manager has got power to alienate joint family property when there is legal necessity, in spite of the existence of a widow in the family, who has, under the Hindu Women's Rights to Property Act, 1937, got an undivided interest in the property and is entitled to partition (*m*).

(2*a*) Where a joint family consists of adults and minors, the mere fact that all the adult members including the manager have consented to the alienation is not proof of legal necessity. Such consent, however, may supply any lacuna that may exist in the evidence of legal necessity (*n*).

(3) When an alienation is made by the manager without legal necessity, but with the consent of all other coparceners, they being all adults, the alienation is valid in its entirety (*o*). If it is made without the consent of all, it would in Bombay and Madras, bind the shares of the consenting members. In West Bengal and Uttar Pradesh, where a coparcener cannot alienate even his own interest without the consent of *all* other coparceners, the alienation would not bind the shares either of the alienor or of the consenting members [§§ 257, 258 and §§ 268, 269].

As to consent, see also the undermentioned cases (*p*).

(4) An alienation by the manager of a joint family made without legal necessity is not void, but voidable (*p*1), at the option of the other coparceners. They may affirm it or they may repudiate it (*q*), but a creditor cannot repudiate it, there being no suggestion that it was in fraud of creditors (*r*).

1. **Hunooman Persaud** v. **Mussumat Babooee** (*s*).—The leading case on the subject of alienation for necessity is *Hunooman Persaud's* case. In that case their Lordships of the Privy Council said:—

"The power of the manager for an *infant* heir to charge an estate not his own is under the Hindu law, a limited and qualified power. It can only be exercised rightly *in*

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61, (1898) 25 I.A. 183, 192, 21 All. 71, 83, *supra*. But see (1903) 30 I.A. 165, 169, 25 All. 407, 415, *supra*. As to Indian decisions, see *Chhotiram* v. *Narayandas* (1887) 11 Bom. 605 [consent presumed]; *Miller* v. *Runga Nath* (1886) 12 Cal. 389, 399 [express consent not necessary]; *Mudit* v. *Ranglal* (1902) 29 Cal. 797 [express consent not necessary]; *Pratab* v. *Shiam Lal* (1920) 42 All. 264, 265, 55 I.C. 37, ('20) A.A. 131 [express consent not necessary]; *Karm Chand* v. *Ram Labhaya* (1926) 7 Lah. 476, 96 I.C. 443, ('26) A.L. 468.

(*k*) (1879) 6 I.A. 88, 101, 5 Cal. 148, 165.

(*l*) *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 130, 39 All. 437, 443, 39 I.C. 280, ('17) A.PC. 61; *Sham Sunder* v. *Achhan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83, *supra*.

(*l*1) *Radhakrishandas* v. *Kaluram* ('67) A.S.C. 574.

(*m*) *Mahadu Kashiba* v. *Gajarabai* (1954) Bom. 883, (1954) 56 Bom. L.R. 387, ('54) A.B. 442.

(*n*) *Salamat Khan* v. *Bhagwat* (1930) 52 All. 499, 131 I.C. 608, ('30) A.A. 379; *Kushi Ram* v. *Mehr Chand* ('50) A. East Punjab 272.

(*o*) *Kandasami* v. *Somakanda* (1912) 35 Mad. 177, 5 I.C. 922; *Shiv Shanker* v. *Bhola*, I.L.R. (1954) Punj. 368.

(*p*) *Gangabai* v. *Vamanaji* (1864) 2 Bom. H.C. 301; *Miller* v. *Runga Nath* (1886) 12 Cal. 389.

(*q*) *Subba Goundan* v. *Krishnamachari* (1922) 45 Mad. 449, 68 I.C. 869, ('22) A.M. 112, dissenting from *Kandasami* v. *Somaskanda* (1912) 35 Mad. 177, 5 I.C. 922; *Jagesar* v. *Deo Dat* (1923) 45 All. 654, 74 I.C. 931, ('24) A.A. 51; *Kashinath* v. *Bapurao* (1940) Nag. 573, 191 I.C. 241, ('40) A.N. 305.

(*p*1) See f.n. (*l*1) above. Also see *Raghubanchmani* v. *Ambica Prasad* ('71) A.SC. 776.

(*r*) *Imperial Bank of India* v. *Mt. Maya Devi* (1935) 16 Lah. 714, ('35) A.L. 867.

(*s*) (1856) 6 M.I.A. 393, 423-424.

*a case of need, or for the benefit of the estate.* But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. *The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it,* in the particular instance, is the thing to be regarded.... Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money.... The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

The question in *Hunooman Persaud's* case was as to the extent of the power of a mother as manager of the estate of her minor son to alienate the estate. The case related to a mortgage created by the mother, but the same principles apply to a sale (*t*). The principles laid down in that case have been held to apply to alienations—

(a) by the manager of a joint family acting on behalf of minor members of the family (*u*), being the case dealt with in § 242;

(b) by a Hindu widow and other limited heirs of property inherited by them from males [§§ 178-179];

(c) by managers of religious endowments [§ 415]; and

(d) by managers of the estate of lunatics (*v*).

2. **Legal necessity.**—See § 243.

3. **Alienation "for the benefit of the estate".**—See § 243A.

4. **Specific performance of contract of sale entered into by manager.**—Where a manager enters into a contract for the sale of immovable property belonging to the joint family *for a legal necessity,* but subsequently refuses to complete the sale the Court may, in a suit for specific performance brought by the purchaser, decree specific performance of the contract, *though some of the members of the joint family are minors* (*v1*). But no specific performance can be granted if the contract is for a purpose not binding upon the other coparceners and made without their concurrence (*w*).

5. **Lease: License.** The alienation may be one by way of permanent lease (*x*) or even of a lease for a term (*y*). Where the practical effect of a license is the same as that of a lease it would be governed by the same rule (*z*).

See notes to §§ 243 and 244.

**243. What is legal necessity.**—The following have been held to be family necessities within the meaning of § 242:—

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(*t*) *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 84, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37.

(*u*) *Soorendro* v. *Nundun* (1874) 21 W.R. 196; *Baboo Kameswar Pershad* v. *Run Bahadur* (1881) 6 Cal. 843, 8 I.A. 8; *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 130, 39 All. 437, 443, 39 I.C. 280, ('17) A.PC. 61. See also *In re Dattatraya Govind Haldankar* (1932) 56 Bom. 519, ('32) A.B. 537; *Krishnarajan* v. *Doraswamy* ('66) A. Kerala 305 (sale by father).

(*v*) *Goureenath* v. *Collector of Monghyr* (1867) 7 W.R. 5; *Kanti Chunder* v. *Bisheswar* (1898) 25 Cal. 585.

(*v1*) *Hari Charan* v. *Kaula Rai* (1917) 2 Pat. L.J. 513, 40 I.C. 142, ('17) A.P. 478 [F.B.]. As to the liability of a manager for damages for breach of contract where there is no legal necessity, see *Adikesavan* v. *Gurunatha* (1917) 40 Mad. 338, 39 I.C. 358, ('18) A.M. 315 [F.B.]. See also *Jamsetji* v. *Kashinath* (1902) 26 Bom. 326; *Dhapo* v. *Ram Chandra* (1935) 57 All. 374, 154 I.C. 235, ('34) A.A. 1019; *Ramrao* v. *Suganchandra* (1946) Nagpur 116. Reference may also be made to *Sankaralinga* v. *Ratnaswami* (1952) Mad. 508, ('52) A.M. 389 where certain observations in the Bombay case cited above were considered. Also see *S. K. Buti* v. *Shriram* (1953) Nag. 579, ('54) A.N. 65; *Bhageran Rai* v. *Bhagwan Singh* ('62) A.P. 319; *Nathuni Mishra* v. *Mahesh Misra* ('63) A.P. 146.

(*w*) *Shamlal* v. *Yesaram* (1954) Nag. 866, ('54) A.N. 334; *Bageshwari Prasad* v. *Deopati Kuer* ('61) A.P. 416.

(*x*) *Bosdeo* v. *Muhammad* (1929) 51 All. 285, 116 I.C. 491, ('28) A.A. 617.

(*y*) *Haribhau* v. *Hakim* ('51) A.N. 249.

(*z*) *Pheku* v. *Harish Chandra* (1954) 1 All. 675, ('53) A.A. 406.

(a) payment of Government revenue and of debts which are payable out of the family property (*a*);

(b) maintenance of coparceners and of the members of their families (*b*);

(c) marriage expenses of *male* coparceners (*c*), and of the *daughters* of coparceners (*d*);

(d) performance of the necessary funeral or family ceremonies (*e*);

(e) costs of necessary litigation in recovering or preserving the estate (*f*);

(f) costs of defending the head of the joint family (*g*), or any other member (*h*) against a serious criminal charge;

(g) payment of debts incurred for family business or other necessary purpose. In the case of a manager other than a father, it is not enough to show merely that the debt is a pre-existing debt (*i*) [§ 246].

See § 415, notes under the head "Legal necessity."

It has been held by the Patna High Court that the mortgage of joint family property by the managing member to defray the marriage expenses of his daughter's daughter, when the father of the daughter was not indigent is not justified by legal necessity (*j*). The expenses of the second marriage of a member of the family have been held not to constitute legal necessity by the Madras High Court (*k*). Gift of a small portion of the property for educational purposes is not for legal necessity (*l*).

**243A. Alienation by manager for "the benefit of the estate."**—There was a conflict of opinion as to the meaning of the words "for the benefit of the estate" which occur in the judgment of the Judicial Committee in *Hunooman Persaud's* case referred to in note 1 to § 242. One view was that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction (see cases cited in the note below). Another view was that for a transaction to be for the benefit of the estate it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the know-

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(*a*) *Gharib-ullah* v. *Khalak Singh* (1903) 25 All. 407, 414-415, 30 I.A. 165; *Mudit* v. *Ranglal* (1902) 29 Cal. 797.

(*b*) See *Makundi* v. *Sarabsukh* (1884) 6 All. 417-421; *Vijaya Ramraj* v. *Vijaya Ananda* ('52) A.A. 564 (case under Madras Impartible Estates Act).

(*c*) *Sundrabai* v. *Shivnarayana* (1908) 32 Bom. 81; *Bhagirathi* v. *Jokhu* (1910) 32 All. 575, 6 I.C. 465; *Gopalakrishnam* v. *Venkatanarasa* (1914) 37 Mad. 273, 17 I.C. 308, ('14) A.M. 432, overruling *Govindarazalu* v. *Devarabhotla* (1904) 27 Mad. 206; *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I.C. 195. Also see *Kathaperumal* v. *Rajendra* ('59) A.M. 409, (1958) 2 Mad. L.J. 183.

(*d*) *Chhotiram* v. *Narayandas* (1887) 11 Bom. 605; *Vaikuntam* v. *Kullapiram* (1900) 23 Mad. 512 (marriage of niece); *Vaikuntam* v. *Kallapiran* (1903) 26 Mad. 497; *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 11 I.C. 570; *Ram Charan* v. *Mihin Lal* (1914) 36 All. 158, 22 I.C. 633, ('14) A.A. 23; *Sellappa* v. *Suppan* (1937) Mad. 906, 171 I.C. 216; ('37) A.M. 496.

(*e*) See *Nathuram* v. *Shoma Chhagan* (1890) 14 Bom. 562; *Lalla Gunput* v. *Toorun* (1871) 16 W.R 52.

(*f*) *Miller* v. *Runga Nath* (1886) 12 Cal. 389.

(*g*) *Beni Ram* v. *Man Singh* (1912) 34 All. 4, 11 I.C. 663; *Ramalingam* v. *Muthayyam* (1914) 26 Mad. L.J. 528, 24 I.C. 356 ('15) A.M. 6; *Hanumat* v. *Sonadhari* (1919) 4 Pat. L.J. 653, 52 I.C. 734, ('20) A.P. 708. But see *Nathu* v. *Dindayal* (1917) 2 Pat. L.J. 166, 39 I.C. 665, ('17) A.P. 504; *Said Ahmed* v. *Raja Barkhandi Mahesh Pratap Narain Singh* (1933) 8 Luck. 40, 139 I.C. 64, ('52) A.O. 255 where the next senior member executed the mortgage and it was held to be binding on the family.

(*h*) *Ram Raghubar* v. *Dip Narain* (1923) 45 All. 311, 71 I.C. 749, ('23) A.A. 287; *Dhanukdhari* v. *Rambirich* (1922) 1 Pat. 171, 70 I.C. 391, ('22) A.P. 553.

(*i*) *Chiranji Lal* v. *Bankey Lal* (1933) 55 All. 370, 142 I.C. 333, ('33) A.A. 273.

(*j*) *Malik Md. Ibrahim* v. *Harakh* (1947) 26 Pat. 430. But see *P. Mudaliar* v. *Nataraja* (1950) Mad. 788.

(*k*) *Patel* v. *Lakkireddigari* (1947) Mad. 379; *Bhagirathi* v. *Jhoku*, 32 All. 575.

(*l*) *Lilavatibai* v. *Takappa* (1948) A.M. 301.

ledge that was available to him at the time of the transaction (*m*). In *Balmukund* v. *Kamla Wati* (*m*1) the Supreme Court observed that for a transaction to be regarded as for the benefit of the family it need not be of a defensive character. In each case the Court must be satisfied from the material before it that it was in fact such as conferred or was reasonably expected to confer benefit on the family at the time it was entered into. Where adult members are in existence the judgment is not to be of the manager of the family alone but that of all the adult members of the family including the manager.

*Alienation for "the benefit of the estate."*—As stated in *Hunooman Persaud's* case (see note 1 to § 242), the power of the manager to alienate the estate can only be exercised rightly "*in a case of need* or *for the benefit of the estate.*" Para. 27 of Chapter I of the Mitakshara says that the father has no power to alienate immovable property without the consent of his sons. To this there is an exception mentioned by Brihaspati which is set forth in para. 28 which is as follows:—

> "An exception to it follows: 'Even a single individual may conclude a donation, mortgage, or sale of immovable property, *during a season of distress, for the sake of the family*, and especially for pious purposes'."

The first authoritative exposition of the expression "for the benefit of the estate" is to be found in *Palaniappa* v. *Deivasikamony* (*n*). The question in that case was as to the power of a mohunt (head of a math) to alienate debuttar land. In the course of the judgment the Judicial Committee observed as follows:—

> "No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

The above passage gave rise to the conflict of opinion noted in the section. In three Allahabad cases the view taken was that a transaction to be for the benefit of the estate must be of a defensive nature. This view was dissented from in a later case by a Full Bench of the Allahabad High Court (*o*). In that case it was held that a transaction to be for the benefit of the estate need not be of a defensive nature, and that the real test was whether the transaction was one which a prudent owner would have carried out with the knowledge then available to him. As to two (*p*) of the three earlier cases, the Full Bench said that the actual decision in those cases was correct on the facts. No opinion was expressed as to the decision in the third case (*q*), where it was held that a mortgage by the manager for starting a new business was not binding on the minor members of the family. As to *Palaniappa's* case the Full Bench observed that though the instances given by their Lordships in that case were all instances where the transaction was of a defensive nature, there was no justification for the suggestion that their Lordships meant to say that the transactions justifiable on the principle of 'benefit to the estate' were limited to transactions which were of a defensive nature.

The expression "in case of need", in the judgment in *Hunooman Persaud's* case may be traced to the words "during a season of distress" in verse 28, and the expression "for the benefit of the estate" to the words "for the sake of the family." The originai words "for the sake of the family" in para. 28 is *kutumbarthe*. As to this word Shah, J., said

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(*m*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 481, ('28) A.A. 454; *Tula Ram* v. *Tulsi Ram* (1920) 42 All. 539, 60 I.C. 3, ('20) A.A. 11; *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 361, 70 I.C. 517, ('24) A.A. 379; *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 64 I.C. 923, ('22) A.B. 122; *Bagho* v. *Zaga* (1929) 53 Bom. 419, 118 I.C. 555, ('29) A.B. 251; *Nagendranath* v. *Hemanta Kumari*, I.L.R. (1956) Cuttack 433.

(*m*1) ('64) A.SC. 1385 [The Court may in a proper case grant specific performance of the interest of the Karta].

(*n*) (1917) 44 I.A. 147, 155, 40 Mad. 709, 718, 39 I.C. 722, ('17) A.PC. 33.

(*o*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454.

(*p*) *Bhagwan Das* v. *Mahadeo* (1923) 45 All. 390, 71 I.C. 950, ('23) A.A. 298; *Shankar* v. *Bechu* (1925) 47 All. 381, 86 I.C. 769, ('25) A.A. 333.

(*q*) *Inspector Singh* v. *Kharak Singh* (1928) 50 All. 776, 112 I.C. 881, ('28) A.A. 403.

in a Bombay case (*r*) that it must be interpreted with due regard to the conditions of modern life. In a later case (*s*), Patkar, J., said: "The explanation of the text of Brihaspati by Mitakshara [in v. 29] is by no means to be considered as exhaustive, and may be treated as illustrative and interpreted with due regard to the conditions of modern life."

We now turn to cases decided under the head "benefit to the estate". The manager of a joint family is not entitled to sell joint family land solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, that is the land itself. Such a sale is not "for the benefit of the estate" (*t*), nor is the manager entitled to sell land simply for the purpose of purchasing other land (*t*1). A mortgage of family property for the purpose solely of purchasing another property (*u*), or for the payment of premium for a lease of another property (*v*), is not for the benefit of the estate. But a sale of a house in a dilapidated condition, in respect of which a notice has been issued by the Municipality to pull it down, is for the benefit of the estate (*w*). Whether a transaction is beneficial to the estate must depend on the facts and circumstances of the particular case (*x*). A sale of joint family property which is inconveniently situated and is unproductive, the purchase-money being invested in another property which is a sound investment (*y*); or in family business (*z*), is for the benefit of the estate. A sale of such property will be upheld even if the price was subsequently lost to the family owing to the failure of the bank in which it was invested, provided the intention was to invest the price in another more productive immovable property which the manager could look after (*a*). Similarly a mortgage of family property for the payment of price for the purchase of a share in a village in which the family already possessed a share is for the benefit of the estate (*b*). A mortgage or sale, however, of family property for the purpose solely of pre-empting another property is not ordinarily for the benefit of the estate (*c*). A deed of exchange executed by a manager of the joint family with a view to defeat a suit for pre-emption, even though made for property of equal value, was held not to bind the other members of the family (*d*). But a mortgage for making additions to and improvements in the family house is for the benefit of the estate (*e*). A mortgage for the purpose of carrying on a speculative litigious suit is obviously not for the benefit of the estate (*f*). Nor is a mortgage for the purpose of repurchasing or acquiring mortgage rights in the estate of a separated brother (*g*). A mortgage by seven adult members of the family for acquiring proprietary interests the consolidation of which had the effect of converting them from mere tenants into landlords is for the benefit of the estate (*h*).

A gift by the manager of a joint family of a small portion of zamindari land purchased by him to a stranger with the object of defeating a claim for pre-emption was held to be a transaction for the benefit of the family and therefore binding on the family (*i*).

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(*r*) *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 316, 64 I.C. 923, ('22) A.B. 122.

(*s*) *Ragho* v. *Zaga* (1929) 53 Bom. 419, 426, 118 I.C. 555, ('29) A.B. 251.

(*t*) *Palaniappa* v. *Deivasikamony* (1917) 44 I.A. 147, 156, 40 Mad. 709, 719, 39 I.C. 722, ('17) A.PC. 33; *Vishnu* v. *Ramchandra* (1923) 25 Bom. L.R. 508, 73 I.C. 1017, ('23) A.B. 453.

(*t*1) *Nirmal Singh* v. *Satnam* ('60) A. Raj. 313, 10 Raj. 999. Reference may also be made to *Helava* v. *Sesigowda* ('60) A. Mys. 231.

(*u*) *Ram Bilas* v. *Ramyad* (1920) 5 Pat. L.J. 622, 627, 58 I.C. 303, ('20) A.P. 441; *Sellappa* v. *Suppan* (1937) Mad. 906, 171 I.C. 216, ('37) A.M. 496; *Ramkaran Thakur* v. *Baldeo Thakur* (1938) 17 Pat. 168, 173 I.C. 292, ('38) A.P. 44.

(*v*) *Manna Lal* v. *Karu Singh* (1919) 1 Pat. L.T. 6, 39 Cal. L.J. 256, 56 I.C. 766, ('19) A.PC. 108.

(*w*) *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 64 I.C. 923, ('22) A.B. 122.

(*x*) *Medikenduri* v. *Venkatayya* ('53) A.M. 210; *Sengoda* v. *Muthuvellappa* ('55) A.M. 531; *Sundarmani Devi* v. *Rupei Dei* ('56) A. Orissa 16 (alienation by widow); *Jagdish Prasad* v. *Shreedharpant* ('55) A.A. 625; *Radha Krishan* v. *Bhushan Lal* ('71) J. & K. 62 (Repairs).

(*y*) *Jado Singh* v. *Nathu Singh* (1926) 48 All. 592, 98 I.C. 773, ('26) A.A. 511.

(*z*) *Jagmohan* v. *Prag Ahir* (1925) 47 All. 452, 87 I.C. 27, ('25) A.A. 618.

(*a*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454.

(*b*) *Beni Madho* v. *Chander Prasad* (1924) 3 Pat. 451, 83 I.C. 603, ('25) A.P. 189; *Shaikh Jan* v. *Bikoo* (1928) 7 Pat. 798, 116 I.C. 33, ('29) A.P. 130; *Sital* v. *Ajablal Mander* (1939) Pat. 306.

(*c*) *Shankar* v. *Bechu* (1925) 47 All. 381, 86 I.C. 769. ('25) A.A. 333; *Kishen Sahai* v. *Raghunath* (1929) 51 All. 473, 116 I.C. 488, ('29) A.A. 139; *Amrej Singh* v. *Shambhu Singh* (1933) 55 All. 1, 140 I.C. 509, ('32) A.A. 632; *Brij Mohan Lal* v. *Sarabjit Singh* (1938) 13 Luck. 597, 171 I.C. 286, ('37) A.O. 513.

(*d*) *Balzor Singh* v. *Raghunandan Singh* (1932) 54 All. 85, 137 I.C. 191, ('32) A.A. 548.

(*e*) *Ratnam* v. *Govindarajulu* (1878-1881) 2 Mad. 339, 341; *Ramrichpal* v. *Bikaner Stores* ('66) A. Raj. 187 (reconstruction of 'kucha' structure).

(*f*) *Bhagwan Das* v. *Mahadeo* (1923) 45 All. 390, 71 I.C. 959, ('23) A.A. 298.

(*g*) *Hans Raj* v. *Khushal Singh* (1933) 14 Lah. 162, 138 I.C. 642, ('32) A.L. 420.

(*h*) *Baijnath Prasad* v. *Binda Prasad* (1938) 17 Pat. 549, ('39) A.P. 97.

(*i*) *Mohib Ali Khan* v. *Baldeo Prasad* (1939) All. 305.

It is submitted that a transaction to be binding on the family must be one which not only confers a benefit upon the estate, but is necessary for its good management (*j*).

As to alienations by a widow for the benefit of the estate, see § 181B and the Orissa case cited in f.n. (*x*) above. As to alienations by a natural guardian for the benefit of the estate, see § 528.

**244. Burden of proof of necessity.**—Where the manager of a joint Hindu family sells or mortgages joint family property, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage, and the burden lies on the purchaser or mortgagee to prove *either* that there was a legal necessity in fact, *or* that he made proper and *bona fide* enquiry as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity (*k*).

An intending mortgagee cannot escape the duty of inquiring into the legal necessity for a mortgage so as to bind the minor members of the joint family, by inducing the guardian to apply to the Court for permission to raise a loan on mortgage and thus attempting to throw the responsibility on the Court (*l*). In general, as the power of the manager is a limited power, it is for the mortgagee to show that the transaction was within the authority of the manager (*m*).

The existence of a necessary purpose is not the same as a legal necessity, for, there may be large resources, a large income making a loan unnecessary. The lender must show necessity for the loan (*n*).

If the purchaser or mortgagee proves that there was a legal necessity in fact, the alienation will be upheld, even though the necessity was brought about by the previous mismanagement of the manager, unless it be shown that the purchaser or mortgagee himself contributed to the mismanagement.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid.

But a purchaser or mortgagee is not bound to see that the money paid or advanced by him is actually applied to meet the necessity. The reason is that he can rarely have the means of controlling and directing the actual application, unless he enters on the management himself (*o*).

It has been held in a Madras case (*p*) that though a lender who has made *bona fide* enquiries, is not bound to see to the application of the money, yet if he makes a case that he knew that the borrowing was for a specific purpose, and that the money was utilised for that purpose, it is incumbent upon him to prove his allegations.

*Debts for family business.*—As to burden of proof, see § 240(3).

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(*j*) *Hurry Mohun* v. *Gonesh Chunder* (1884) 10 Cal. 823, 830 [F.B.]; *Durgaprasad Barhai* v. *Jewdhari Singh* (1935) 62 Cal. 733.

(*k*) *Kesar Singh* v. *Santokh Singh* (1936) 17 Lah. 824. As to the duty of the alienee see *Venkata Chenchayya* v. *Ramalingam* ('57) A. Andh. Pra. 744; *Shivashankar* v. *Raghubansh* ('67) A.P. 172 (alienation by limited owner); *Kumaraswami* v. *Rajamanikkam* ('66) A. Kerala 266.

(*l*) *In re Dattatreya Govind Haldankar* (1932) 56 Bom. 519, 141 I.C. 697, ('32) A.B. 537.

(*m*) *Suraj Bakhsh Singh* v. *Kedar Nath* (1932) 7 Luck. 505, 135 I.C. 379, ('32) A.O. 66.

(*n*) *Ganpat Rao* v. *Ishwar Singh* (1940) Nag. 20, ('38) A.N. 816; *Babu Lal* v. *Satya Narain Prasad* (1941) All. 680, 197 I.C. 509, ('41) A.A. 372.

(*o*) *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290, ('17) A.PC. 188; *Hunooman Persaud* v. *Mst. Babooee* (1856) 6 M.I.A. 393; *Soorendro* v. *Nundun* (1874) 21 W.R. 196; *Lala Bunseedhur* v. *Bindeseree* (1866) 10 M.I.A. 454, 471; *Dalibai* v. *Gopibai* (1902) 26 Bom. 433; *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135; *Muddun Thakoor* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 199, 1 I.A. 321, 334; *Tula Ram* v. *Tulshi Ram* (1920) 42 All. 559, 60 I.C. 3, ('20) A.A. 11; *Chintamani* v. *Satyabadi Kar* (1922) 1 Pat. 715, 70 I.C. 226, ('23) A.P. 71; *Baijnath* v. *Gokul* (1923) 45 All. 718, 74 I.C. 498, ('24) A.A. 37; *Rodha Ram* v. *Amar Chand* (1923) 4 Lah. 208, 77 I.C. 333, ('24) A.L. 141; *Bed Nath* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I.C. 725, ('37) A.O. 406; *Lalta* v. *Avadh Naresh Singh* (1940) 15 Luck. 68, 185 I.C. 443, ('40) A.O. 59; *Dayaram* v. *Kashiram* ('64) A.M.P. 286.

(*p*) *Pethu Reddiar* v. *Kandaswami* (1950) 1 M.L.J. 469, ('50) A.M. 560.

*Alienation for purposes of family business.*—See § 246 below.

*Recital of necessity.*—Recitals of legal necessity in mortgages or deeds of sale executed by the father or manager are admissible in evidence, but are not of themselves evidence of such a necessity without substantiation by evidence *aliunde* (*r*). They may be corroborated by representation made by the borrower (*s*). But the recitals are admissions of the manager and they also amount to a representation about the need of the family and where owing to the length of time it is impossible to produce other evidence they have evidentiary value also (*t*). (See cases under § 182).

*Lapse of time.*—See notes to § 182 under the same head.

*Rate of interest.*—Those who support a mortgage of joint family property made by its manager must prove not only that there was necessity to borrow the principal, but that it was not unreasonable to borrow at such rate of interest and upon such terms as are provided by the mortgage (*u*). If the rate of interest is exorbitantly high although the security is ample, the Court can properly infer that it was unnecessarily high, and can make a mortgage decree allowing a reduced rate (*v*). Upon a written statement alleging that there was no legal necessity to execute the document sued on, the defendant, while admitting the necessity to borrow the principal, can contend that the rate of interest was unnecessarily high. A plea of no legal necessity for a loan in the written statement opens the door for a defendant to say that the rate of interest is excessive though there is no specific plea in the written statement that there was no necessity to borrow at so high a rate of interest (*w*). The same rules apply to a mortgage by a Hindu widow or other limited owner of property inherited by her from the last full owner (*x*).

In two cases the Judicial Committee laid down that the authority of a manager to borrow in a case of necessity was one to borrow "upon reasonable commercial rates" (*y*). This expression means, as their Lordships observed in a later case, such terms as can be arranged freely between borrower and lender in the circumstances of the particular case; no reference to the current rate of interest upon mercantile transactions is to be understood, especially if the parties belong to a community which is not a commercial community and the transaction is one which no one would call mercantile. In the same case it was held that a previous borrowing upon terms as onerous as those in question may be evidence that those terms are reasonable and proper (*z*).

In Oudh 12 per cent per annum is looked upon as a normal rate of interest even where the security is abundant (*a*).

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(*r*) *Biswanath Singh* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422; *Bed Nath Singh* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I.C. 725, ('37) A.O. 206; *Nagayya* v. *Chenganna* ('57) A. Andh. Pra. 264.

(*s*) See *Rani* v. *Santa Bala* ('71) A.SC. 1028 referred to under § 182; *Padam Singh* v. *Reoti Saram* ('29) A.A. 481.

(*t*) *Dwarka Ram* v. *Bakshi Parnaw Prasad* (1935) 14 Pat. 595, 156 I.C. 859, ('35) A.P. 178. See also *Murugesam* v. *Manickavasaka* (1917) 44 I.A. 98. Reference may be made to *M.B. Fund Ltd.* v. *Devarajulu* ('55) A.M. 455; *Sivarama* v. *Subramonia* ('53) A. Tr. Co. 417.

(*u*) *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657; *Bajrang Singh* v. *Govind Prasad* (1936) 11 Luck. 11, 154 I.C. 841, ('35) A.O. 373.

(*v*) *Nazir Begam* v. *Rao Raghunath Singh* (1919) 41 All. 571, 576, 46 I.A. 145, 149, 50 I.C. 434. ('19) A.PC. 12; *Ram Bujhawan Prasad* v. *Nathu Ram* (1923) 50 I.A. 14, 20-21, 2 Pat. 285, 290-291, 71 I.C. 933, ('23) A.PC. 37 [compound interest at 3 per cent per month payable with quarterly rests, reduced to simple interest at 1 per cent per month]; *Radha Kishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184; *Sunder Mull* v. *Satya Kinker Sahana* (1928) 55 I.A. 85, 7 Pat. 294, 108 I.C. 337, ('28) A.PC. 64 [interest and compound interest at 15 per cent per annum rate upheld]; *Hurro Nath* v. *Randhir Singh* (1891) 18 Cal. 311, 18 I.A. 1; *Nand Ram* v. *Bhupal Singh* (1912) 34 All. 126, 13 I.C. 5; *Ram Khelawan* v. *Ram Naresh* (1919) 41 All. 609, 51 I.C. 52, ('19) A.A. 268; *Premukhdas* v. *Rambhujawan* (1919) 1 Pat. L.T. 34, 52 I.C. 964, ('20) A.P. 678; *Bhikhi* v. *Kodai* (1919) 41 All. 523, 50 I.C. 814, ('19) A.A. 238; *Mahadeo* v. *Bissessar* (1923) 2 Pat. 488, 74 I.C. 695, ('24) A.P. 71; *Parmeshwar* v. *Raj Kishore* (1924) 3 Pat. 829, 80 I.C. 34, ('25) A.P. 59; *Sukh Lal* v. *Murari Lal* (1926) 1 Luck. 160, 95 I.C. 1019, ('26) A.O. 273; *Durgaprasad* v. *Jewdhari Singh* (1935) 62 Cal. 733 where 18 per cent compound interest with nine monthly rests was reduced to 18 per cent simple interest.

(*w*) *Ram Bujhawan Prasad* v. *Nathu Ram* (1923) 50 I.A. 14, 22, 2 Pat. 285, 287, 71 I.C. 933, ('23) A.PC. 37; *Radha Kishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184; *Ram Dayal* v. *Amin Uddin* (1931) 29 All. L.J. 29, 133 I.C. 311, ('31) A.A. 203.

(*x*) *Radha Kishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184; *Ram Dayal* v. *Amin Uddin* (1931) 29 All. L.J. 29, 133 I.C. 311, ('31) A.A. 203.

(*y*) *Nazir Begam* v. *Rao Raghunath Singh* (1919) 41 All. 571, 576, 46 I.A. 145, 149, 50 I.C. 434, ('19) A.PC. 12, (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184, *supra.*

(*z*) *Sunder Mull* v. *Satya Kinker Sahana* (1928) 55 I.A. 85, 7 Pat. 294, 108 I.C. 337, ('28) A.PC. 64.

(*a*) *Suraj Bakhsh Singh* v. *Kedar Nath* (1932) 7 Luck. 505, 135 I.C. 379, ('32) A.O. 66.

**245. Purchase-money or money raised on mortgage applied by manager in part only to purposes of legal necessity.**—(1) *Sale.*—Cases frequently arise in which joint family property is sold by the manager of the family for legal necessity, but the whole of the price is not proved to have been *applied* to purposes of necessity, and the sale is challenged on that ground by the other members of the family. In such cases, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been *applied* to purposes of necessity would not invalidate the sale, the purchaser not being bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of necessity is considerable or not (*b*). In *Radhakrishandas* v. *Kaluram* (*b*1), the Supreme Court considered the leading decisions of the Privy Council on the subject and expressed agreement with them. See §189.

In an Allahabad case (*c*), where the sale was for Rs. 6,000 which was a fair price but the amount proved to have been applied for purposes of legal necessity was only Rs. 3,281, and there was *no evidence of any inquiry* having been made by the purchaser as to the necessity for the loan, it was held that the sale itself was not one which was justified by legal necessity, and that it should be set aside conditionally on payment by the plaintiffs of Rs. 3,281 to the purchaser.

A contract of sale may be justified by legal necessity, as where it is made for payment of a previous mortgage debt. But it may be improvident and therefore beyond the powers of the manager, as where he has entered into a previous agreement for a sale of part of the property and is therefore unable to complete the sale, and the purchaser is thereby placed in a position indefinitely to postpone completion of the purchase and payment of the price, so that the contract may be of no value to relieve the financial necessity existing at its date. In such a case, if the sale is completed at a time when it is deprived of all value as a solvent of the family's financial difficulties the sale should be set aside, but, if the purchase money has been applied by the manager in payment of the mortgage debt, the purchaser should have the full benefit of the mortgage. An example of the commonest kind where the sale would be deprived of all value as a solvent of the family's financial difficulties would be where the price at which the property is agreed to be sold is Rs. 22,500, and the mortgage debt at the date of the contract of sale is Rs. 14,000, but the sale is completed after several years, and the mortgage debt at the date of sale has augmented to a sum equivalent almost to the price of the property, so that at the date of the completion of the sale hardly any surplus is left to the vendor (*d*).

Although there may be legal necessity justifying alienation, it is not open to a father or other manager to sacrifice family property for an inadequate

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(*b*) *Krishan Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37 [price Rs. 3,500—Rs. 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121 [sale upheld unconditionally]; *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105 [price Rs. 18,400—Rs. 2,000 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Gauri Shankar* v. *Jiwan Singh* (1928) 30 Bom. L.R. 64, 107 I.C. 4, ('27) A.PC. 246 [price Rs. 4,000—Rs. 500 not applied to purposes of necessity—sale upheld unconditionally]; *Shyam Lal* v. *Badri Prasad* (1929) 51 All. 1039, 122 I.C. 744, ('29) A.A. 789; *Ram Sunder* v. *Lachhmi* (1929) 51 All. 430, 160 I.C. 605, ('29) A.PC. 143 [price Rs. 10,767—Rs. 3,033 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Achutanand* v. *Surjanarain* (1926) 5 Pat. 746, 95 I.C. 991, ('26) A.P. 427 [price Rs. 750—Rs. 200 not proved to have been applied, etc.—sale upheld unconditionally]; *Suraj Bhan Singh* v. *Sah Chain Sukh* (1927) 29 Bom. L.R. 1385 [P.C.], 105 I.C. 257, ('27) A.PC. 244 [sale by widow]; *Murli* v. *Ghammar* (1929) 51 All. 61, 121 I.C. 285, ('30) A.A. 22; *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 133 I.C. 628, ('31) A.L. 419; *Kalipada* v. *Purnabala* (1948) 2 Cal. 485; *Gobindkar* v. *Mohan* (1949) A.O. 218.

(*b*1) ('67) A.S.C. 574.

(*c*) *Sri Nath* v. *Jagannath* (1931) 52 All. 891, 125 I.C. 230, ('30) A.A. 292. See also *Lachhman Prasad* v. *Sarnam Singh* (1917) 39 All. 500, 44 I.A. 163, 40 I.C. 284, ('17) A.PC. 41 [mortgage].

(*d*) *Ram Charan* v. *Bhagwan Das* (1926) 53 I.A. 142, 48 All. 443, 95 I.C. 898, ('25) A.PC. 68.

consideration. A transfer in such cases is liable to be set aside at the instance of other coparceners (*e*).

(2) *Mortgage.*—It has been held in Oudh that the rule stated in sub-§ (1) applies only to sales, and not to mortgages. The reason given is that it is not always possible for the father [or manager] of a family to sell that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding, while in the case of a mortgage he can borrow the precise amount required to meet the family necessity. The mortgage therefore can be redeemed on payment to the mortgagee of such sum only as was required for legal necessity (*f*). The decision has been followed by the High Court of Patna (*g*). In a case where the mortgage was for Rs. 12,000 and it was found that there was justifiable necessity only for Rs. 7,700, the Calcutta High Court held that there was no *bona fide* inquiry and granted a decree only for the latter sum with the corresponding interest, at the same time observing that it was not necessary to express any opinion on the question discussed above (*h*).

*Illustration of sub-§ (1)*

A joint Hindu family consists of a father and his minor sons. The father sells one of the joint family properties for Rs. 3.500 out of which Rs. 3,000 are paid to the creditors of the family. Afterwards the sons sue to set aside the sale on the ground that the surplus of Rs. 500 was not applied to purposes of necessity: It is proved that the price was adequate and that the purchaser had made due inquiry as to the necessity for the sale. The mere fact that the surplus is not proved to have been applied to purposes of necessity is not a sufficient ground in law for setting aside the sale: *Krishan Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37. In this leading case on the subject the Privy Council disapproved of the view taken by the Allahabad High Court (*i*) and held that a sale of joint family property should not be set aside merely because a *considerable* part of the purchase money is not proved to have been applied to purposes of legal necessity. The real question to be considered is whether the sale itself was justified by legal necessity; if the purchaser has acted honestly and made due inquiry as to the existence of necessity for the sale, he is not bound to account for the application of the price. If the above conditions are fulfilled the sale must be upheld. It was also held that on the same principle a decree upholding a sale conditionally upon the purchaser paying a *small* part of the price not proved to have been applied to purposes of necessity is also contrary to law; the sale must be upheld unconditionally. In this case (*l*) the Judicial Committee adopted the principles laid down by the same tribunal in 1856 in *Hunooman Persaud* v. *Musummat Babooee* (*m*). Almost all the cases cited by the Judicial Committee in *Krishan Das* v. *Nathu Ram*, as supporting their decision, were cases of sales by a Hindu widow. The point emphasized in both the cases was that the validity of a sale in such cases did not depend upon proof of the *application* of the price. The reason is that a *bona fide* purchaser for value is not bound to see the application of the price paid by him; if it were otherwise, he would himself have to enter on the management and direct and control the actual application of the money. Hence it

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(*c*) *Kailash Nath* v. *Tulshi Ram* (1946) All. 457; *Dudh Nath* v. *Sat Narain Ram* ('66) A.A. 315 (F.B.).

(*f*) *Thakar Jai Indira* v. *Lala Khairati Lal* (1929) 4 Luck. 107, 113 I.C. 489, ('28) A.O. 465.

(*g*) *Dwarka Ram* v. *Bakshi Parnaw Prasad* (1935) 14 Pat. 595, 156 I.C. 859, ('35) A.P. 178, distinguishing *Hitendra* v. *Sukhdeb* (1929) 8 Pat. 558, 115 I.C. 886, ('29) A.P. 360.

(*h*) *Durgaprasad Barhai* v. *Jewdhari Singh* (1935) 62 Cal. 733, 161 I.C. 595, ('36) A.C. 116.

(*i*) *Gobind Singh* v. *Baldeo Singh* (1903) 25 All. 330 [sale by widow—price Rs. 3,299—Rs. 376 not proved to have been applied to purposes of necessity]; *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494 [sale by widow—price Rs. 2,995—Rs. 445 not proved, etc.]; *Jainarayan* v. *Bhagwan* (1922) 44 All. 683, 80 I.C. 1006, ('22) A.A. 321 [price Rs. 375—Rs. 101 not proved, etc.]; *Dwarka Ram* v. *Jhulai* (1923) 45 All. 429, 431, 72 I.C. 134, ('23) A.A. 248 [price Rs. 600—Rs. 200 not proved etc.]; *Daulat* v. *Sankhata* (1925) 47 All. 355, 86 I.C. 91, ('25) A.A. 324 [price Rs. 2,142—Rs. 105 not proved to have been applied to purposes of necessity]; *Lal Bahadur* v. *Kamleshar* (1926) 48 All. 183, 90, I.C. 988, ('25) A.A. 624 (F.B.) [price Rs. 5,995—Rs. 259 not proved to have been applied to purposes of necessity].

(*l*) (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37.

(*m*) (1856) 6 M.I.A. 393, 423-424.

has been held that the mere fact that a considerable part of the price, *e.g.*, Rs. 712 out of Rs. 5,000 (*n*), or Rs. 2,000 out of Rs. 18,400 (*o*), or Rs. 5,100 out of Rs. 43,500 (*p*), or even one-third of the whole price (*q*), is not proved to have been applied to purposes of necessity, is not a sufficient ground in law for setting aside the sale.

The decision in *Krishan Das* v. *Nathu Ram* was followed by the same tribunal in *Niamat Rai* v. *Din Dayal* (*r*). In that case the managing member of a joint Hindu family sold part of the joint property for Rs. 43,500, which was the full value. Out of the price Rs. 38,400 was applied to discharge debts incurred in carrying on a business to which the joint family had succeeded and the balance was invested in that business. Two minor members of the family sued to set aside the sale on the ground that the surplus of Rs. 5,100 was not applied to purposes of necessity. It was held that even if there had been no joint family business, proof that pre-existing debts to the amount of Rs. 38,400 had been satisfied out of the price, would support the sale, without showing how the balance had been applied. See § 189 and notes.

**246. Alienation by manager of coparcenary property for purposes of family business.**—The power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business. An alienation so made is binding on the family property, including the interest of minor coparceners therein (*s*). Further, the manager has authority to raise money not only to discharge debts arising out of the family business, but also money needed to carry it on. It is a matter for his decision whether the money necessary should be raised by mortgage or by a sale, and whether it was better to raise money to continue a business which latterly had not been profitable, or to close it down; it would be unreasonable to expect a lender or purchaser to investigate questions of that kind (*t*): If the lender or purchaser acted honestly and with due caution, and made reasonable inquiries which led him to believe that a sufficient and real necessity for the raising of the money for the purposes of the family business did exist (*u*), he is not bound to see to the application of the money (*v*).

Where the alienation was made by a manager who was blind and deaf and practically all the money which had been disallowed by the High Court had been borrowed by the fourth and fifth defendants, who were the eldest members of the family and the manager's right-hand men, their conduct in not giving evidence and remaining as defendants, while causing their sons to file the suit questioning the alienation, was held by their Lordships of the Privy Council to be strong corroborative evidence of legal necessity (*w*).

A mortgage by the manager for enlarging a family business by the purchase of fresh stocks is binding on the family property including the interest of the minor coparceners therein, provided the transaction is one which a prudent owner would enter into having regard to all the circumstances of the case (*x*).

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(*n*) *Medai Dalavoi* v. *Nainar Tavan* (1922) 27 C.W.N. 365, 74 I.C. 604, ('22) A.PC. 307.

(*o*) *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105.

(*p*) *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121.

(*q*) *Ram Gopal Ghose* v. *Bullodev Bose* (1864) W.R. 385.

(*r*) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121, *supra*.

(*s*) *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136; *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. li; *Sham Sundar* v. *Achhan Kunwar* (1899) 21 All. 71, 83, 25 I.A. 183, 192; *Khem Chand* v. *Narain Das* (1925) 6 Lah. 493, 89 I.C. 1022, ('26) A.L. 41; *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 364, 79 I.C. 517, ('24) A.A. 379; *Narayanan* v. *Muthiah* (1924) 47 Mad. 692, 80 I.C. 654, ('24) A.M. 680; *Palanippa* v. *A. & F. Harvey Ltd.* ('53) A. Tr. Co. 481.

(*t*) *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121.

(*u*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 (F.B.), 155 I.C. 136, ('35) A.A. 221.

(*v*) *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136.

(*w*) *Jagannath* v. *Shri Nath* (1934) 56 All. 123, 61 I.A. 150, 147 I.C. 903, ('34) A.PC. 55.

(*x*) *Raj Kumar* v. *Mohan Lal* (1931) 29 All. L.J. 219, 131 I.C. 872, ('31) A.A. 253.

A manager in executing a mortgage for a legal necessity may, under section 69, Transfer of Property Act, confer, on the mortgagee, the right of sale without recourse to the court (*y*).

As to new business, see § 234(2).

**247. Reference to arbitration by manager.**—A father (*z*) or other manager has power to refer to arbitration disputes relating to joint family property provided such reference is for the benefit of the family. The other members of the family including minors are bound by the reference and by the award made upon it (*a*).

The reference may be in respect of disputes between the family and an outsider or disputes between members of the family themselves, e.g., as to shares on partition.

**248. Compromise by manager.**—A compromise entered into by the manager *bona fide* for the benefit of the family, binds the other members of the family including minors (*b*).

But where a suit relating to joint family property, to which a father and his minor sons are parties, is pending and the father himself is the next friend or guardian *ad litem* of the minors, his powers are controlled by the provisions of O. 32, r. 7, of Code of Civil Procedure, 1908, and he is debarred from entering into any compromise relating to the joint family property without leave of the Court. The minors are not bound in such a case either by the compromise or by a consent decree in terms of the compromise (*c*). The Court may in such a case set aside the whole compromise (*d*). A manager of a joint family is subject to O. 32, rr. 6 & 7, Civil Procedure Code (*e*).

**248A. Manager's power to give valid discharge for debts.**—The manager has power to give a valid discharge for a debt due to the joint family. Hence if one of the members is a minor, he cannot claim the benefit of sec. 7 of the Limitation Act, 1908 (*f*).

**248B. Family Arrangement or Family Settlement.**—In §§ 192 and 193 the subject of Family Arrangement and compromise by a widow has been dealt with. Family Arrangement or Family Settlement as it is sometimes termed, generally meets with approval of the Court and the Court always leans in favour of a transaction relating to any such arrangement which ensures peace and goodwill among the family members. This does not rest on any special rule of Hindu law but flows from general principles and policy of law. Though conflict of legal claims *in praesenti* or *in futuro* is generally regarded as a condition for the validity of a family arrangement it is not necessarily so. Even *bona fide* dispute, present or possible, which may not involve future

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(*y*) *Paramanand Doss Chota Doss & Sons* v. *Nannulal Kanji & Ors.* (1942) Mad. 287, 201 I.C. 62, ('42) A.M. 232.

(*z*) *Shantilal* v. *Munshilal* (1932) 56 Bom. 595, 139 I.C. 820, ('32) A.B. 498.

(*a*) *Jagan Nath* v. *Mannu Lal* (1894) 16 All. 231; *Balaji* v. *Nana* (1903) 27 Bom. 287; *Dwarka Das* v. *Krishan* (1921) 2 Lah. 114, 121-124, 61 I.C. 628, ('21) A.L. 34; *Guran Ditta* v. *Pokhar Ram* (1927) 8 Lah. 693, 104 I.C. 202, ('27) A.L. 362; *Nanak Chand* v. *Banarsi Das* (1931) 12 Lah. 65, 126 I.C. 579, ('30) A.L. 425; *Kanshi Ram* v. *Harnam Das* (1940) 21 Lah. 599, 188 I.C. 493, ('40) A.L. 73.

(*b*) *Pitam Singh* v. *Ujagar Singh* (1878) 1 All. 651; *Dwarka Das* v. *Krishan* (1921) 2 Lah. 114, 123-124, 61 I.C. 628, ('21) A.L. 34; *Dangal Ram* v. *Jaimangal* (1926) 5 Pat. 480, 95 I.C. 1051, ('26) A.P. 361; *Bhagwan Singh* v. *Beharilal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*c*) *Ganesh Row* v. *Tuljaram Row* (1913) 40 I.A. 132, 36 Mad. 295, 19 I.C. 515.

(*d*) *Venkata Row* v. *Tuljaram Row* (1922) 49 I.A. 91, 45 Mad. 298, 74 I.C. 765, ('22) A.PC. 69 [continuation of litigation in 40 I.A. 132, 19 I.C. 515, supra].

(*e*) *Fatmabi* v. *Tukabai* (1945) Nag. 242.

(*f*) *Rati Ram* v. *Niadar* (1919) 41 All. 435, 49 I.C. 990, ('19) A.A. 209; *Bapu* v. *Bala* (1921) 45 Bom. 446, 59 I.C. 759 ('21) A.B. 289; *Supdu* v. *Sakharam* (1928) 52 Bom. 441, 110 I.C. 276, ('29) A.B. 13; *Varada Bhaktavatsaluda* v. *Damojipurapu Venkata Narasimha Rao* (1940) Mad. 752, 191 I.C. 369, ('40) A.M. 530.

claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement (*f*1). The transaction is not the creation of an interest. In such an arrangement, ordinarily, each party takes a share or interest in the property by virtue of the independent title which is admitted to that extent by the other parties. But every party who takes benefit under it need not necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary to show is that the parties are related to each other in some way and have a possible claim or even a semblance of a claim or some other ground as, say affection (*f*2). Also see § 192.

Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what was agreed upon between the parties. The document which contains the arrangement does not require registration unless, by itself it creates interest in immovable property. A memorandum is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration (*f*3).

For family arrangement of the nature of a partition created by "will", reference may be made to § 345 *post* and the undermentioned case (*f*4) and the decisions there cited.

**249. Acknowledgment and part payment of debt by manager.**—It is competent to a manager to acknowledge a debt, or to pay interest on a debt, or to make part payment of a debt, so as to extend the period of limitation, but he has no power to pass a promissory note so as to revive a debt barred by the law of limitation (*g*). But he can renew a note, the time for filing a suit on which expired during the summer recess of a court and the suit could therefore be filed on the reopening day (*h*).

A manager or a member cannot keep a debt alive against the other members of the family by making payment after partition (*i*). Also see § 234A.

Now see sections 18 and 19 of the new Limitation Act, 1963.

It was expressly provided by sec. 21(3)(b) of the old Indian Limitation Act, 1908 that for the purposes of secs. 19 and 20 of the Indian Limitation Act, 1908, where a liability had been incurred by or on behalf of a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being should be deemed to have been made on behalf of the whole family. Section 19 of the Limitation Act, 1908, dealt with acknowledgments, and sec. 20 with payment of interest as such on a debt and with part payment of principal.

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(*f*1) *Pullaiah* v. *Narasimham* ('66) A.S.C. 1836; *Ram Charan* v. *Girja Nandini* ('66) A.SC. 323; *Tek Bahadur* v. *Debi Singh* ('66) A.S.C. 292 (compromise by parties in an earlier suit and decree). Reference may be made to *Shanmugam Pillai* v. *K. Shanmugam Pillai* ('72) A.S.C. 2069. Also see cases cited under §§ 192, 193 above, Also see *Sant Bhushan Lal* v. *Brij Bhushan Lal* ('67) A. Delhi 137 (compromise in partition suit by next friend of minor); *Manu Biswal* v. *Lata Biswalani* ('65) A. Orissa 13 (compromise in partition suit by manager of a branch); *Mania* v. *Dep. Director Consolidation* ('71) A.A. 151; *Jokhan* v. *Ram Deo* ('67) A.A. 212; *Laxmi Narayan* v. *Banshi Lal* ('65) A.A. 522.

(*f*2) *Ram Charan* v. *Girja Nandini* ('66) A.S.C. 323.

(*f*3) *Ram Charan supra*; *Pullaiah* v. *Narasimham supra*.

(*f*4) *Kuppuswami* v. *Perumal* ('64) A.M. 291.

(*g*) *Bhaskar* v. *Vijalal* (1893) 17 Bom. 512; *Dinkar* v. *Appaji* (1896) 20 Bom. 155; *Chinnaya* v. *Gurunatham* (1882) 5 Mad. 169; *Dalip Singh* v. *Kundan Lal* (1913) 35 All. 207, 18 I.C. 726; *Sadhu Saran* v. *Brahmdeo* (1921) 6 Pat. L.J. 256, 260-261, 61 I.C. 20, ('21) A.P. 299; *Thakar Das* v. *Mst. Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611; *Nagarmal* v. *Bajranglal* (1950) A.PC. 15; *Dasappa Setty* v. *Vedavathamma* ('72) A. Mys. 283.

(*h*) *Subba Reddi* v. *Venkataramayya* (1945) Mad. 634.

(*i*) *Pangudaya* v. *Uthandiya* (1938) Mad. 968, 177 I.C. 188, ('38) A.M. 774; *Rengaswami Ayyangar* v. *Sivaprakasam Pillai & Ors.* (1942) Mad. 251, 198 I.C. 177, ('41) A.M. 925.

*Revival of time-barred debt.*—As to revival of a time-barred debt by passing a promissory note, see the Indian Contract Act, 1872, s. 25(3). If the manager revives a time-barred debt by passing a promissory note he alone is liable on the note (*j*).

*Admissions by father.*—"In the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may very well be presumed" (*k*).

**250. Relinquishment of debt by manager.**—The manager has no power to give up a debt due to the joint family (*l*).

**251. Parties to suits.**—(1) Where the manager of a joint family, having power to do so, enters into a transaction *in his own name* on behalf of the family, whether it be a contract (*m*), or a mortgage (*n*), or a sale (*o*), he may sue or be sued alone in respect of that transaction. Where the mortgage by the manager extends to the entire interest of the family and is not confined to the manager's share he must be deemed to have acted in the transaction on behalf of the family (*p*). The other coparceners are not necessary parties to a suit on such a mortgage, as they are effectually represented by him (*q*) and are bound by the decree in the suit (*r*). But a member who contends that the action of the manager was beyond his powers is not properly represented by the manager and ought to be joined as a party if he wishes (*s*).

The above proposition is based upon two decisions of the Privy Council set out in illustrations (1) and (2) below.

*Illustrations*

(1) *A* and *B* are managers of a joint family which carries on the business of money-lenders. As such managers they advance moneys belonging to the joint family to *C*. *A*

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(*j*) *Thakar Das* v. *Mst. Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611.

(*k*) *Surendra Nath* v. *Sambhunath* (1928) 55 Cal. 210, 218, 104 I.C. 219, ('27) A.C. 870.

(*l*) *Dasaratharama* v. *Narasa* (1928) 51 Mad. 484, 109 I.C. 329, ('28) A.M. 601.

(*m*) *Kishan Prasad* v. *Har Narain Singh* (1911) 38 I.A. 45, 33 All. 272, 9 I.C. 739, reversing 29 All. 311 [money lending transaction]; *Ramnath* v. *Ramrao* (1922) 46 Bom. 358, 64 I.C. 966, ('22) A.B. 281 [promissory note]; *Gangaram* v. *Bapusaheb* (1922) 46 Bom. 1022, 84 I.C. 508 ('22) A.B. 354 [rent-note]; *Jagabhai* v. *Rustamji* (1885) 9 Bom. 311 [partnership agreement between manager and stranger to family]; *Anant Ram* v. *Channu Lall* (1903) 25 All. 378 [partnership between manager and stranger to family]; *Gopal Das* v. *Badri Nath* (1905) 27 All. 361 [goods sold and delivered]; *Durga Prasad* v. *Damodar Das* (1910) 32 All. 183, 5 I.C. 767 [purchase of silver bars]; *Ram Kishan* v. *Ganga Ram* (1931) 12 Lah. 428, 133 I.C. 116, ('31) A.L. 559. The decision to the contrary in *Seshan* v. *Veera* (1909) 32 Mad. 284, 4 I.C. 38 [account stated], and *Shamrathi* v. *Kishan* (1907) 29 All. 311, 314 [account stated], are no longer good law. The decision in *Alagappa* v. *Vellian Chetti* (1895) 18 Mad. 33 [contract of employment], may be supported on the ground that the single plaintiff in that suit was not shown to be the manager—see 38 I.A. 45, 53, 33 All. 272, 278, 9 I.C. 739.

(*n*) *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I.A. 216, 220, 36 All. 383, 386-387, 24 I.C. 501, ('14) A.PC. 136 affmg. 33 All. 71, 7 I.C. 902 [a case under Transfer of Property Act, s. 85]; *Hori Lal* v. *Munman Kunwar* (1912) 34 All. 549, 15 I.C. 126 [a case under C.P.C. O. 34, r. 1]; *Madan Lal* v. *Kishan Singh* (1912) 34 All. 572, 15 I.C. 138 [ditto]; *Ramkrishna* v. *Vinayak* (1910) 34 Bom. 354, 5 I.C. 967 [Transfer of Property Act, s. 85]; *Chimna* v. *Sada* (1910) 12 Bom. L.R. 811, 7 I.C. 990 [ditto]; *Sheik Ibrahim* v. *Rama Iyer* (1912) 35 Mad. 685, 5 I.C. 967; *Raghunandan* v. *Parmeshwar* (1917) 2 Pat. L.J. 306, 39 I.C. 779, ('17) A.P. 375 [a case under C.P.C., O. 34, r. 1]; *Jag Sah* v. *Ram Chandra* (1921) 6 Pat. L.J. 640, 63 I.C. 564, ('21) A.P. 377 [ditto]; *Sheikh Abdul* v. *Shib Lal* (1921) 6 Pat. L.J. 650, 63 I.C. 570, ('22) A.P. 252; *Bungsee* v. *Soodist Lall* (1882) 7 Cal. 739; *Ramayya* v. *Venkataratnam* (1894) 17 Mad. 122; *Pirthipal* v. *Rameshwar* (1927) 2 Luck. 288, 99 I.C. 154, ('27) A.O. 27 [foreclosure suit—O. 34 r. 1]; *Madhusudan* v. *Bhagwan* (1929) 53 Bom. 444, 118 I.C. 788, ('29) A.B. 213. The decisions to the contrary in *Debi Prosad* v. *Dharamjit* (1914) 41 Cal. 727, 22 I.C. 570, ('14) A.C. 455, and *Ramchandra* v. *Shripatrao* (1916) 40 Bom. 248, 33 I.C. 771, ('16) A.B. 278, can no longer be upheld.

(*o*) (1914) 41 I.A. 216, 36 All. 383, 24 I.C. 504, ('14) A.PC. 136, *supra* [purchase of equity of redemption], *supra*.

(*p*) *Daulat Ram* v. *Mehr Chand* (1888) 15 Cal. 70, 14 I.A. 187; *Ramanathan Chettiar* v. *S. Rm. M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 731, ('37) A.M. 345.

(*q*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610.

(*r*) *Ramnathan Chettiar* v. *S. Rm. M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 731, ('37) A.M. 345; *Bhagwan Singh* v. *Beharilal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237; *Buthawan* v. *Hanuman* ('53) A.P. 173.

(*s*) *Motiram* v. *Lalchand* (1937) Nag. 366, 172 I.C. 192, ('37) A.N. 121.

and *B* are entitled to sue *C* on an acknowledgment passed to them by *C* in respect of the money dealings. The other coparceners are not necessary parties to the suit. Accordingly the joinder of the other coparceners as plaintiffs after the statutory period has expired being unnecessary, does not prevent the suit as originally constituted from being in time: *Kishan Parsad* v. *Har Narain Singh* (1911) 38 I.A. 45, 33 All. 272, 9 I.C. 739. But after partition the position of the members is that of partners and all must sue (*t*).

(2) *M* mortgages two immovable properties to *J*. He then borrows moneys from *H* and *D*, the managing members of a joint Hindu family, and executes a *second mortgage* of one of the properties to them. He also sells the equity of redemption of the other property to *H* and *D*, and executes a sale-deed in their favour. *J* sues *M*, *H* and *D* on his mortgage, and obtains a foreclosure decree against them. The other members of the joint family are not parties to the suit. *H* and *D* do not avail themselves of the right to redeem, and the decree is made absolute. The decree is binding on the other members of the family, and they are not entitled to sue *J* for redemption: *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I.A. 216, 220, 36 All 383, 24 I.C. 504, ('14) A.PC. 136. In the course of the judgment their Lordships of the Privy Council said:—

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions *including foreclosure suits* when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself."

It is not necessary that the manager, either when he sues or is sued, should be described as such in the pleadings. But it is always advisable to do so. In a suit by the manager, where it is necessary in order to safeguard the interest of the defendants, to implead the other members of the family, the defendants may apply to bring them on record (*u*).

(2) Where a transaction purports to have been entered into by two or more persons described as kartas or managers of the joint family, they *must all* join as plaintiffs in the suit (*v*). But it is not necessary that all the members of the family must join in the suit (*w*). Reference may be made to the undermentioned decision of the Supreme Court referred to under § 236 (*w*1).

(3) Even if the suit be one on a contract which *is not in writing signed by the manager*, the manager may sue alone as representing the family (*x*).

(4) There is a conflict of opinion whether, as regards *immovable property* belonging to a joint family, the manager is entitled as such to bring a suit to establish a right in respect of such property without making the other members of the family parties to the suit, it being held in some cases that he is (*y*), and in others that he is not (*a*). It would seem from a Privy Council decision that he is (*b*). [See sub-§ (5) below].

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(*t*) *Bihari Lal* v. *Pt. Ram Chandra Sharma* (1942) 17 Luck. 702, 200 I.C. 172, ('42) A.O. 335.

(*u*) *Madhgouda Babaji* v. *Halappa Balappa* (1934) 58 Bom. 348, 151 I.C. 370, ('34) A.B. 178, but see *Lilabati* v. *Guruprosad* ('47) A.C. 259.

(*v*) *Ramsebuk* v. *Ramlall* (1881) 6 Cal. 815; *Imam-ud-din* v. *Liladhar* (1892) 14 All. 524, both explained in 38 I.A. 45, 52, 33 All. 272, 277-278, 9 I.C. 739.

(*w*) *Gendalal* v. *Nanalal* ('56) A.M.B. 58.

(*w*1) *Union of India* v. *Shree Ram* ('65) A.SC. 1531.

(*x*) *Bhola Koy* v. *Jung Bahadur* (1914) 19 Cal. L.J. 5, 93, 22 I.C. 798, ('14) A.C. 681 [suit for rent]

(*y*) *Arunachala* v. *Vythialinga* (1883) 6 Mad. 27 [right to drain water of plaintiff's village through defendant's village]; *Md. Sadik* v. *Khedan Lall* (1916) 1 Pat. L.J. 154, 36 I.C. 197, ('16) A.P. 251 [suit to eject trespasser].

(*a*) *Kattusheri* v. *Vallotil* (1881) 3 Mad. 234 [against lessees for possession]; *Balkrishna* v. *Municipality of Mahad* (1886) 10 Bom. 32 [to remove encroachment—suit by a coparcener]; *Hari Gopal* v. *Gokaldas* (1888) 12 Bom. 158 [suit in ejectment]; *Balkrishna* v. *Moro Krishna* (1897) 21 Bom. 154 [suit in ejectment]; *Kashinath* v. *Chimanaji* (1906) 30 Bom. 477 [declaration of right to immovable property]; *Angamuthu* v. *Kolandavelu* (1900) 23 Mad. 190 [ditto].

(*b*) *Lingangowda* v *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.PC. 56. Reference may also be made to (1911) 38 I.A. 45, 33 All. 272.

The sons are not necessary parties to a suit brought *against* the father for possession of joint family property sold by him (*f*). A decree in a suit would bind all the members of a joint family even though some only were parties, if the interest of those who are not parties are sufficiently and substantially represented by the others and if the common title of all is affected (*g*).

As to suits on mortgage, see the Code of Civil Procedure, 1908, O. 34, r. 1.

(5) It seems that the manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family property, and that a decree passed against him in such a suit would bind all other members of the family if, as regards minors, he acted in the litigation in their interest (*h*), and, as regards adults, with their consent. The consent need not be express; it will be implied if they do not come and apply to be joined as parties to the suit (*i*), but not if they applied to be made parties in order to contest the manager's action (*j*). The fact that besides the manager who is sued as such, some other members of the family also are added as parties will not render the suit defective simply on the ground that some other minor member has not been joined. The suit can still be a representative suit (*k*).

In *Lingangowda* v. *Basangowda* (*l*), their Lordships of the Privy Council observed as follows:—"In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Explanation 6 of sec. 11 of the Code of Civil Procedure, 1908, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors." There is no right in a minor or an adult member of the family to bring a suit to set aside a decree passed against the manager on the ground that he acted with gross negligence in the conduct of the suit (*m*).

Where a right to bring a suit was possessed by a father and other members then living and persons who were born later had also acquired the right before the right is barred by limitation the right will continue up to 3 years after majority of the youngest of the sons (*n*).

(6) A *coparcener*, who is not the managing member, is not entitled to sue alone as representing the family.

In *Alagappa* v. *Vellian* (*o*) *the plaintiff who was a member of a joint family entered* into a contract with the defendant in *his own name*, whereby he appointed the defendant as manager of the family business in Moulmein. The plaintiff sued the defendant for damages for breach of the contract of service. The Madras Court held that the plaintiff alone was not entitled to sue. As to this case their Lordships of the Privy Council observed as follows in *Kishan Prasad* v. *Har Narain Singh* (*p*)—

"The decision in the case of *Alagappa* v. *Vellian* cited by the respondents may be supported on the ground that the single plaintiff in that case *was not shewn to be the managing member of the family* or to be the only partner or proprietor of the business with which the litigation was concerned. Their Lordships think, however, that the proposition there laid down to the effect that the *manager* cannot sue without joining all those interested with him, if literally construed goes too far."

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(*f*) *Guran Ditta* v. *Pokhar Ram* (1927) 8 Lah. 693, 104 I.C. 202, ('27) A.L. 362.

(*g*) *Kishan Lal* v. *Ram Chandar*, I.L.R. (1944) All. 338.

(*h*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.) 171 I.C. 101, ('37) A.M. 610. See *Budaraju Venkatarathna* v. *Venkata Subbaiah* (1950) A.M. 136; *Shankarrao* v. *Vinayak* (1950) Nag. 806; *Ishar Singh* v. *Gajadhar Prosad* ('57) A.P. 174.

(*i*) See *Guravayya* v. *Dattatraya* (1904) 28 Bom. 11.

(*j*) *Motiram* v. *Lalchand* (1937) Nag. 366, 172 I.C. 192, ('37) A.N. 121.

(*k*) *Jaigobind* v. *Nagesar* ('53) A.P. 326.

(*l*) (1927) 54 I.A. 122, 125, 51 Bom. 450, 453, 101 I.C. 44, ('27) A.PC. 56.

(*m*) *Krishnamurti* v. *Chidambaram* (1946) Mad. 670.

(*n*) *Avdesh Kumar* v. *Zakaul Hasnain* (1944) All. 612.

(*o*) (1895) 18 Mad. 33.

(*p*) (1911) 38 I.A. 45, 53, 33 All. 272, 278, 9 I.C. 739.

Where a promissory note was taken by a father, the son cannot sue on it during the father's life-time without proof of renunciation by the father amounting to civil death (*q*). A suit was filed by all the members of the joint family on a promissory note executed in favour of one of the members. The defendant denied that the family was joint and contended that the suit was not maintainable. The court held (1) that the family was joint; (2) the suit should be allowed to proceed by an appropriate amendment of the description of the plaintiffs and (3) in any event the suit was maintainable (*r*).

(7) Where a joint family carries on a business, the members of the family who are *minors* and who are not shown to have been admitted into the trading firm or to have taken any part in the business or exercised any control therein, need not be joined as plaintiffs in a suit to recover moneys due to the family trading firm (*s*).

(8) *Death of manager.*—On the death of the manager pending a suit or appeal to which he is a party as representing the joint family, the coparcener succeeding him as manager may be brought on the record, and the suit or appeal proceeded with. It is not necessary to bring his sons on the record (*t*). Where one manager obtained a decree and, after realising a portion of the amount, disappeared, the next manager of the family is entitled to be brought on the record for the purpose of continuing the execution proceedings (*u*).

(9) Where a promissory note is taken by a manager but by a subsequent arrangement between the coparceners he becomes entitled only to a portion of the amount due under it, he can recover only this share (*v*). To such a suit the other sharers must be joined as parties.

(10) As to suits on promissory notes signed by the manager alone, see § 240 (4).

*Illustrations*

(1) *L* and *R* two brothers, constitute a joint family. The joint family carries on business as money-lenders in the name of *R.C.* *S* borrows moneys from time to time from the firm. Then *R* dies leaving a minor son. After *R*'s death there are further dealings between the firm and *S*. An account of the dealings is made up, and *S* passes a promissory note to the firm of *R.C.* for Rs. 12,000. *L*, the surviving brother, sues *S* upon the note. *L* had three minor sons at the date of the suit, and one was born to him after the institution of the suit. It is not proved that either the minor son of *R* or the minor sons of *L* were admitted into the family firm. None of them is a necessary party to the suit: *Lutchmanen* v. *Siva* (1899) 26 Cal. 349, 355 Sale, J., said: "Decrees obtained in such suits by or against the managers of the business will be presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family."

(2) If in the case put above *L* and *R* were both dead at the date of the suit, *all* the sons of *L* and *R* must be joined as plaintiffs to the suit: *Kalidas* v. *Nathu* (1883) 7 Bom. 217.

**252. Adding new plaintiff and limitation.**—Where coparceners who ought to have been joined as plaintiffs to a suit are not made parties to the suit, the Court may order that they be added as parties. But if the suit as

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(*q*) *Krishnaji* v. *Hanmaraddi* (1934) 58 Bom. 536, 153 I.C. 800, ('34) A.B. 385.

(*r*) *Chaudhri Atma Ram* v. *Umar Ali* (1941) Lah. 39, 190 I.C. 78, ('40) A.L. 256.

(*s*) *Lutchmanen* v. *Siva* (1899) 26 Cal. 349; *Anant Ram* v. *Channu Lal* (1903) 25 All. 378; *Lalji* v. *Keshowji* (1913) 37 Bom. 340, 17 I.C. 193.

(*t*) *Atma Ram* v. *Banku Mal* (1930) 11 Lah. 598, 125 I.C. 369, ('30) A.L. 561; *Ganeshram* v. *Mangilal* (1953) Nag. 248, ('52) A.N. 390. Reference may also be made to *Kedarnath* v. *Khaitan Sons & Co.* ('59) A.C. 368.

(*u*) *Narain Sarup* v. *Daya Shankar* (1938) All. 425, 175 I.C. 390, ('38) A.A. 256.

(*v*) *Gopalu Pillai* v. *Kothandarama Ayyar* (1934) 57 Mad. 1082, 153 I.C. 916, ('34) A.M. 529.

regards them would then be barred by limitation, the whole suit must be dismissed as time-barred (*w*).

It has been held by the High Court of Bombay, that where a suit is brought by the *manager* of a joint family as representing the family (in that case the suit was for recovery of possession of family property) the question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are *adults*, and that the right to insist on the other coparceners being brought on the record is for the benefit of the defendant so as to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive. If the defendant takes objection to non-joinder of parties at a late stage of the suit, the objection may be disregarded and the suit proceeded with (*x*). The same view has been taken by the High Court of Allahabad (*y*). The High Court of Calcutta has held, purporting to follow the Bombay decision, that the addition even of a *minor* coparcener after the expiry of the period of limitation as plaintiff to a suit on a mortgage is not fatal to the suit (*a*).

Now see section 21 of the new Limitation Act, 1963.

*Illustration*

*A* and *B* are members of a joint family which owns a house in Bombay. *A* alleging that *C* is in wrongful occupation of the house, *alone* sues *C* to recover possession of the house. The suit is instituted on January 1, 1911. The last date for instituting the suit is August 15, 1911. The suit comes on for hearing on 1st September 1911. *C* contends at the hearing that *B* is a necessary party to the suit. Here *B* is obviously a necessary party to the suit, and if he were to be added as a plaintiff the suit as regards him would be deemed to have been instituted on that date [the Indian Limitation Act, 1908, sec. 22], and this would clearly be *after* the expiration of the period of limitation for instituting the suit. The suit must therefore be dismissed. But if *A* was the *manager* and *B* was an adult at the date of the suit the Court could direct *B* to be joined as a plaintiff even after the expiry of the statutory period *unless* *C* objected to *B*'s non-joinder at an early stage of the proceedings: *Guravayya* v. *Dattatraya* (1904) 28 Bom. 11.

It will be seen from what is stated above that the question as to who should be joined as plaintiffs, dealt with in the preceding section is important because of the provisions of sec. 22 of the Indian Limitation Act, 1908.

**253. Decree against manager and** *res judicata*.—A decree passed against the manager of a joint family *as representing the family* for a debt contracted by him for family necessities, or for the family business, or in respect of family properties, operates as *res judicata* under the Code of Civil Procedure, sec. 11, Explanation 6, and is binding upon all members of the family including minors, and it may be executed against the whole coparcenary property,

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(*w*) *Kalidas* v. *Nathu* (1883) 7 Bom. 217; *Ramsebuk* v. *Ram Lall* (1881) 6 Cal. 815; *Seshan* v. *Veera* (1909) 32 Mad. 284, 4 I.C. 38; *Girwar* v. *Makbunessa* (1916) 1 Pat. L.J. 468, 36 I.C. 542, ('16) A.P. 310 [Limitation Act, 1908, s. 22].

(*x*) *Guravayya* v. *Dattatraya* (1904) 28 Bom. 11 [suit for possession of land], following *Hari Gopal* v. *Gokaldas* (1888) 12 Bom. 158. Also see *Devidas* v. *Shrishailappa* ('61) A.SC. 1277.

(*y*) *Pateshri* v. *Rudra Narain* (1904) 26 All. 528 [suit for possession], s.c. on app. to P.C. sub-nominee *Imdad Ahmad* v. *Pateshri* (1910) 37 I.A. 60, 52 All. 241, 6 I.C. 981. See also *Chetan Singh* v. *Sartaj Singh* (1924) 46 All. 709, 79 I.C. 1001, ('24) A.A. 908.

(*a*) *Thakur Mani* v. *Dai Rani* (1906) 33 Cal. 1079, 1093.

although the other members were not parties to the suit (*b*). It is otherwise, if the decree is against the manager *personally*. A decree, even for a family debt, passed against the manager *personally*, cannot be executed against the whole coparcenary property; it can be executed only against his interest in the property (*c*).

It is not necessary, in order that a decree against the manager may operate as *res judicata* against coparceners who were not parties to the suit, that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager is in fact suing or being sued as representing the whole family (*d*). See § 251(5).

*Illustration*

*A*, *B* and *C* are members of a joint family. *A* and *B* are the managing members. *A* and *B* borrow Rs. 5,000 from *P* for the necessities of the family. *P* sues *A* and *B* as *managers*, and obtains a decree against them *as such*. The decree may be executed against the whole coparcenary property including *C*'s interest therein, though *C* was not a party to the suit, and even if *C* was a minor: *Baldeo* v. *Mobarak* (1902) 29 Cal. 583.

*Note.*—In the case put above, *P* is entitled also to a personal decree against *A* and *B*, they being *parties* to the contract. Such a decree will enable *P* to proceed against the separate properties also of *A* and *B*. But *P* is not entitled to a personal decree against *C*, even if *C* was an adult, for *C* was not a party to the contract. See § 240.

*Suit by or against manager in representative capacity.*—A suit by or against the manager will be deemed to be one brought by him or against him as *representing the family* if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property (*e*). It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant, that he is being sued as manager. A karta can represent the family effectively in a certificate proceeding though he is not named as such (*f*).

*Decree dismissing manager's suit.*—The decree referred to in this section may be one dismissing the suit brought by the manager as plaintiff (*g*).

*Decree against father for injunction.*—*A* and his son *B* are members of a joint family. *A*'s neighbour *C* sues *A* for an injunction restraining *A* from tethering cows and storing

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(*b*) *Daulat Ram* v. *Mehr Chand* (1888) 15 Cal. 70, 14 I.A. 187; *Lingangowda* v. *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.PC. 56; *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I.A. 216, 36 All. 383, 24 I.C. 504, ('14) A.PC. 136; affirming *Jaddo Kunwar* v. *Sheo Shankar* (1911) 33 All. 71, 7 I.C. 902; *Sheo Pershad* v. *Saheb Lal* (1893) 20 Cal. 453, 38 I.A. 45, 33 All. 272, 9 I.C. 739; *Baldeo* v. *Mobarak* (1902) 20 Cal. 583; *Kunjan* v. *Sidda* (1899) 22 Mad. 461; *Hari* v. *Jairam* (1890) 14 Bom. 597; *Bhana* v. *Chindhu* (1897) 21 Bom. 616; *Kashinath* v. *Chimnaji* (1906) 30 Bom. 477; *Sakharam* v. *Devji* (1899) 23 Bom. 372. In *Channa Basaregowda* v. *Rangegowda* ('51) A. Mysore 38, the manager and the adult member of a joint family were made defendants to a mortgage suit, and it was held that the adult members could be taken to represent their progeny, and the decree was binding on the entire family. In *Laxman* v. *Vinayak* (1916) 40 Bom. 329, 33 I.C. 956, ('16) A.B. 262, it was suggested that the rule laid down in this section applied only if the manager was the father, but this view is not correct. See also *Jahangir* v. *Janardhan* (1947) All. 218; *Gurbasappa* v. *Vankat* ('56) A. Hyd. 146; *Ghassu Khan* v. *Najar Ali* ('57) A.N. 91; *Kumaji Sare Mal* v. *Kalwa Devadattam* ('58) A. Andh. Pra. 216.

(*c*) *Viraragavamma* v. *Samudrala* (1885) 8 Mad. 208; *Guruvappa* v. *Thimma* (1897) 10 Mad. 316; *Sathuvayyan* v. *Muthusami* (1889) 12 Mad. 325; *Balbir Singh* v. *Ajudhia* (1887) 9 All. 142; *Ram Dayal* v. *Durga Singh* (1890) 12 All. 209; *Lachmi* v. *Kunji Lal and anr.* (1894) 16 All. 449; *Mela Mal* v. *Gori* (1922) 3 Lah. 288, 66 I.C. 485, ('22) A.L. 200.

(*d*) *Hori Lal* v. *Munman Kunwar* (1912) 34 All. 549, 15 I.C. 126; *Lalchand* v. *Sheogovind* (1929) 8 Pat. 788, 128 I.C. 331, ('29) A.P. 741; *Ram Kishan* v. *Ganga Ram* (1931) 12 Lah. 428, 133 I.C. 116, (31) A.L. 559; *Pirthipal* v. *Rameshwar* (1927) 2 Luck. 288, 99 I.C. 154, ('27) A.O. 27; *Surendra Nath* v. *Sambhunath* (1928) 55 Cal. 210, 104 I.C. 219, ('27) A.C. 870.

(*e*) *Mulgund Co-operative Credit Society* v. *Shidlingappa Isvarappa* (1941) Bom. 682, 197 I.C. 428, ('41) A.B. 385, 43 Bom. L.R. 807.

(*f*) *Mani Sahoo* v. *Lokanath* ('50) A. Orissa 140; *Lalchand* v. *Seogobind*, 8 Pat. 788; *Hari Prasad* v. *Lal Behari*, 19 Pat. 618 (F.B.).

(*g*) See *Lingangowda* v. *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, (527) A.PC. 56.

fodder close to *C*'s premises, and a decree is passed against *A*. The decree may be executed after *A*'s death against his son *B*, though the son was not a party to the suit (*h*).

*Order under sec. 145 of Criminal Procedure Code, 1898.*—An adverse order passed under sec. 145 of the Criminal Procedure Code against the manager requiring him to delivery possession of a property to another person binds the other members of the family, though they were not parties thereto (*i*).

**254. Decree against father as manager and res judicata.**—A decree obtained against the father as manager of a joint family is binding upon his sons, if in the case of minor sons he was acting in the former litigation on their behalf in their interest (*j*), and in the case of majors with the assent of the majors. Such a decree operates as *res judicata* by virtue of the provisions of Explanation VI of sec. 11 of the Code of Civil Procedure (*k*). See § 251(5).

## IV.—ALIENATION OF COPARCENARY PROPERTY

**255. Who may alienate coparcenary property.**—The following persons alone have power to alienate coparcenary property so as to pass a good title to the alienee:—

(1) the whole body of coparceners, where they are all adults (*l*);

(2) the manager, to the extent mentioned in § 242;

(3) the father, to the extent mentioned in § 256;

(4) a sole surviving coparcener in the circumstances mentioned in § 257.

No other coparcener is entitled to alienate coparcenary property so as to bind the other coparceners unless he is authorized by them to do so (*m*).

We are not dealing now with the power of a coparcener to alienate *his own interest* in coparcenary property. That subject is dealt with in §§ 258-260 below.

**256. Alienation by father.**—A Hindu father as such has special powers of alienating coparcenary property which no other coparcener has. In the exercise of these powers—

(1) he may make a gift of ancestral *movable property* to the extent mentioned in § 225, and even of ancestral *immovable property* to the extent mentioned in § 226;

(2) he may sell or mortgage ancestral property, *whether movable or immovable,* including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes [§ 295].

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(*h*) *Manilal* v. *Kikabhai* (1931) 33 Bom. L.R. 1118, 134 I.C. 968, ('31) A.B. 482; *Ganesh* v. *Narayan* (1931) 55 Bom. 709, 134 I.C. 961, ('31) A.B. 484.

(*i*) *Venkatasomaraju* v. *Varahalaraju* (1929) 52 Mad. 787, 122 I.C. 17, ('30) A.M. 48.

(*j*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610. As to consent decree see *Basant Lal* v. *Rameshwar Prasad* ('57) A.A. 287.

(*k*) (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.PC. 56, *supra.*

(*l*) *Mahabeer Persad* v. *Ramyad* (1874) 12 Beng. L.R. 90, 94.

(*m*) *Guruvappa* v. *Thimma* (1887) 10 Mad. 316; *Sheo Pershad* v. *Saheb Lal* (1893) 20 Cal. 453, 461; *Krishna* v. *Krishnasami* (1900) 23 Mad. 597, 600; *Puttoo Lal* v. *Raghubir Prasad* (1934) 9 Luck. 237, 147 I.C. 540, ('33) A.O. 535; *Gopinath* v. *Jagannath* ('69) A. Orissa 18.

Except as aforesaid, a father has no greater power over coparcenary property than any other manager (*o*), that is to say, he cannot alienate coparcenary property except for legal necessity or for the benefit of the family [§ 242].

Thus a mortgage by the father for raising moneys for a speculative litigation, which is for his own benefit, is not for legal necessity and, there being no antecedent debt, such a mortgage is not binding on the sons' shares (*p*).

Where a father was converted to Christianity and afterwards was reconverted to Hinduism a mortgage by him during the minority of his son does not bind the son's share, as the father became divided from his son when he became a Christian and there could be no reunion with his son who was a minor (*q*).

When the immovable property consists of *raiyati* interest in lands, a father, if he is unable to cultivate them, may surrender such interest and the surrender would be upheld unless it is shown to be a dishonest transaction intended to prejudice the sons (*q*1).

The father is in all cases naturally, and in the case of minor sons, necessarily the manager of the joint family [§ 236]. As manager, he has the power to alienate coparcenary property, but only in the cases specified in § 242 above. As father, he has power to alienate coparcenary property in the cases mentioned in the present section. Beyond that, he has no power to alienate coparcenary property.

**257. Alienation by sole surviving coparcener.**—(1) A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the *alienation,* whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten [§ 270].

(2) As to dispositions by will, see § 368 below.

(3) As to the rights of a widow sharing her deceased husband's property under the Hindu Women's Rights to Property Act, 1937 to challenge alienation by sole surviving coparcener of her husband see the undermentioned case (*q*2) and § 35 *ante.*

## V.—ALIENATION OF UNDIVIDED COPARCENARY INTEREST

**258. Gift of undivided interest.**—(1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift (*r*). Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property (*s*). He may,

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(*o*) *Chinnayya* v. *Perumal* (1890) 13 Mad. 51; *Rayakkal* v. *Subbanna* (1893) 16 Mad. 84; *Bala* v. *Balaji* (1898) 22 Bom. 825; *Ningareddi* v. *Lakshmawa* (1902) 26 Bom. 163 (gift to a concubine); *Rottala* v. *Pulicat* (1904) 27 Mad. 162; *Mahendra Singh* v. *Attar Singh* ('67) A.A. 488.

(*p*) *Ram Chandra* v. *Jang Bahadur* (1926) 5 Pat. 198, 90 I.C. 553, ('26) A.P. 17.

(*q*) *Vella Venkatasubbayya* v. *Yella Venkatramayya* (1944) Mad. 33.

(*q*1) *Sheoprasad Sahu* v. *Deocharan Sahu* (1934) 13 Pat. 390, 151 I.C. 188, ('34) A.P. 212.

(*q*2) *Ramalingam* v. *Ramalakshmi* ('58) A.M. 228; (1958) Mad. 7; (1957) 2 Mad. L.J. 382.

(*r*) *Baba* v. *Timma* (1884) 7 Mad. 357 [F.B.]; *Ponnusami* v. *Thatha* (1886) 9 Mad. 273; *Ramanna* v. *Venkata* (1888) 11 Mad. 246; *Rottala* v. *Pulicat* (1904) 27 Mad. 162 at p. 166; *Peramanayakam* v. *Sivaraman* (1952) Mad. 835, ('52) A.M. 419 (F.B.); *Salvalingam* v. *Lingamurthy* ('62) A.A.P. 173; *Uddaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Vendravandas* v. *Yamunabai* (1875) 12 Bom. H.C. 229; *Kalu* v. *Barsu* (1895) 18 Bom. 803; *Tatoba* v. *Tarabai* (1957) 59 Bom. L.R. 633.

(*s*) *Venkatappayya* v. *Raghavayya* ('51) A.M. 318.

however, make a gift of his interest with the consent of the other coparceners (*t*).

(2) As to disposition by will after the coming into operation of the Hindu Succession Act, 1956, see section 30 of that Act and Notes thereunder. Also see § 368.

*Separate and self-acquired property.*—A coparcener may dispose of his separate or self-acquired property in any way he likes [§ 222].

**259. Sale or mortgage of undivided interest.—Bombay, Madras and Madhya Pradesh.**—According to the Mitakshara law as administered in the Bombay and Madras States, a coparcener may sell, mortgage, or otherwise alienate *for value* his undivided interest in coparcenary property without the consent of the other coparceners (*u*).

The same rule applies to cases governed by the Mitakshara law as administered in the Madhya Pradesh (*v*).

**260. Sale or mortgage of undivided interest—Other States.**—According to the Mitakshara law as administered in West Bengal and Uttar Pradesh no coparcener can alienate even for value his undivided interest *without the consent of the other coparceners* (*w*), unless the alienation be for legal necessity [§ 242], or for payment by a father of antecedent debts [§ 295]. The consent of the other coparceners is necessary even if the alienation is made in favour of a coparcener (*x*).

The same rule applies to cases governed by the Mitakshara law as administered in Bihar and Orissa (*y*), the Punjab (*z*), and in Oudh (*a*).

Also see § 269 (1) and § 270 (4).

According to the strict theory of the Mitakshara law, each coparcener has a proprietary interest in the *whole* of the coparcenary property. No coparcener, therefore, can alienate his interest in the property without the consent of the other coparceners. This rule has been strictly applied in many States to cases governed by the Mitakshara law.

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(*t*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 396, L.R. I.A. Sup. Vol. 47, 66.

(*u*) *Tukaram* v. *Ramchandra* (1869) 6 Bom. H.C. A.C. 247; *Vasudev* v. *Venkatesh* (1873) 10 Bom. H.C. 139; *Fakirapa* v. *Chanapa* (1873) 10 Bom. H.C. 162; *Pandu* v. *Goma* (1919) 43 Bom. 472, 50 I.C. 765, ('19) A.B. 84; *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Aiyyagari* v. *Aiyyagari* (1902) 25 Mad. 690, 703; *Nanjundaswami* v. *Kanagaraju* (1919) 42 Mad. 154, 49 I.C. 666, ('19) A.M. 500 [settlement on daughter in consideration of marriage]; *Peramanayakam* v. *Sivaraman* (1952) Mad. 835, ('52) A.M. 419 (F.B.); *Lakshman* v. *Ramchandra* (1880) 5 Bom. 48, 61, 7 I.A. 181; *Pandurang* v. *Bhagwandas* (1920) 44 Bom. 341, 55 I.C. 544, ('20) A.B. 341; *Suraj Bunsi Koer* v. *Sheo Persad* (1879) 5 Cal. 148, 166, 6 I.A. 88, 101-102; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 351, 20 I.A. 116-125. See also *Subba* v. *Venkatrami* (1915) 38 Mad. 1187, 1191, 36 I.C. 983, ('15) A.M. 740 [specific performance]; *Ganpati* v. *Motiram* (1947) Nag. 172; *Narayan* v. *Namdeo* (1955) Nag. 772, ('55) A.N. 208; *Rajanna* v. *Dhondusa* ('70) A. Mys. 270.

(*v*) *Syed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('22) A.PC. 353; *Bhojraj* v. *Nathuram* (1917) 37 I.C. 498, 12 N.L.R. 161, ('16) A.N. 25.

(*w*) *Madho Parshad* v. *Mehrban Singh* (1891) 18 Cal. 157, 17 I.A. 194; *Sadabart Prasad* v. *Foolbash* (1869) 3 Beng. L.R.F.B.R. 31; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 351, 20 I.A. 116, 125; *Manna Lal* v. *Karu Singh* (1919) 1 Pat. L.T. 6, 56 I.C. 766, ('19) A.PC. 108; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479 [F.B.]. For other cases, see § 269 below.

(*x*) *Chandar* v. *Dampat* (1894) 16 All. 369.

(*y*) *Jwala Prasad* v. *Maharajah Protap* (1916) 1 Pat. L.J. 497, 37 I.C. 184, ('16) A.P. 203; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433; *Krishnadeb* v. *Jokhilal* ('56) A.P. 290.

(*z*) *Piare* v. *Ram* (1912) P.R. No. 21, p. 75, 11 I.C. 443; *Ralla Ram* v. *Atma Ram* (1933) 14 Lah. 584, 150 I.C. 184, ('33) A.L. 343.

(*a*) (1891) 18 Cal. 157, 17 I.A. 194, *supra*; *Angraj* v. *Ram Rup* (1931) 6 Luck. 158, 127 I.C. 38, ('30) A.O. 284; *Puttoo Lal* v. *Raghubir Prasad* (1934) 9 Luck. 237, 147 I.C. 540, ('33) A.O. 535.

But the rigour of the rule has been relaxed in favour of alienees *for value* in Bombay, Madras and Madhya Pradesh [§ 261] and in favour of *purchasers at an execution sale* throughout India [§ 289].

*Lease.*—A lease stands on the same footing as a sale or mortgage (*b*).

**261. Rights of purchaser of coparcener's interest.**—According to the Mitakshara law as applied in Bombay, Madras and Madhya Pradesh a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in a specific property forming part of the joint family properties. But he has no right to alienate, as *his interest* any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property (*c*). According to the Mitakshara law as it prevails in West Bengal, Uttar Pradesh and some other States no coparcener can alienate even his own undivided interest in the coparcenary property without the consent of the other coparceners. If he does so, the alienation is not valid even to the extent of his own interest in the property [§ 269]. But the Mitakshara law as administered in *all* the States allows the sale of the undivided interest of a coparcener *in execution of a decree* against him [§ 289]. The present section deals with the rights of the purchaser of a specific property, or of a coparcener's interest in the specific property, as to possession and partition, whether the property has been sold by private treaty or in execution. Almost all the cases dealt with in this section relate to the sale of a specific property or the sale of the undivided interest of a coparcener in a specific property. The principles laid down in those cases apply *mutatis mutandis* to the case of a sale of the undivided interest of a coparcener in all the joint family properties.

(1) *Right to joint possession in West Bengal, Uttar Pradesh and Madras.* As regards the purchaser's right to joint possession the Bombay decisions differ in certain respects from those of the other High Courts. We shall deal first, with the decisions of High Courts other than Bombay, and next, with Bombay decisions.

The purchaser of the undivided interest of a coparcener (*d*) in a specific property—

(i) at a sale in execution in West Bengal (*e*) and Uttar Pradesh, or

(ii) at a private sale or a sale in execution in Madras (*f*),

does not acquire a right to *joint possession* with the other coparceners. Such a purchaser acquires merely the right to compel a *partition* which the coparcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place. That right can only be en-

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(*b*) *Jadu* v. *Abdul* (1911) C.W.N. 93, 11 I.C. 892.

(*c*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6, 11; *Venkatachella* v. *Chinnaiya* (1870) 5 Mad. H.C. 166, 171; *Patil Hari* v. *Hakamchand* (1886) 10 Bom. 363 [mortgage].

(*d*) Reference may also be made to s. 44 of the Transfer of Property Act.

(*e*) *Deendayal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 209, 4 I.A. 247; *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 174, 6 I.A. 88; *Hardi Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 636-637, 11 I.A. 26.

(*f*) *Maharaja of Bobbili* v. *Venkataramanjula* (1916) 39 Mad. 265, 267, 25 I.C. 585, ('15) A.M. 453; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440 [private sale]; *Jagdish* v. *Rameshwar* ('60) A.P. 54; *Laxminarasamma* v. *Ranganayakamma* ('64) A. Orissa 43.

forced by a suit for a general partition to which all the coparceners must be joined as parties (*g*). The purchaser may in such a suit ask the Court to allot to his vendor the specific property sold to him, and the Court may allot that property to him if the interest of the other coparceners will not be prejudiced thereby [sub-§ 3].

Where the purchaser *has not obtained possession*, but claims the whole property as his own, the non-alienating coparceners may sue him for a declaration that he is entitled to no more than the undivided interest of the alienating coparcener. The proper decree to be passed in such a suit would be an order declaring that, by virtue of the sale, the purchaser acquired *only* the undivided share of the alienating coparcener in the property with such power of ascertaining the extent of such share by means of a partition as the alienating coparcener possessed and confirming the possession of the other coparceners subject to such proceedings as the purchaser may take to enforce his rights (*h*). If the purchaser *has obtained possession*, the non-alienating coparceners are entitled to sue for and recover possession of the *whole of the property* for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general; he must, if he wants to realize his vendor's interest, bring a suit of his own for a general partition. Where a suit therefore is brought by the non-alienating coparceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession to the plaintiffs of the *whole* property, and declaring that the purchaser is entitled to a declaration that he has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition (*i*). But to protect the purchaser a further direction is added that the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled (*j*).

In *Ramasami* v. *Venkatarama* (*k*), however, the Madras High Court held, relying upon the observations of the Judicial Committee in *Ramkishore* v. *Jainarayan* (*l*), that when relief by way of general partition can be conveniently given to the purchaser in a coparceners' suit for possession, as where all the coparceners are parties to the suit and the Court is seized of the whole matter, the purchaser should not be driven to a

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(*g*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6. The executing Court has no power to direct a partition; *Yelumalai* v. *Srinivasa* (1906) 29 Mad. 294; *Brij Lal* v. *Durga* (1920) 1 Lah. 134, 56 I.C. 254, ('20) A.L. 159; *V. C. Thani Chettiar* v. *Dakshinamurthy* (1955) Mad. 1278, ('55) A.M. 288 [nature of suit: limitation]; *Ganesh* v. *Radhakrishnan* ('69) A.M. 416; *Laxminarasamma* v. *Ranganayakamma* ('64) A. Orissa 43.

(*h*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 174-175, 6 I.A. 88.

(*i*) *Deendayal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 209, 4 I.A. 247; *Baboo Hurdei Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 637, 11 I.A. 26; *Subba* v. *Krishnamachari* (1922) 45 Mad. 449, 460-463, 68 I.C. 869, ('22) A.M. 112 [private sale]; *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 328, 96 I.C. 993, ('26) A.M. 774 [private sale]; *Medni Prasad* v. *Nand Keshwar* (1923) 2 Pat. 386, 85 I.C. 1014, ('23) A.P. 451 [sale in execution]. *Papayamma* v. *Gopalakrishnamurty* ('69) A.A.P. 341.

(*j*) *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 328, 96 I.C. 993, ('26) A.M. 774; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 25-26, 46 I.C. 133, ('18) A.B. 101.

(*k*) *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 75 I.C. 406, ('24) A.M. 81 [private sale]. See also *Sellappa* v. *Masa* (1924) 47 Mad. 79, 76 I.C. 1018, ('24) A.M. 297.

(*l*) (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

separate suit [ill. (a)]. Referring to this case the same High Court said in a later case (*m*): "The decision in 46 Mad. 815 applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition." Reference may also be made to the Full Bench decision of the same High Court in *Peramanayakam* v. *Sivaraman* (1952) Mad. 835, ('52) A.M. 419. Also see sec. 44 of the Transfer of Property Act.

*Right to joint possession in Bombay.*—The following principles have been laid down with regard to the rights and remedies of the purchaser and the non-alienating coparceners, whether the sale be one by private contract or in execution of a decree (*n*):

(1) If the purchaser is a *stranger*, and *has not obtained possession*, he should not be given joint possession with the other coparceners, but should be left to his remedy of a suit for general partition (*o*).

(2) If the purchaser *has obtained possession*, the non-alienating coparceners are entitled to *joint possession* of the property with him, and if they sue for it, the Court must decree joint possession to them (*p*). The reason given is that the purchaser cannot, by obtaining a possession to which he was not entitled without partition, force on the other coparceners the necessity of bringing a suit for partition (*q*). The proper decree to pass in such a case is one placing the plaintiffs-coparceners in joint possession with the purchaser. A mere declaration of the plaintiff's right to joint possession is not enough (*r*).

(3) Further, if the purchaser *has obtained possession*, the non-alienating coparceners may sue for recovery of possession of the whole of the property sold to him; in other words, they may sue for exclusive possession. But the Court is not bound, as in Madras, to eject the purchaser and decree exclusive possession to the plaintiffs, and it may in its discretion declare that the purchaser is entitled to hold the property until partition, as a tenant-in-common with the other coparceners; in other words, the Court may in a proper case allow the purchaser to remain in joint possession with the plaintiffs. Each case as to the propriety or otherwise of allowing the purchaser joint possession should be decided on its own facts (*s*).

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(*m*) (1927) 50 Mad. 320, 324, 96 I.C. 993, 363 [mortgagee with possession from one coparcener dispossesed by purchaser at a sale in execution of a decree against another coparcener—*held* mortgagee entitled to joint possession with purchaser]; *Nana* v. *Appa* (1896) 20 Bom. 627 [suit by purchaser for exclusive possession—joint possession decreed]; *Naranbhai* v. *Ranchod* (1902) 26 Bom. 141 [purchaser's suit for exclusive possession —suit dismissed by trial judge—decree reversed and suit remanded for inquiry whether purchaser should be awarded joint possession on the merits of the case]; *Bhiku* v. *Puttu* (1906) 8 Bom. L.R. 99, 105-106.

('25) A.M. 774 [private sale], *supra*.

(*n*) *Bhau* v. *Budha* (1926) 50 Bom. 204, 206, 96 I.C. 166, ('26) A.B. 399 [where the earlier cases are collected].

(*o*) *Pandurang* v. *Bhaskar* (1874) 11 Bom. H.C. 72; *Krishnaji* v. *Sitaram* (1881) 5 Bom. 496; *Balaji* v. *Ganesh* (1881) 5 Bom. 499; *Pandu* v. *Goma* (1919) 43 Bom. 472, 50 I.C. 765, ('19) A.B. 84; *Ishwappa* v. *Krishna* (1922) 46 Bom. 925, 931, 67 I.C. 833, ('22) A.B. 413.

(*p*) *Mahabalaya* v. *Timaya* (1875) 12 Bom. H.C. 138 [coparceners suit for joint possession]; *Babaji* v. *Vasudev* (1876) 1 Bom. 95 [ditto]; *Kallapa* v. *Venkatesh* (1878) 2 Bom. 676, at p. 678; *Dugappa* v. *Venkatramnaya* (1881) 5 Bom. 493 [suit by coparceners for possession of entire property—*held* entitled only to joint possession with purchaser]; *Patil Hari* v. *Hakamchand* (1886) 10 Bom.

(*q*) (1906) 8 Bom. L.R. 99, 106, *supra*.

(*r*) (1902) 26 Bom. 141, 145, *supra*.

(*s*) *Bhau* v. *Budha* (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 399, and the cases cited in f.n. (*p*) above.

Thus the Court, may not eject the purchaser if he is a relative of the parties and has long been in possession, but may allow him to continue in joint possession with the other coparceners. If they do not like joint possession with the purchaser, their remedy lies in suing for a partition (*t*). If the case is one in which joint possession should be allowed, the proper decree to pass is one placing the plaintiffs in joint possession with the defendant purchaser. If the case is one in which joint possession should not be allowed, the proper decree to pass would be an order directing the purchaser to deliver possession of the *whole* property to the plaintiffs, and declaring that the purchaser has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition, with a further direction that the execution of the decree be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will be cancelled (*u*).

*Difference between Madras and Bombay views.*—The main point of difference between the Madras and Bombay High Courts is that while in Madras the purchaser is not entitled in any case to joint possession before partition, in Bombay the Court may in its discretion award joint possession to him. The reasons for this difference are as follows:

(a) According to the Bombay decisions, the purchaser from a coparcener is a tenant-in-common with the other coparceners (*v*). A similar view was taken by the High Court of Madras in some of the earlier cases, but that view has since been disapproved, and it has been held that the purchaser is not a tenant-in-common, but has only an equity to enforce his rights by partition (*w*). The same view has been taken by the Patna High Court (*x*).

(b) The Madras High Court (*y*) has interpreted the judgments of the Judicial Committee in the undermentioned cases (*z*) as laying down the broad proposition that the purchaser in possession is liable to be ejected at the instance of the non-alienating coparceners. Commenting on this Fawcett, J., said in a Bombay case that they were all cases from Bengal where one coparcener has not authority, without the consent of his coparceners, to alienate even his own undivided interest in coparcenery property, and that the Privy Council decisions do not amount to saying that *in no case* can the Court properly allow a stranger purchaser to remain in possession with the non-alienating coparceners (*a*).

(2) *Right to partition.*—In Bombay (*b*) and Madras (*c*), the purchaser of the undivided interest of a coparcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, for his vendor himself could not have claimed it, unless the other coparceners consent to it. He can only enforce his rights by a suit for a general partition. In Allahabad (*d*), and in Calcutta (*e*) it has been held that the purchaser is entitled to a partition of the specific property without suing for a general partition, but these decisions are of doubtful authority.

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(*t*) (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 399, *supra*.

(*u*) *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 25-26, 46 I.C. 133, ('18) A.B. 101.

(*v*) See *Muhabalaya* v. *Timaya* (1875) 12 Bom. H.C. 138, 110, which is the first Bombay case on the subject.

(*w*) *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440; *Maharaja of Bobbili* v. *Venkataramanjulu* (1916) 39 Mad. 265, 25 I.C. 585, ('15) A.M. 453. Also see *Peramanayakam* v. *Sivaraman* (1952) Mad. 835, ('52) A.M. 419 (F.B.).

(*x*) *Bhubneshwar Prasad* v. *Sidheswar* (1949) A.P. 309.

(*y*) (1916) 39 Mad. 265, 268-269, 25 I.C. 585, ('15) A.M. 453, *supra*.

(*z*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 6 I.A. 88; *Hardi Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 11 I.A. 26; *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

(*a*) *Bhau* v. *Budhu* (1926) 50 Bom. 204, 207-209, 96 I.C. 166, ('26) A.B. 399.

(*b*) *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Murarrao* v. *Sitaram* (1899) 23 Bom. 184; *Shivmurdeppa* v. *Virappa* (1900) 24 Bom. 128; *Ishrappa* v. *Krishna* (1922) 46 Bom. 925, 67 I.C. 833, ('22) A.B. 413.

(*c*) *Venkatarama* v. *Mecra* (1890) 13 Mad. 275; *Palani* v. *Masakonan* (1897) 20 Mad. 243; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555.

(*d*) *Ram Mohan* v. *Mul Chand* (1906) 28 All. 39.

(*e*) *Tarinicharan Chakrabarti* v. *Debendralal De* (1935) 62 Cal. 655.

The non-alienating coparceners, on the other hand, are entitled in Bombay (*f*), Madras (*g*), and Allahabad (*h*), to sue the purchaser for partition of the alienated property without bringing a suit for a general partition. But one of several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property (*i*).

Where a suit is brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, as they are entitled to do, the purchaser is not entitled *in that suit to counter-claim* for a general partition. He must bring a suit of his own for a general partition (*j*).

Where a suit has been brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, and an *unconditional* decree is passed for partition of the alienated property and for delivery of their share to them, the share so delivered becomes the *separate property* of the non-alienating coparceners (*k*). But it would continue as *joint* if the relief granted to the non-alienating coparceners is made *conditional* on their assenting to the results of a suit for general partition which the alience may offer to bring (*l*).

The share allotted to the non-alienating coparcener is his *separate* property as between him and the alienating coparcener, but not as between him and his male issue.

(3) *Equitable rights of purchaser on partition.*—The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition an equitable right to have that property (*m*), or his alienor's share in that property (*n*), as the case may be, assigned to him if it could be done without injustice to the other coparceners. But there may be equities between the coparceners or liabilities attaching to the alienor's share which may render it inequitable or impracticable to do so (*o*). In such a case the alienee is entitled to recover from his alienor property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated (*p*). In making adjustments, the court will take the value of the properties at the time of the division and not at the time of the sale (*q*).

It has been held by the Madras High Court in *Sabapathi* v. *Thandavaroya* (*r*) that such equitable relief by way of obtaining substituted property cannot be claimed by or

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(*f*) *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 26, 46 I.C. 133, ('18) A.B. 101; *Naro Gopal* v. *Paragauda* (1917) 41 Bom. 347, 355, 39 I.C. 23, ('16) A.B. 130.

(*g*) *Venkatachella* v. *Chinnaya* (1870) 5 Mad. H.C. 166; *Chinna* v. *Suriya* (1882) 5 Mad. 196; *Subramanya* v. *Padmanabha* (1896) 19 Mad. 267; *Iburamsa* v. *Theruvenkatasami* (1911) 34 Mad. 269 (F.B.), 7 I.C. 559 [suit by purchaser from non-alienating coparcener].

(*h*) *Ram Charan* v. *Ajudhia* (1906) 28 All. 50.

(*i*) *Shyam Sunder* v. *Jagarnath* (1923) 2 Pat. 925, 74 I.C. 758, ('23) A.P. 590.

(*j*) *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 96 I.C. 993, ('26) A.M. 774.

(*k*) *Souri* v. *Pachia* (1926) 49 Mad. 483, 91 I.C. 868, ('26) A.M. 241.

(*l*) See *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 46 I.C. 133, ('18) A.B. 101.

(*m*) *Pandurang* v. *Bhaskar* (1874) 11 Bom. H.C. 72; *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Aiyyagari* v. *Aiyyagari* (1902) 25 Mad. 690, 718-719 [F.B.]; *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 62, 9 I.C. 596 [F.B.]; *Dhulabhai* v. *Lala Dhula* (1922) 46 Bom. 28, 64 I.C. 115, ('22) A.B. 137; *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 324, 96 I.C. 993, ('26) A.M. 774; *Gurlingappa* v. *Sabu* (1931) 33 Bom. L.R. 141, 131 I.C. 886, ('31) A.B. 218.

(*n*) *Venkatarama* v. *Meera* (1890) 13 Mad. 275, (1902) 25 Mad. 690, 718-719 [F.B.], *supra*; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440; *Sitamahalakshmi* v. *Ramachandra* ('57) A. Andh. Pra. 572; *Sethu Ramalinga* v. *Veerasicami* ('71) A.M. 174: Also see *Ramakrishna* v. *Suppayya* ('65) A. Kerala 77.

(*o*) (1902) 25 Mad. 690, 718-719, *supra*.

(*p*) (1915) 38 Mad. 684, 687, 22 I.C. 555, ('14) A.M. 440; *supra*; *Sabapathi* v. *Thandavaroya* (1920) 43 Mad. 309, 310-311, 54 I.C. 515, ('20) A.M. 316. Also see *V. C. Thani Chettiar* v. *Dakshinamurthy* ('55) A.M. 288, (1955) Mad. 1278; *Peramanayakam* v. *Sivaraman* ('52) A.M. 419 (F.B.), (1952) Mad. 835; *Narasimhaiah* v. *Chikkathimmaiah* ('54) A. Mysore 115. See (1875) 11 Bom. H.C. 76, 83, *supra*. *Padmanabha Pillai* v. *Abraham* ('71) A. Kerala 154.

(*q*) *Virupaksha Reddi* v. *Chanalal Siva Reddi* (1944) Mad. 212.

(*r*) (1920) 43 Mad. 309, 54 I.C. 515, ('20) A.M. 316, supra.

granted to a purchaser at a Court sale, there being no warranty of title at such sale and no privity of contract between the auction purchaser and the judgment-debtor; and this decision was followed by the Bombay High Court in *Chidambargauda* v. *Channappa* (*s*). The view taken in these cases seems to be rather narrow. Neither the purchaser at a Court sale nor one by private treaty, of the undivided interest of a coparcener in a joint Mitakshara family can acquire title to any specific property; both are entitled to equities, which can and should be granted provided the purchaser is a purchaser for value. The correct view, it seems, has been taken by a division bench of the Bombay High Court (*t*) which has refused to follow the two cases mentioned above and held that there is no distinction in this respect between a private purchaser and a purchaser at a Court Sale. A Full Bench of the Andhra Pradesh High Court has held that the equity which arises in the case of a first alienee is not available to the alienee from an alienee of a specific item of property from a coparcener and the later alienee cannot maintain a suit for general partition claiming the allotment to him of that specific item (*t*1). Reference may also be made to the undermentioned decisions (*t*2).

*Limitation.*—There is no article of the Limitation Act which specifically provides for a suit by an alienee from coparcener for general partition or for working out his equities in such suit. A suit for recovery of possession of immovable property by way of substitution by an alienee or transferee for consideration from a coparcener falls under Article 144 of the old Indian Limitation Act, 1908 (*u*). Now see art. 65 of Limitation Act, 1963. Reference may also be made to the undermentioned case (*t*3).

(4) *Right to sue for partition even after vendor's death.*—The purchaser of the interest of a coparcener is not bound to sue for partition in the lifetime of the coparcener. He may sue after his death. The right which he has to a partition is not lost by the death of the coparcener (*v*).

After the death of the alienating coparcener, the purchaser from him suing for partition is not entitled to an equity that the property alienated should be allotted to the share of the alienating coparcener so as to be available to the purchaser (*v*1).

(5) *Share to which purchaser is entitled on partition.*—The share to which an alienee is entitled on partition is the share which the alienor was entitled *at the date of alienation*, and not at the date when the alienee seeks to reduce his interest into possession (*w*) [ills. (c) and (d)]. But this principle applies only to the fraction representing the share of the alienor. As to the actual items of the property in which the purchaser is entitled to a share, it has been held that the family property as existing on the date of the suit, is to be taken (*x*).

(6) *Right to mesne profits.*—The purchaser of the interest of a coparcener is not entitled to mesne profits between the date of his purchase and the date of his suit for partition (*y*). In a recent case the Supreme Court has held that a person who has purchased the interest of a member of the family in execution of a decree against him is not entitled to institute a suit against the other coparceners for recovery of a share of the income of the family

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(*s*) 36 Bom. L.R. 694, (1934) A.B. 329.

(*t*) *Vasudeo* v. *Kankochand* (1950) Bom. 777, ('51) A.B. 226.

(*t*1) *Gurunadham* v. *Venkata Rao* ('59) A.A.P. 523 (F.B.); *Sethu Ramalinga* v. *Veeraswami* ('71) A.M. 174.

(*t*2) *Fatimunissa Begum* v. *Abu Baker* ('63) A.A.P. 119; *Venkata Subbayya* v. *Srirangam* ('56) A.A.P. 188.

(*t*3) *Manikayala* v. *Narasimhaswami* ('66) A.SC. 470.

(*u*) *Sitamahalakshmi* v. *Ramachandra* ('57) A. A. Pra. 572; *V. C. Thani Chettiar* v. *Dakshinamurthy* ('55) A.M. 288; *Satyanarayana* v. *Lakshminarayana* ('63) A.A.P. 281.

(*v*) (1902) 25 Mad. 690, *supra.*

(*v*1) *Namdeo* v. *Mumtaz Begum* ('64) A.B. 101.

(*w*) *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 9 I.C. 596, [F.B.]; *Sakarchand* v. *Narayan* (1951) Bom. 217, 52 Bom. L.R. 888, ('51) A.B. 10 [F.B.] approving *Naro Gopal* v. *Paragauda*, 41 Bom. 347, ('16) A.B. 130; and overruling *Gurlingapa* v. *Nandapa* (1896) 21 Bom. 797 at p. 805; *Kumaraswami* v. *Rajamanikkam* ('66) A. Kerala 266.

(*x*) *Muthukumara Sathapathiar* v. *Sivanarayana Pillai* (1933) 56 Mad. 534, 141 I.C. 122, ('33) A.M. 158.

(*y*) *Maharaja of Bobbili* v. *Venkataramanjulu* (1916) 39 Mad. 265, 25 I.C. 585, ('15) A.M. 453; *Trimbak* v. *Pandurang* (1920) 44 Bom. 621, 57 I.C. 582, ('26) A.B. 103.

properties from the date of his purchase. He can work out his rights only by a suit for partition and his right to possession would commence only from a period when a specific allotment is made in his favour (*z*). But where the family had become divided in status without a division of the property by metes and bounds, the purchaser of the undivided share of one of the members of the family is entitled to claim mesne profits from the members in possession thereof (*a*).

(7) *Right to sue for specific performance.*—If the coparcener who has sold his interest dies before completion of the sale, the purchaser is nevertheless entitled to specific performance of the agreement for sale (*b*).

(8) *Purchaser takes subject to equities.*—The alienee of a single coparcener's interest takes such interest subject to all changes, incumbrances and liabilities, affecting the coparcenary property or that interest (*c*). Thus the purchaser of the undivided interest of a son in joint family property takes that interest subject to the liability attaching to that interest to pay his father's personal debts not tainted with immorality (*d*) [§ 290].

(9) *Right to impeach previous alienations.*—See § 270 (4) below.

*Illustrations*

(a) *A* and his son *B* are members of a joint family. *A* sells a certain item of the joint family property to *C*, the sale not being for legal necessity or for payment of antecedent debts, and puts *C* in possession. The value of the property alienated is *less* than the value of *A*'s share. There is no person interested in the joint family properties except *A* and *B*. *A* sues *B* and *C* for possession of the property. According to a Madras decision, it is competent to the Court in such a case to declare that *C* is entitled to retain the property as the purchaser thereof, without driving him to the necessity of filing a fresh suit for partition: *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 75 I.C. 406, ('24) A.M. 81.

(b) *A* and *B* are members of a joint Hindu family. *C* is a bhauband (relation) of *A* and *B*. *B* sells his undivided share in one of the joint family properties to *C*. *C* enters into possession of the whole of that property, and continues in possession for several years. Subsequently *A* sues *C* for exclusive possession of the property. In such a case, according to the Bombay rulings, the proper decree would be a decree putting *A* in joint possession with *C*, leaving *A* if he is not willing to continue in joint possession with *C* to file a suit for partition: *Bhau* v. *Budha* (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 399. According to the Madras rulings, the proper decree would be one directing *C* to deliver possession of the whole property to *A*, and declaring that *C* had acquired that undivided interest of *B* in the property with liberty to *C* to file a suit to have that share ascertained by a general partition. The Court may also stay execution for a fixed period to enable *C* to bring the suit: *Subba* v. *Krishnamachari* (1922) 45 Mad. 449, 68 I.C. 69, ('22) A.M. 112; *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 96 I.C. 993, ('26) A.M. 774. The decree would be the same in form in Bombay if the Court held upon the facts of the case that the purchaser should not be allowed joint possession with *A*: *Bhau* v. *Budha* (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 399.

(c) *A* mortgages certain ancestral property to *M*. Subsequent to the mortgage a son *B* is born to *A*. Thereafter a partition takes place between *A* and *B*, and the mortgaged property is divided between them equally. *M* then sues *A* and *B* for a sale of the mortgaged property. *B* objects to a decree against his half share. *B*'s objection must be overruled and a decree passed for the sale of the *whole* property, as the father was

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(*z*) *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad* (1954) S.C.R. 177.

(*a*) *Sivaramamurthi* v. *Venkayya* (1934) 57 Mad. 667, 148 I.C. 1086, ('34) A.M. 364.

(*b*) *Bhagwan* v. *Krishnaji* (1920) 44 Bom. 967, 58 I.C. 335, ('20) A.B. 104.

(*c*) *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Narayan* v. *Nathaji* (1904) 28 Bom. 201; *Venkureddi* v. *Venku Reddi* (1927) 50 Mad. 535, 538, 100 I.C. 1018, ('27) A.M. 472. Also see *Peramanayakam* v. *Sivaraman* ('52) A.M. 419 (F.B.).

(*d*) (1927) 50 Mad. 535, 100 I.C. 1018, ('27) A.M. 471, *supra*. Also see *In Re Official Assignee, Madras* v. *Venkayya* ('65) A.M. 60.

entitled to the whole of the property *at the date of the mortgage*: *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 9 I.C. 596. The same principle applies to sales: *Naro Gopal* v. *Paragauda* (1917) 41 Bom. 347, 39 I.C. 23, ('16) A.B. 130.

(d) *A*, *B* and *C* are members of a coparcenary. *A*'s interest in the coparcenary property is sold, and it is purchased by *P*. *B* dies after the sale. *P* then sues *A* and *C* for partition. *P* is entitled on partition not to one-half, but to one-third only, the latter being *A*'s *share at the date of sale*. *B*'s one-third share will pass to *A* and *C* by survivorship each taking one-sixth.

(e) *A*, a member of a joint family, sells one of the joint properties $x$ to *B*. Afterwards *A* sues his coparceners for partition, and another property $y$ of an equal value is allotted to him on partition. Is *B* entitled to recover property $y$ from *A*? It has been held that he is. But it has been held that if *B* sells property $x$ to *C*, and a partition subsequently takes place between *A* and his coparceners, and property $y$ is allotted to *A* on partition, *C* is not entitled to recover property $y$ from *A*, and that *C*'s only remedy is to sue *B* for damages for breach of warranty, the reason given being that *C* never bargained for that property.

**Privy Council rulings.** The three leading Privy Council cases bearing on the subject dealt with in the present section are—

(1) *Deendyal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247.

(2) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 6 I.A. 88.

(3) *Hardi Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 11 I.A. 26.

In cases (1) and (3), a money decree was obtained against the father, and his "right, title and interest" in a specific property belonging to the family was sold in execution of the decree, the decree-holder himself being the purchaser. In both cases, the purchaser *obtained* possession of the *whole* property. The cases were governed by the Mitakshara law as applied in Bengal, and the suit was brought by the sons to set aside the sale in *its entirety* on the ground that the debt incurred by the father was without legal necessity, and the sale therefore was invalid and that it did not, according to the Mitakshara law as applied in Bengal [§ 260], pass even the father's interest in the property as the father himself could not have, according to that law, sold his interest. On the other hand, it was contended for the purchaser that the debt was contracted for a justifying necessity and that he was entitled to the *whole* property including the sons' interest. It was found in each case that the debt was incurred without legal necessity and it was held that the sale being one in execution of a decree (as distinguished from a voluntary sale), the purchaser acquired the father's interest in the property [§ 289]. But the purchaser did not acquire the sons' interest for what was attached and sold was the "right, title and interest" of the father only in the property. The Judicial Committee accordingly passed a decree directing the purchaser to deliver possession of the whole property to the sons and declaring that the purchaser had acquired the interest of the father and was entitled to take proceedings to have that interest ascertained by partition.

Case (2) was also governed by the Mitakshara law, as applied in Bengal. The suit in that case was brought against the father for a sale of a family property mortgaged by him, and a decree was passed for a sale of the property. The property was put up for sale and was purchased by a stranger. The sons had before the sale objected to the sale on the ground that the debt incurred by the father was for immoral purposes, but they were referred by the executing Court to a regular suit. After the sale, the sons brought a suit to set aside the sale. The purchaser *had not entered into possession* of the property as in cases (1) and (3). It was found that the debt incurred by the father was for immoral purposes. The Judicial Committee held that the proper decree to be passed was an order declaring that the purchaser acquired the undivided interest of the father in the property with such power of ascertaining the extent of that interest by means of a partition as the judgment-debtor himself possessed before the sale and an order confirming the possession of the sons subject to such proceedings to enforce his right as the purchaser might take.

The form of the decree in cases (1) and (3) applies where the purchaser has obtained possession of the property; that in case (2) applies where he has not obtained possession. The substance of these forms is set out in sub-§ (1) of the present section. Their application is not confined to Court-sales. They also apply to voluntary or private sales. It will be noted that in cases (1) and (3), the Judicial Committee directed the purchaser by their judgment to deliver possession of the whole property to the sons, though they declared that the purchaser was entitled to the undivided interest of the father.

**262. Position of coparcener whose undivided interest has been sold.**—Where the undivided interest of a coparcener has been sold, but there has been no partition either at the instance of the purchaser or of the other coparceners, the sale does not affect the *status* of such coparcener in the family, nor does it extinguish his right to take by survivorship the interest of other coparceners on their death (*e*). Even if the other coparceners sue to set aside the sale and to recover their share of the property sold it does not normally amount to a partition. Whether it does or not depends on the form of the plaint and the relief granted (*f*).

See ill. (d) to § 261, at p. 329.

**263. Rights of mortgagee from a coparcener.**—(1) The principles laid down in § 261 above apply *mutatis mutandis* to a mortgagee of joint family property from a coparcener. When a mortgage executed by a father for himself and an only minor son was found to be not binding on the joint property and when another son was born at the time of suit, the mortgage is binding on a half-share and not merely one-third-share (*g*).

(2) Where a coparcener mortgages a specific property belonging to the joint family, or his undivided interest in such property, that property may at a partition between the coparceners, be allotted to another coparcener subject to the mortgage (as a part of the partition arrangement) or the latter takes the property free from the mortgage. In the former case the other coparceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee who may sue them on the mortgage (*h*). In the latter case the mortgagee is entitled to recover his claim out of the substituted property which falls to the share of the mortgagor at the partition unless the partition is unfair and in fraud of the mortgagee (*i*); and may follow it in the hands of a subsequent transferee unless the transfer is shown to be without notice (*j*). In a proper case the partition may be re-opened (*k*).

**264. Renunciation by coparcener of his share.**—A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them (*l*). If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener

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(*e*) *Gurlingapa* v. *Nandapa* (1897) 21 Bom. 797, 803; *Subheti* v. *Nokhesingh* (1946) Nagpur 699, ('46) A.N. 354. Reference may be made to *Anjancyulu* v. *Ramayya* ('65) A.A.P. 177 (F.B.).

(*f*) *Chimalakonda Ramasubbaraya Sastri* v. *Ganapathiraju Venkata Appalanarasimharaju* (1940) Mad. 405, 188 I.C. 700, ('40) A.M. 217.

(*g*) *Sree Rajah Vasi Reddi Balachandrasekhara Varaprasad Bahadur Manne Sultan Garu* v. *Lakshminarasimham & Ors.* (1940) Mad. 913, ('40) A.M. 691.

(*h*) *Atmaramrao* v. *Bhupendranath* (1941) Nag. 677, 194 I.C. 537, ('40) A.N. 149, (1940) N.L.J. 365.

(*i*) *Muthia* v. *Appala* (1911) 34 Mad. 175, 6 I.C. 991; *Bijnath Lall* v. *Ramoodeen* (1873) 1 I.A. 106, 21 W.R. 233; *Hem Chunder* v. *Thako Moni* (1893) 20 Cal. 533; *Shahebzada* v. *Hills* (1908) 35 Cal. 388; *Amolak* v. *Chandan* (1902) 24 All. 485; *Nagendra* v. *Pyari Mohan* (1916) 43 Cal. 103, 30 I.C. 420, ('15) A.C. 339.

(*j*) *Kharag Narayan* v. *Janki Raj* (1937) 16 Pat. 230, 160 I.C. 906, (37) A.P. 546.

(*k*) *Lakshman* v. *Gopal* (1899) 23 Bom. 385.

(*l*) *Peddayya* v. *Ramalingam* (1881) 11 Mad. 406. But see *Sudarsanam* v. *Narsimhulu* (1902) 25 Mad. 149, 156, and compare *Appa* v. *Range* (1883) 6 Mad. 71, where there was no renunciation in fact. The renunciation, however, must be unequivocal if effect has to be given to it.

or coparceners in whose favour the renunciation is made (*m*). Such renunciation is not invalid even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance (*n*). Reference may be made to § 328 (6).

*Illustrations*

*A*, *B*, *C* and *D*, four Hindu brothers, are members of a joint family. *A* and *B* execute a writing renouncing their interest in the joint property in favour of *C* alone. Subsequently *C* sues *D* for partition of the joint property, and claims three-fourths of the property. According to the Madras High Court, *C* is entitled to three-fourths and *D* is entitled to one-fourth. According to the Allahabad High Court, the renunciation by *A* and *B*, though made in favour of *C* alone, enures for the benefit of both *C* and *D* and the property should be divided equally between *C* and *D*.

In a Bombay case, it was held that where *X* has two sons *A* and *B* and *A* has a son *C*, and *B* has a son *D*, a release by *A* of his interest in the coparcenary property in favour of his father *X* enures for the benefit of all the other coparceners *including A*'s son *C* (*o*). In a later Bombay case, the facts were these: *A* had two sons *B* and *C*. *C* had a son *D*. *C* was of weak intellect; he lived separately and his father allotted to him property *X* being part of the joint family properties for his maintenance. After *A*'s death, *B* entered into possession of properties *Y* and *Z* being the rest of the joint family properties. Afterwards *D* sued his uncle *B* and his father *C* for partition. *C* died pending the suit. It was held that all the three properties should be thrown into hotchpotch and divided equally between *B* and *D* (*p*). Both these decisions were affirmed on appeal by the Judicial Committee. No assignment of a co-sharer's interest in actionable claims is necessary when he retires from the membership of the family business and renounces his share therein (*q*).

**265. Insolvency of manager, father or other coparcener.**—(1) *Insolvency of manager not being the father of the other coparceners.*—On the insolvency of the manager of a joint Hindu family governed by the Mitakshara law, there vest in the Official Assignee or Receiver—

(a) the separate property of the insolvent manager and his undivided interest in the joint family property; and

(b) it was held in the undermentioned cases (*r*) that the power of the managing member of a joint Hindu family to sell or mortgage the interest of the other coparceners for the satisfaction of joint family debts vests in the Official Assignee under sec. 52 (2) (b) of the Presidency Towns Insolvency Act. It was held however that as there is no provision corresponding to that of sec. 52 (2) (b) of the Presidency Towns Insolvency Act, in the Provincial Insolvency Act, under the latter Act, on the insolvency of the manager his power to sell the share of other members would not vest in the Receiver (*s*).

It is well settled since the pronouncements of the Judicial Committee in *Sat Narain* v. *Behari Lal* (*t*) and *Sat Narain* v. *Sri Kishen Das* (*u*) that the power

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(*m*) *Chandar* v. *Dampat* (1894) 16 All. 369; *Anandrao* v. *Vasantrao*, 17 M.L.J. 184 (P.C.); *Subbanna* v. *Balasubba Reddi* (1945) Mad. 610 (F.B.).

(*n*) *Guruswami* v. *Marappa* (1950) Mad. 665, ('50) A.M. 140.

(*o*) *Wasantrao* v. *Anandrao* (1904) 6 Bom. L.R. 925, 947, affirmed on appeal to the P.C. sub-nom. *Anandrao* v. *Vasantrao* (1907) 9 Bom. L.R. 595. See *Shivajirao* v. *Vasantrao* (1909) 33 Bom. 267, 2 I.C. 249, contrast *Sivagnana Tevar* v. *Periasami* (1878) 1 Mad. 312, 5 I.A. 61.

(*p*) *Mukund* v. *Balkrishna* (1927) 54 I.A. 413, 52 Bom. 8, 105 I.C. 703 ('27) A.PC. 224.

(*q*) *Brijmohan* v. *Mahabeer* (1936) 63 Cal. 194.

(*r*) *Rangayya* v. *Thanikachalla* (1896) 19 Mad. 74 [elder brother manager]; *Sardarmal* v. *Aranvayal* (1897) 21 Bom. 205 [uncle manager]; *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214 [eight uncles managers].

(*s*) *Nori Ramasastrulu* v. *Teluguntla Balakrishna Rao* (1943) Mad. 83, 203 I.C. 507, ('42) A.M. 682 (F.B.).

(*t*) 52 I.A. 22.

(*u*) 63 I.A. 384.

of the father, to sell the interest of his sons is not 'property' within the meaning of sec. 17 of the P.T.I. Act. It is not the property itself but the power of the father relating to that property that would vest in and could be exercised by the Official Assignee under sec. 52 (2) (b) of the P.T.I. Act. Accepting that principle, the question would be whether the power of the manager to sell the family property for joint debts could come within sec. 52 (2) (b) of the Presidency Towns Insolvency Act. Clause (b) speaks of "the capacity to exercise and to take proceedings for exercising all such powers in, or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge." The expression "own benefit" occurring in the clause means the exclusive benefit of the bankrupt. As the right of the manager to sell family property is not exclusively for his benefit but is for the benefit of all the members the proper view to take would be that such power cannot vest in the Receiver under sec. 52 (2) (b) of the Presidency Towns Insolvency Act (*v*). With regard to the father the position is undoubtedly different for the father has the power to have the son's interest in the family estate sold for discharge of his own personal debts.

(2) *Insolvency of father.*—On the insolvency of the father of a joint Hindu family governed by the Mitakshara law, there vest in the Official Assignee or Receiver—

(a) The separate property of the insolvent father and his undivided interest in the joint family property; and

(b) The power which the father has to alienate the joint family property including the interest of his sons therein for paying his antecedent debts not contracted for an immoral purpose. In cases governed by the Presidency-Towns Insolvency Act, 1909, this power vests in the Official Assignee under sec. 52(2) of the Act (*w*). It does not pass by survivorship to the son and it may be exercised by the Official Assignee or by the Receiver after the father's death (*x*). As to cases governed by the Provincial Insolvency Act, 1920, the law on this point is now settled by legislation and the Provincial Insolvency (Amendment) Act, 1948, which came into force on 12th April 1948, enacts as follows:—

Sec. 28 (A) "Insolvent's Property to comprise certain capacity:—

The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in order or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge." Thus there is no longer any distinction between the provisions of the Presidency Towns Insolvency Act, and those of the Provincial Act, in this respect and the change of law in the

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(*v*) Per Leach, C.J. in *Nori Ramasastrulu* v. *Teluguntla* (1943) Mad. 83 (F.B.); *Virupaksha* v. *Chanalal* (1943) A.M. 652.

(*w*) *Official Assignee of Madras* v. *Ramchandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55; *Sellamuthu Servai, In re* (1924) 47 Mad. 87, 80 I.C. 108, ('24) A.M. 411 [F.B.]; *Sat Narain* v. *Sri Kishen* (1936) 63 I.A. 384, (1936) 17 Lah. 644, 38 Bom. L.R. 1129, 164 I.C. 6, ('36) A.PC. 277; *Balusami, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.]; (1903) 26 Mad. 214, *supra* [Indian Insolvency Act, 1848, s. 30]; *Wasudeo* v. *Devidas* (1948) Nag. 85 (F.B.).

(*x*) *Fakirchand* v. *Motichand* (1883) 7 Bom. 438 [Ind. I. Act, 1848, s. 7 applied].

Provincial Act has expressly been made retrospective (c). It was accordingly held by the Supreme Court that where a Hindu father who has mortgaged the joint family property for an antecedent debt which is not illegal or immoral becomes insolvent and the Receiver sells the property, the interest of his sons in the property also vests in the purchaser, even in the case of a sale held before the Amendment Act of 1948 came into force, and the sons cannot redeem the property (*d*).

(c) As the interest of the son does not vest in the Official Assignee or Receiver, it may be attached even after the insolvency of the father by a creditor of the father in execution of a decree obtained by him against the father or against the father and son in respect of a personal debt of the father, unless, it has been previously sold by the Official Assignee or Receiver, and leave of the Insolvency Court is not necessary for attaching the son's shares (*e*). *After* attachment the Official Assignee or Receiver cannot exercise the power of sale as the father himself could not have done so [ill. (a)]; see § 295(5). Where the son's share is attached after the insolvency of the father, the proper procedure is to carry out execution proceedings in combination with the Official Assignee or Receiver so that the entire property may be sold at the same time to the benefit both of the attaching creditor and the father's creditors (*f*).

(d) As in the case of the father, so in the case of the Official Assignee and Receiver, the power to sell the son's share for paying the father's debts subsists if at all only so long as the family remains joint. *After* partition the Official Assignee or Receiver cannot sell the son's interest as the father himself could not have done so [§ 294(4)]. It has accordingly been held that if the son sues the father for partition of joint family property pending the insolvency of the father, the Official Assignee or Receiver cannot sell the son's share. The institution of a suit for partition puts an end to the joint family status [§ 325(1)] and with it, to the right also of the father to sell his son's share for his debts, and as a result, extinguishes the right (even if it can pass otherwise) also of the Official Assignee or Receiver to sell the son's share for the father's debts (*g*). But though the Official Assignee or Receiver cannot *sell* the son's share after the institution of a suit for partition, he can institute a suit against the son for realizing debts due to the father's creditors and enforce the decree in such suit by selling the son's share or he may apply to be joined as a party in the son's suit for partition and by proper procedure can obtain a decree which he can execute against the son's share (*h*) [ill. (b)].

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(*c*) See *Official Receiver of Ramnad* v. *Devarayan* (1948) 2 M.L.J. 415.

(*d*) *Cheruvu Nageswaraswami* v. *Rajah Vadrevu Viswasundara Rao* (1953) S.C.R. 894, ('53) A.SC. 370.

(*e*) *Arunachalam* v. *Sabaratnam* (1939) Mad. 585.

(*f*) *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das* (1926) 48 All. 343, 92 I.C. 309, ('26) A.A. 262 [Prov. I. Act]; (1925) 49 Bom. 785, 89 I.C. 996, ('25) A.B. 416, *supra*.

(*g*) *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.]; *Krishnamurthy* v. *Sundaramurthy* (1932) 55 Mad. 558, 138 I.C. 225, ('32) A.M. 381; *Sat Narain* v. *Sri Kishen Das*, 63 I.A. 384, 17 Lah. 644, 38 Bom. L.R. 1129, 164 I.C. 6, ('36) A.PC. 277. This case overrules the contrary decision of the Full Bench of the Allahabad High Court, in *Bankey Lal* v. *Durga Prasad*, 53 All. 868, 135 I.C. 139, ('31) A.A. 512, on this point.

(*h*) (1928) 51 Mad. 417, 443, 467-468, 112 I.C. 541, ('28) A.M. 735 [F.B.], *supra*; *Chatrati Sriramamurthi* v. *Official Receiver* ('57) A. Andh. Pra. 692; *Bindya Wasini* v. *Dharamnath Prasad* ('68) A.P. 378.

(3) *Insolvency of other coparceners.*—On the insolvency of any other coparcener, his separate property and his interest in the joint family property vest in the Official Assignee or Receiver and are available for the benefit of his personal creditors (*i*). But the creditors of the insolvent's father are not entitled to priority over those of the insolvent (*j*). The purchaser of the undivided interest of the insolvent coparcener from the Official Assignee is like any other private purchaser and is not entitled to mesne profits prior to a suit for partition (*k*).

*Illustrations*

(a) *A* and his son constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and a Receiver is appointed of his property. The family owns five immovable properties of which two are sold by the Receiver. Afterwards one of *A*'s personal creditors who had obtained a decree against *A* and his son attaches the son's share in the remaining three properties in execution of the decree. The attachment is valid and the creditor is entitled to sell the son's share in these properties in execution of his decree and apply the sale proceeds in payment of the judgment debt. The Receiver has no right after the attachment to sell the son's share in those properties for the benefit of the general body of *A*'s creditors (*l*).

(b) *A* and his sons constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and his property vests in the Official Assignee. Pending *A*'s insolvency *A*'s sons institute a suit against *A* for partition of the joint family properties. The Official Assignee cannot, after the institution of the suit, *sell* the son's shares in the joint family properties, though he may seize them in execution of a decree that he may obtain against them in a regular suit to be filed by him against the sons in respect of the father's debts: *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.]. If the Official Assignee or Receiver himself files a suit for partition against the sons after the insolvency of the father, and allows a decree to be passed allotting separate shares to the sons, and the sons take possession of their shares, he cannot afterwards apply to sell those shares for the benefit of the father's creditors: *Trayamkeshar* v. *Babu Basant* (1930) 5 Luck. 248, 123 I.C. 61 ('30) A.O. 36.

**Insolvency Acts.**—See Indian Insolvency Act, 11 and 12 Vict. c. 21, ss. 7 and 30 [repealed]; Presidency-Towns Insolvency Act, 1909, s. 2(e), and ss. 17, 28, and 52; and Provincial Insolvency Act, 1920, s. 2(d) and ss. 28, 28(A) and 37.

**Joint Possession.**—According to the Madras High Court the Official Assignee is entitled, on the insolvency of any coparcener, to joint possession with the other coparceners (*m*). [Contrast s. 261.]

**Sat Narain** *v.* **Behari Lal** (*n*).—To appreciate the exact point of decision of the Privy Council in this case, it may be necessary to refer briefly to the facts of the case. The plaintiff who was the appellant before the Privy Council filed his suit claiming a right of pre-emption over an adjoining house basing his claim on the ground of contiguity. The defence was that as the father of the plaintiff who was the karta of a joint Mitakshara family, had been adjudicated under the Presidency Towns Insolvency Act, the plaintiff's interest in the property by virtue of which the right of pre-emption was claimed vested in the Official Assignee, and hence no longer existed. The trial Court negatived the defence and gave the plaintiff a decree. On appeal to the Lahore High Court the learned Judges who heard the appeal made an order referring to a Full Bench the following question:—

> "Does an order of adjudication against a father vest in the Official Assignee his son's interest in the joint family property?"

The Full Bench presided over by Shadilal C.J. answered the question in the affirmative. Against that an appeal was taken to the Privy Council and the Judicial Committee

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(*i*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, 221; *Lakshmanan Chettiar* v. *Srinivasa Iyengar* (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131.

(*j*) *Pr. N. Sm. Chockalingam Chettiar* v. *Official Assignee of Madras* (1943) Mad. 603, 206 I.C. 482, 69 I.A. 157, ('43) A.PC. 15.

(*k*) *Venkatarayudu* v. *Sivaramakrishnayya* (1935) 58 Mad. 126, 153 I.C. 368, ('34) A.M. 676.

(*l*) *Gopalakrishnayya* v. *Gopalan* (1928) 51 Mad. 342, ('28) A.M. 479. The decision is not correct with respect to the first two items.

(*m*) *Official Assignee* v. *Ramachandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55; *Venkatram* v. *Chokkier* (1928) 51 Mad. 567, 109 I.C. 516, ('28) A.M. 531.

(*n*) (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18, reversing *Beharilal* v. *Sat Narain* (1922) 3 Lah. 329, 69 I.C. 486, ('23) A.L. 1.

reversed the decision of the Full Bench and restored the judgment of the trial Judge with slight modification.

Their Lordships referred in their judgment to the provisions of S. 17 and S. 2(e) of the Presidency Towns Insolvency Act, and held that as the father's power of disposal over the son's property was not absolute but conditional on his having debts of a particular type, it could not be regarded as property as defined in S. 2(e) which contemplates an absolute and unconditional power of disposal. "It may be" so runs the judgment "that under the provisions of sec. 52 or in some other way, that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the Assignee, and no such provision should be read into the Act."

In the second case of *Sat Narain* v. *Sri Kishen* (*o*) it was expressly held by the Privy Council that the capacity of the father of a joint Hindu family governed by the Mitakshara law to exercise his power to sell the joint family estate to enforce the pious obligations of his sons to discharge untainted antecedent debts, vests in the Official Assignee under Sec. 52(2)(b) of the Presidency Towns Insolvency Act; and although such power could be exercised subject to all the limitations under which it could be exercised by the father himself it does not militate against the provisions of sec. 49(5) or of sec. 17 of the Presidency Towns Insolvency Act.

The position therefore is: on the insolvency of the father, the son's share as such does not vest in the Official Assignee. The decisions which took that view must be held to be incorrect (*p*). What vests in the Assignee is the power to sell, and the power being exercisable for the personal benefit of the father can be regarded as "property" of the father himself and is recognised as such in the recent legislation (*q*)

(4) Two or more members of a joint family may be adjudicated insolvents on a single petition if they are liable on a joint debt and have committed a joint act of insolvency, but the joint family as such cannot be adjudicated insolvent (*r*).

(5) See § 522 Mulla's Laws of Insolvency 2nd Edition pp. 490-498. Also see *ibid.* pp. 498-501.

**266. Joint family firm—Minor—Insolvency.**—A minor member of a joint family firm cannot as such be adjudged an insolvent (*s*).

A Hindu dies leaving a business. On his death the business descends to his five sons, *A*, *B*, *C*, *D* and *E*. *E* is a minor. The firm is unable to pay its debts. *A*, *B*, *C* and *D* may be adjudged insolvents, but not *E*, as *E* is a minor. This proceeds on the rule of English as well as Indian law that an infant *partner* cannot be adjudicated an insolvent (*t*). But though *E* cannot be adjudged an insolvent, the Official Assignee succeeds on the insolvency of *A*, *B*, *C* and *D*, the managing members of the joint firm, to the right of a manager to alienate the joint family property including the share of minor coparceners for the payment of debts incurred in the course of the business (*u*).

The above observations apply only to an ancestral business. A different rule applies when a *new* business is started by the adult members of a joint family after the death of the ancestor. In such a case the matter rests purely on *contract* with the result that on the insolvency of *A*, *B*, *C* and *D*, the Official Assignee does not succeed to the rights of a manager of a joint family firm, but gets a right merely to recover the minor's share

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(*o*) 63 I.A. 384.

(*p*) See *Fakirchand* v. *Motichand* (1888) 7 Bom. 438.

(*q*) See Provincial Insolvency Amendment Act, 1948,

(*r*) *Mahabir Prasad Poddar* v. *Ram Tahal Mandar* (1937) 16 Pat. 724, 172 I.C. 737, ('37) A.P. 665; *Pohlo Mal* v. *Basant Ram* I.L.R. 1941 Lah. 55, 92 I.C. 532.

(*s*) *Sanyasi Charan* v. *Asutosh* (1915) 42 Cal. 225, 26 I.C. 836, ('15) A.C. 482; *Hansraj Malji In re* (1883) 7 Bom. 411, 413. See also *Nobodeep Chunder, In re* (1886) 13 Cal. 68.

(*t*) (1915) 42 Cal. 225, 26 I.C. 836, ('15) A.C. 482, *supra.*

(*u*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, but see 42 Cal. 225, 233-240, 26 I.C. 836, ('15) A.C. 482, *supra*; *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901; *Bhola Prasad* v. *Ramkumar Marwari* (1932) 11 Pat. 399, 319 I.C. 31, ('32) A.P. 231.

for the benefit of the creditors of the *partnership*, if the minor was admitted to the benefits of the partnership within the meaning of sec. 247 of the Contract Act (*v*).

It is well established that a minor cannot be a *partner*, but he may be admitted to the benefits of a partnership between the adult members in respect of a *new* business started by them, in which case the minor's share in the property of the firm is liable for the obligations of the firm. See notes to § 234, "New business," at p. 289.

## VI.—SETTING ASIDE ALIENATIONS

**267. Setting aside gifts.**—A coparcener, according to the Mitakshara law, cannot make a gift of the coparcenary property, not even of his own interest in the property [§ 258]: Therefore, where such a gift is made, and it is objected to by the other coparceners, the Court will set aside the gift *in its entirety*. The gift is not valid even to the extent of the donor's interest in the property [§ 270, sub-§ (1), ill. (a)].

The above rule does not apply to gifts by a *father* of ancestral property to the extent mentioned in §§ 225 and 226.

When a coparcener makes a gift of his entire interest in favour of the sole remaining coparcener such gift may be held to be valid either on the principle of renunciation or as a transfer with the consent of all the coparceners, the consent of the other coparcener, who is himself the donee, being presumed (*w*).

**268. Setting aside sales and mortgage—Bombay and Madras.**—(1) Where a member of a joint family governed by the Mitakshara law as administered in the Bombay and Madras States sells or mortgages *more than his own interest* in the joint family property, the alienation not being one for legal necessity [§242] or for payment by a father of an antecedent debt [§ 295], the other members or persons to whom their interests in the property have passed (*x*), are entitled to have the alienation set aside *to the extent of their own interest therein* (*y*). The alienation cannot be set aside in its entirety, for according to the law as prevailing in Bombay and Madras, a coparcener can alienate *his own interest* in the joint property. If any coparcener has consented to the alienation, the alienation will bind his interest also [§ 242(3)].

(2) *Equities on setting aside alienations.*—Where an alienation is not for legal necessity or for payment of an antecedent debt, and it is set aside at the instance of the other coparceners as regards their shares, there is no equity entitling the alienee to a refund of a proportionate part of the purchase-money in respect of those shares (*z*). And it has been held that even if a suit is brought by the sons for a partition and for setting aside an alienation made by their father, the sons are not, as a condition to recovering their share of the property, under a pious obligation to refund to the alienee their share of the consideration received by the father. The ground of the decision is that the pious obligation to pay the father's debts attaches only to a debt existing *at the date of the suit*, and that the consideration received by the father from the alienee is not in the first instance a *debt* due from the

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(*v*) *Sanyasi Charan* v. *Krishnadhan* (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.PC. 237 [business not ancestral but new—case governed by Contract Act, s. 247, and decided under that section].

(*w*) *Ram Saran Singh* v. *Prithipal* ('50) A.A. 224.

(*x*) *Alla Venkataramanna* v. *Palacherla Mangamma*, (1944) Mad. 867.

(*y*) *Marappa* v. *Rangasami* (1900) 23 Mad. 89; *Naro* v. *Paragowda* (1917) 19 Bom. L.R. 69, 39 I.C. 23, ('16) A.B. 130; *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*z*) *Virabhadra* v. *Guruvenkata* (1899) 22 Mad. 312.

father; it becomes a debt only when the alienation is set aside and a decree is obtained by the alienee against the father for failure of consideration (*a*). [See the cases cited in § 269 (2)].

The method of adjusting equities between alienee and non-alienating coparcener was explained in detail in a Full Bench decision of the Madras High Court (*b*).

*Equities on setting aside alienations.*—The rule that a coparcener cannot make a *gift* of his share cannot be evaded by making a sale at a grossly inadequate price (*c*).

*Improvements made by alienee.*—See § 185 [Equities on setting aside alienation by widow], and the undermentioned case (*d*).

*Mesne profits on setting aside alienation.*—Where an alienation is set aside under this section, and the purchaser is in possession, he may be required to pay mesne profits from the date on which the sale is repudiated by the other coparceners, but not from the date of sale, the sale being valid until it is repudiated (*e*).

*Partition—Shares on partition*—Mother.—In a suit by a son for partition and separate possession of his share after setting aside the alienation of joint family property made by his father, the mother who is a party, is entitled to a share, if the Court comes to a conclusion that the alienation is not for a purpose binding upon the family consisting of the father, mother and sons (*f*).

**269. Setting aside sales and mortgages—Other States.**—(1) Where a member of a joint family governed by the Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh sells or mortgages the joint family property or *any portion* thereof without the consent of his coparceners, the alienation is liable to be set aside wholly unless it was for legal necessity [§ 242], or for payment by a father of an antecedent debt [§ 295], and it does not pass the share even of the alienating coparcener. The result is that if the alienation is neither for legal necessity nor for the payment of an antecedent debt, the other coparceners are entitled to a declaration that the alienation is void *in its entirety* (*g*). Even in the Punjab where by custom a son cannot claim partition against the father, the son is entitled to joint possession with the father when the alienation is set aside (*h*). See § 269 above.

It has been held in Allahabad and Patna that the alienation can be impeached only by a coparcener other than the alienating coparcener or by a transferee who has acquired the interest of the entire joint family in the property alienated (*i*).

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(*a*) *Srinivasa* v. *Kuppuswami* (1921) 44 Mad. 801, 64 I.C. 698, ('21) A.M. 447; *Polavarapu, Lingayya & Ors.* v. *Vupputuri Punnayya & Ors.* (1942) Mad. 502, 198 I.C. 588, ('42) A.M. 183 [F.B.]. Also see *Satyanarayanamurthi* v. *Satyanarayanamurthi* ('66) A.A.P. 349 (sale justifiable in part for antecedent debt).

(*b*) *Peramanayakam* v. *Sivaraman* ('52) A.M. 419, (1952) Mad. 835.

(*c*) *Rottala* v. *Pulicat* (1904) 27 Mad. 162.

(*d*) *Ramappa* v. *Yenappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*e*) *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 822, 75 I.C. 406, ('24) A.M. 81; *Gangabisan* v. *Vallabhdas* (1924) 48 Bom. 428, 432, 87 I.C. 703, ('24) A.B. 433.

(*f*) *Parappa* v. *Mallappa* ('56) A.B. 332 (F.B.).

(*g*) *Sadabart Prasad* v. *Foolbash Koer* (1869) 3 Beng. L.R. [F.B.R.] 31 [mortgage]; *Madro Parshad* v. *Mehrban Singh* (1891) 18 Cal. 157, 17 I.A. 194 [sale]; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 20 I.A. 116 [mortgage]; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 208, 1 I.C. 479 [F.B.] [mortgage]; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909 [mortgage]; *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [mortgage]; *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290, ('17) A.PC. 188 [mortgage]; *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280, ('17) A.PC. 61 [mortgage]; *Manna Lal* v. *Karu Singh* (1920) 1 Pat. L.J. 6, 56 I.C. 766, ('19) A.PC. 108 [mortgage]; *Ram Sahai* v. *Parbhu Dayal* (1921) 43 All. 655, 63 I.C. 358, ('21) A.A. 137 [sale]; *Badam* v. *Madho Ram* (1921) 2 Lah. 338, 66 I.C. 19, ('22) A.L. 241 [sale by father]; *Daya Ram* v. *Harcharn Das* (1927) 8 Lah. 678, 107 I.C. 781, ('28) A.L. 111 [sale by father]; *Ramjee Rai* v. *Gopal Ahir* ('63) A.P. 34; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433 [mortgage]; *Ram Bilas* v. *Ramyad* (1920) 5 Pat. L.J. 622, 58 I.C. 303, ('20) A.P. 441 [mortgage]; *Mathura* v. *Rajkumar* (1921) 6 Pat. L.J. 526, 62 I.C. 132, ('21) A.P. 447 [F.B.] [mortgage]; *Angraj* v. *Ram Rup* (1931) 6 Luck. 158, 127 I.C. 38, ('30) A.O. 284 [suit for possession by mortgagee]; *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510; *Makhanlal* v. *Harnarain* ('60) A.M.P. 56.

(*h*) *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.C. 636.

(*i*) *Madan Lal* v. *Gajendrapal* (1929) 51 All. 575, 580, 116 I.C. 436, ('29) A.A. 243; *Madan*

The power of avoidance in such a transferee cannot be greater than that of the coparcenery body at the time of the transfer (*j*).

(2) *Equities on setting aside alienations.*—Where in Bengal and Uttar Pradesh an alienation is set aside in its entirety, the question often arises whether the alienee is entitled to any equity or charge on the alienor's share for the consideration paid by him to the alienor. It has been held by the Judicial Committee that he is not (*k*), except perhaps in special circumstances such as those which existed in *Mahabeer Persad* v. *Ramyad* (*l*). In that case the High Court of Bengal declared a charge on the shares of the mortgagors (being the father and his eldest son) in favour of the mortgagee on the ground that they had represented to him that they had power to charge the joint family property which, in fact they had not [ills. (1) and (3)]. And it has been held by the same court that even where such circumstances exist, the equity (if any) arising out of them cannot be enforced where the coparcener who made the alienation is dead and his share has passed by survivorship to the other coparceners, such as nephews, who are not liable for the personal debts and obligations of the deceased (*m*). They take the share of the deceased in their right by survivorship, and are not affected by any such equity [ill. (2)].

There is a conflict of opinion whether where a sale is effected by the father, and the suit is brought by the sons in their father's lifetime to set aside the sale, the sale not being one either for legal necessity or for the payment of an antecedent debt, the sons are entitled to a decree without refunding the whole or any part of the purchase money to the purchaser. The High Court of Calcutta has held that they are not entitled to a decree without refunding the whole of the purchase money, the reason given being that immediately the sale is set aside, the purchaser would be entitled to recover the whole of the purchase money from the father, and it would thus become a *debt* due by the father for which the whole of the joint family property, including the property sold, would be liable by reason of the son's pious obligation to discharge the father's debt, unless it was contracted for an immoral purpose (*n*). This view has been dissented from by the High Court of Lahore (*o*), Madras (*p*), Allahabad (*q*) and Orissa (*q*1).

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*Lal* v. *Chiddu* (1931) 53 All. 21, 23-26, 128 I.C. 829, ('30) A.A. 852; *Kharag Narayan* v. *Janki Rai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 546; *Shyam Behari Singh* v. *Rameshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208, ('42) A.P. 213; *Gomti* v. *Rameshwardas* ('71) A. Raj. 211 (F.B.).

(*j*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479.

(*k*) *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [mortgage]; *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 176, 44 I.C. 290, ('17) A.PC. 188, followed in *Ram Sahai* v. *Parbhu Dayal* (1921) 43 All. 655, 63 I.C. 358, ('21) A.A. 137; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433.

(*l*) (1874) 12 Beng. L.R. 90, as explained in *Madho Parshad's* case (1890) 18 Cal. 157, 160, 17 I.A. 194, and *Narain Prasad's* case (1917) 44 I.A. 163, 164, 165, 39 All. 500, 504, 40 I.C. 284, ('17) A.PC. 41; *Mahabeer Persad's* case was followed in *Jamuna* v. *Ganga* (1892) 19 Cal. 401, 410, where the alienation was impeached by a *stranger to the family* who had succeeded to the rights of all the coparceners including a coparcener who had not consented to the alienation. See also (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433, *supra*.

(*m*) *Madho Parshad* v. *Mehrban Singh* (1891) 18 Cal. 157, 17 I.A. 194.

(*n*) *Koer Hasmat Rai* v. *Sunder Das* (1885) 11 Cal. 396. But see *Modhoo Dyal Singh* v. *Golbur Singh* (1868) 9 W.R. 511.

(*o*) *Daya Ram* v. *Harcharn Das* (1927) 8 Lah. 678, 107 I.C. 781, ('28) A.L. 111; *Badam* v. *Madho Ram* (1921) 2 Lah. 338, 66 I.C. 19, ('22) A.L. 241.

(*p*) *Srinivasa* v. *Kuppuswami* (1921) 44 Mad. 801, 64 I.C. 698, ('21) A.M. 447; *Satyanarayanamurthi* v. *Satyanarayanamurthi* ('66) A.A.P. 349.

(*q*) *Madan Gopal* v. *Sati Prasad* (1917) 39 All. 485, 40 I.C. 451, ('17) A.A. 326; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479.

(*q*1) *Dhanurjay* v. *Dhano Ganda* ('68) A. Orissa 179.

It has been held by the last mentioned Courts that the pious obligation to pay the father's debt does not attach except to a debt existing *at the date of the suit*, and the price received by the father from the purchaser is in no sense a debt owing by him to the purchaser. It becomes a debt only when the sale is set aside by the Court, for it is only then that the purchaser is entitled to a refund of the price for failure of consideration. It has accordingly been held by those Courts, that the sons are not, as a condition to recovering the property, under a pious obligation to refund any portion of the purchase money, and the sale must be set aside unconditionally.

(3) An alienation which does not bind the share of the alienor himself cannot bind the share of a coparcener consenting thereto [§ 242(3)].

*Illustrations*

(1) *A* and his son *B* are members of a joint family governed by the Mitakshara law as administered in Allahabad. *B* mortgages his half share to *M* for his own personal benefit without *A*'s consent and without legal necessity. *M* sues *A* and *B* for a decree for sale on the mortgage. The mortgage is void, and it cannot be enforced even against *B*'s share. But *M* may obtain a money decree against *B* personally, and attach and sell *B*'s interest in the property in execution of the decree: *Balgobind Das* v. *Narain Lal* (1893) 20 I.A. 116, 15 All. 339. [There were no special circumstances in this case to entitle *M* to a charge on *B*'s share for the money advanced by him to *B*.]

(2) *A* and his brother's son *B* are members of a joint family governed by the Mitakshara law as administered in Bengal. *A* sells his undivided interest in the joint family property to *P* for Rs. 10,000 without the consent of *B* and without legal necessity. Afterwards *A* dies, and his share passes by survivorship to his nephew *B*. After *A*'s death, *B* sues *P* to set aside the sale. The sale by *A*, though it was of his own share, is void and *B* is entitled to *A*'s share by *survivorship*. Even if there was any equity in *P*'s favour, *B* could not be affected by it. *B* takes *A*'s share in his own right by survivorship and is not liable for the personal debts of his uncle: *Madho Parshad* v. *Mehrban Singh* (1891) 17 I.A. 194, 18 Cal. 157.

(3) A joint family consists of three Hindu brothers and their sons, governed by the Mitakshara law as administered in Allahabad. The three brothers mortgage the joint family property without the consent of their sons and without legal necessity. The mortgage is void in its entirety. There being no special circumstances in the case, the mortgagee is not entitled to a charge even on the shares of the mortgagors in the property: *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41.

In *Madho Parshad's* case (1891) 17 I.A. 194, 18 Cal. 157 [ill. (2)], Lord Watson declined to apply the rule in *Mahabeer Persad's* case on the ground that no analogy existed between the latter case and the case before the Board. In the case of *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 165, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [ill. (3)] the Judicial Committee appear to confine the applicability of the rule in *Mahabeer Persad's* case to cases where an express representation has been made out. Their Lordships declined to hold that such a representation was to be implied in all cases, and observed: "Whether that particular case (*i.e., Mahabeer Persad's* case) was rightly decided or not it is not necessary to consider here, because the learned judges proceeded upon the footing that there had been the representation referred to. On looking at the facts their Lordships agree with the observation of Mr. Parikh that there was very little, if any, evidence of such a representation, *but that there was such a representation was the basis of the judgment*, and unless the learned judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now whatever may happen when there are special circumstances, such as there were in the case referred to, that is not the general law." This decision was followed by the Judicial Committee in *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290 ('17) A.PC. 188. The result is that the rule in *Mahabeer Persad's* case can no longer be applied except in cases where special circumstances, such as an express representation, exist.

Lease.—A lease stands on the same footing as a sale or mortgage (*s*).

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(*s*) *Jadu* v. *Abdul* (1911) 16 C.W.N. 93, 11 I.C. 892.

Mesne profits on setting aside alienation.—Where the purchaser from a coparcener has entered into possession, he may be required to pay mesne profits from the date of repudiation of the sale by the other coparcener (*t*).

**270. Objections to alienations by coparceners existing (born or conceived) at the time of the alienation.**—(1) Where an alienation is made by a coparcener *in excess of his powers*, it may be set aside to the extent mentioned in §§ 268 and 269 at the instance of any other coparcener who was *in existence* at the time of the completion of the alienation (*u*). It may also be set aside at the instance of any coparcener who, though born subsequent to the date of alienation, was *in his mother's womb* at the date of alienation; the reason is that under the Hindu law a son conceived is, in many respects, equal to a son born (*v*).

*Illustrations*

(a) *A*, governed by the Mitakshara law, makes a *gift* of certain ancestral property to *B*. *A* has no son at the date of the gift, but a son is born to him two months later. The gift may be set aside at the instance of the son, as he was in his mother's womb at the date of the *gift*. The transaction being a *gift*, it will be set aside altogether, and not merely to the extent of the son's share [§ 267]: *Ramanna* v. *Venkata* (1888) 11 Mad. 246.

(b) *A*, governed by the Mitakshara law as applied in Madras, *sells* certain ancestral property to *B* without legal necessity. The sale may be set aside at the instance of a son who, though born subsequent to the date of sale, was in his mother's womb at the time of sale. It will not, however, be set aside altogether but to the extent only of the son's interest in the property [§ 268]: *Sabapathi* v. *Somasundaram* (1893) 16 Mad. 76.

(c) *A* and his son *B* are members of a joint family governed by the Mitakshara law. *A* sells certain ancestral property to *C* including *B*'s interest therein, without *B*'s consent to pay an antecedent debt of his not contracted for immoral or illegal purposes. The sale is valid in its entirety. It cannot be impeached by *B*, for it is made to pay his father's debts [§ 295]: see *Girdharee Lall* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321.

*At the time of completion of the alienation.*—See ill. (a) to sub-§ (2) below, and the note appended to the illustration.

*Rights of a son in his mother's womb.*—Under the Hindu law a son begotten (or conceived, or in his mother's womb) is equal, in many respects, to a son actually in existence. Thus a son in his mother's womb—and this also applies to a daughter—is entitled to *inheritance*, if born alive. He is also entitled to a share on *partition*. Further, he is entitled to take coparcenary property *by survivorship* as against a legatee of such property under his father's will. That is to say, just as a son living at the time of his father's death is entitled on his father's death to take coparcenary property by survivorship, so is a son who is in his mother's womb at the time of the father's death. The father cannot bequeath coparcenary property to a third person so as to defeat the son's right of survivorship whether the son was in existence at the time of his death or was in his mother's womb at the time [§ 256]. Lastly, an *alienation* that can be impeached by a son actually existing at the time of alienation can also be impeached by a son who was in his mother's womb at the time.

(2) *By after-born coparceners.*—An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of the alienation on the ground that it was made without legal necessity (*x*). But an alienation made

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(*t*) *Bhirgu Nath* v. *Narsingh* (1917) 39 All. 61, 35 I.C. 475, ('17) A.A. 479.

(*u*) *Ponnambala* v. *Sundarappayyar* (1897) 20 Mad. 354; *Narain Das* v. *Har Dayal* (1913) 35 All. 571, 21 I.C. 830.

(*v*) *Guramma* v. *Mallappa* ('64) A.S.C. 510, 66 Bom. L.R. 284; *Sabapathi* v. *Somasundaram* (1893) 16 Mad. 76 [sale]; *Ramanna* v. *Venkata* (1888) 11 Mad. 246 [gift]; *Girdharee Lall* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321; *Deo Narain* v. *Ganga Singh* (1915) 37 All. 162, 26 I.C. 871, ('15) A.A. 65; *Basayya* v. *Balingayya* (1947) Bom. 750; *Venkata Chenchayya* v. *Ramalingam* ('57) A. Andh. Pra. 744.

(*x*) *Bholanath* v. *Kartick* (1907) 34 Cal. 372; *Suraj Prasad* v. *Makhan Lal* (1922) 44 All. 382, 385, 66 I.C. 134, ('22) A.A. 51; *Biswesswar* v. *Jaineswar* ('68) Cal. 213.

by a father who has sons then living not being one for legal necessity, or for payment of an antecedent debt, if made without their consent, may be set aside by one of those sons—partially or wholly according to the state in which the question arises (§§ 259 and 260). If all the sons living at the time of the alienation predecease their father and no other son is born before the death of the last of them so that the father remains the sole coparcener for some time, then the alienation is not liable to be impeached by after-born sons (*y*). If, before the sons alive at the time of the alienation are all dead, another son is born, in the States referred to in § 260, the alienation may be set aside at the instance of the latter also (*z*), unless *before* his birth, the former ratified it (*a*), or their cause of action is lost by limitation (*b*). But in the States referred to in § 259, if the cause of action of the coparceners who did not consent to the alienations is barred, the alienation becomes unimpeachable (*c*). If the coparcener is born before their right is barred, he becomes a coparcener with them in the property, the title to which is not yet lost by the adverse possession of the alienee and all of them can sue to recover their shares or the after-born coparcener alone can sue to recover his share. It is submitted that the principle of the decisions in f.n. (*z*) on this page applies to these States also; the only difference being that, in the States referred to in § 260 the whole alienation may be set aside whereas in the States in § 259 the plaintiffs can only recover their share or shares. But an opposite view was taken in Bombay and Nagpur (*c*). The Bombay decision was based on *Lal Bahadur* v. *Ambika Prasad* (*d*) and the Nagpur decision. Mr. Justice Mukherjee, later Chief Justice of India, who edited the eleventh edition of this work expressed the opinion that the Bombay and Nagpur decisions were not correctly decided. In a later decision of the Full Bench of the Bombay High Court the earlier Bombay case was overruled (*e*).

*Illustrations*

(a) *A*, governed by the Mitakshara law, sells certain ancestral property to *B*, *A* has no son either born or begotten at the time of the sale. The sale is made without legal necessity. The sale is *valid*, though made without legal necessity, for the restriction that a coparcener should not sell coparcenary property without legal necessity applies only when there are *other coparceners living at the time*. Therefore if a son *C* is born to *A* two years after the date of the sale, he cannot impeach the sale. Even if there was a son existing at the time of the sale, if the sale had been made with his consent, it would have been valid when made, and therefore not liable to be set aside by *C*.

*Note*.—The above case assumes that there has been a *complete transfer* of the property to the purchaser. If the transfer is not complete, as where there is a mere *agree-*

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(*y*) *Hitendra* v. *Sukhdeo* (1929) 8 Pat. 558, 115 I.C. 886, ('29) A.P. 360; *Mukund Singh* v. *Wazir-ruddin* (1933) 149 I.C. 506, ('33) A.L. 359; *Visweswara Rao* v. *Surya Rao* (1936) 59 Mad. 667, 163 I.C. 712, ('36) A.M. 440.

(*z*) *Bunwari Lal* v. *Daya Sunkar* (1909) 13 C.W.N. 815, 822; *Tulshi Ram* v. *Babu* (1911) 33 All. 654, 1 I.C. 908; *Bhup Kunwar* v. *Balbir Sahai* (1922) 44 All. 190, 64 I.C. 885, ('22) A.A. 342; *Dwarka Das* v. *Krishan* (1921) 2 Lah. 114, 119-120, 61 I.C. 628, ('21) A.L. 34; *Bhagwat Prasad Bahidar* v. *Debichand Bogra* (1941) 20 Pat. 727, 199 I.C. 408, ('42) A.P. 99; *Narayan* v. *Namdeo* (1955) Nag. 772, ('55) A.N. 208; *Varada* v. *Sriramulu* ('53) A.M. 894, (1953) 1 M.L.J. 31; *Venkataramayya* v. *Krishna Rao* ('63) A.A.P. 305.

(*a*) *Chuttan Lal* v. *Kallu* (1911) 33 All. 283, 8 I.C. 719.

(*b*) *Raja Ram* v. *Luchmun* (1867) 8 W.R. 15, 21; *Lachmi Narain* v. *Kishan* (1916) 38 All. 126, 33 I.C. 913; *Ranodip Singh* v. *Parmeshwar Prasad* (1925) 52 I.A. 69, 47 All. 165, 86 I.C. 249, ('25) A.PC. 33; *Seshamma* v. *Venkayya* ('57) A. Andh. Pra. 386; *Kumaraswami* v. *Rajamanikkam* ('66) A. Kerala 266 [limitation, estoppel, ratification].

(*c*) *Kashinath* v. *Bapurao* (1940) Nag. 573, 191 I.C. 271, ('40) A.N. 305; *Gujrath Oil Mills & Mfg. Co. Ltd.* v. *Patel Shakarabhai* (1943) Bom. L.R. 507, ('43) A.B. 239, 1943 Bom. 423, 210 I.C. 122; *Bahadursingh* v. *Girdharilal* (1942) Nag. 543, 200 I.C. 166, ('42) A.N. 39.

(*d*) (1925) 52 I.A. 443, 47 All. 795, 91 I.C. 471.

(*e*) *Shivaji* v. *Murlidhar* (1954) Bom. 794, (1954) 56 Bom. L.R. 426 (F.B.), ('54) A.B. 386.

*ment* to sell, and a son is born *before* the sale is completed, the son is entitled to have the sale set aside in its entirety if the parties are governed by the Mitakshara law as applied in Bengal and Uttar Pradesh, and to the extent of the son's interest, if they are governed by that law as applied in Bombay and Madras [see sub-§ (1) above].

(a1) *A*, who has a son *B*, sells certain ancestral property to *C* without *B*'s consent and without justifying necessity. *B* then dies. A year after *B*'s death a son *D* is born, *D* cannot impeach the alienation.

(b) *A*, who has a son *B*, sells certain ancestral property to *C*, *without B's consent* and *without justifying necessity*. Two years later, while *B* is living, another son *D* is born to *A*. In States referred to in § 260, the sale not being valid when it was made, *D* also is entitled to have it set aside. But if the sale is ratified by *B* before the birth of *D*, *D* cannot object to the sale, for ratification validates a sale as much as *consent*. But no ratification by *B after D*'s birth would deprive *D* of the right to object to the sale: *Tulshi Ram* v. *Babu* (1911) 33 All. 654, 10 I.C. 908; see also *Haroddott* v. *Beer Narain* (1869) 11 W.R. 480.

(c) *A*, his son *B*, and *C* alleged to have been adopted by *A*'s paternal uncle as his son, are members of a joint family. During *B*'s *minority*, *A* and C divided the family property between them, *A* transferring certain family property to *C*. *A* son *D* is subsequently born to *A*. *B* and *D* sue *A* and *C* to recover from *C* the property transferred to him by *A* alleging that though *C* was treated by *A* as the adopted son of his uncle, his adoption was invalid, and he was not therefore entitled to any share of the family property. It is clear that if *C*'s adoption was not valid, the transfer to him of a portion of the family property would not be valid, unless it could be supported as a *bona fide* compromise of a disputed claim. Hence in States referred to in § 260 *B* as well as *D* are entitled to impeach the alienation: see *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

In ills. (b) and (c), in the States referred to in § 259 if *B* files a suit on behalf of the family excepting the alienor, *D* may participate in the benefit of the decree as a member of the joint family.

(3) An alienation, valid when it was made, cannot be impeached by a son adopted after the date of alienation (*f*).

(4) Where an alienation is made in Allahabad of joint family property by an *individual* coparcener as distinguished from the whole body of coparceners, the question arises as to who is entitled to impeach the alienation [§ 269]. The following is a statement of the law as settled in that State:—

(i) The right to impeach an alienation made by an individual coparcener is not confined to the non-alienating coparceners only. It may also be exercised by a subsequent transferee who has acquired by transfer or by limitation the *entire interest* of the whole joint family in the property alienated (*g*).

(ii) The alienor himself cannot impeach his own alienation; nor can a subsequent transferee by private contract of the *interest only of the alienor*. But a purchaser, though it be of the alienor's interest alone, at a sale in execution of a decree against the alienor, is entitled to impeach a previous alienation made by the alienor (*h*).

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(*f*) *Sudanand* v. *Soorjoomonee* (1869) 11 W.R. 456; *Rambhat* v. *Lakshman* (1881) 5 Bom. 630; *Brij Raj Saran* v. *Alliance Bank of Simla* (1936) 17 Lah. 686, ('36) A.L. 946.

(*g*) *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 11 I.C. 220 [F.B.]; *Inayat* v. *Hardeo* (1923) 45 All. 692, 74 I.C. 325, ('24) A.A. 29; *Madan Lal* v. *Gajendrapal* (1929) 51 All. 575, 116 I.C. 436 ('29) A.A. 243; *Madan Lal* v. *Chiddu* (1931) 53 All. 21, 128 I.C. 829, ('30) A.A. 852; *Ram Kishore* v. *Baij Nath* (1928) 3 Luck. 598, 113 I.C. 410, ('28) A.O. 287; *Kharag Narayan* v. *Janki Rai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 546; *Ram Nath* v. *Sunderbai* (1948) Nag. 310.

(*h*) (1931) 53 All. 21, 128 I.C. 829, ('30) A.A. 852, *supra*.

(iii) The reversionary heir to the estate of a non-alienating coparcener is also entitled to impeach an alienation made by another coparcener (*i*).

(iv) A prior mortgagee of joint family property from a single coparcener is not entitled to impeach a subsequent sale of that property (*j*).

*Illustrations*

(a) *A*, the manager of a joint family, mortgages joint family property to *B*. *A* then sells the property to *C*. *C* remains in possession of the property adversely to the *whole* family for upwards of 12 years. *C*, having acquired ownership of the whole property by adverse possession, is entitled to challenge the validity of the mortgage to *B* on the ground that it was made without legal necessity (*k*).

(b) The father of a joint family executes a mortgage of joint family property. He then sells the property to meet an antecedent debt. The purchaser, being a transferee of the entire interest in the property, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

(c) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property. Subsequently all the coparceners join in selling the property to *B*. *B*, being a transferee of the interest of *all* the coparceners, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

(d) *A* and his son *B* are members of a joint Hindu family. *A* executes a mortgage of joint family property to *C*. Thereafter *A* dies. *B* dies next. On *B*'s death his mother succeeds to the property for a widow's estate. *C* sues *B*'s mother on the mortgage and *D* succeeds to the property as the next reversionary heir of *B*. *D* is entitled to challenge the validity of the mortgage to *C* on the ground that it was made without legal necessity. The decree obtained by *C* against the mother would be binding on *D* unless it was obtained by fraud or collusion (*l*).

(e) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property to *B*. He then sells the property to *C*. *C* sues *B* for redemption. *B* is not entitled to impeach the sale on the ground that it was made without legal necessity (*l*).

A female member of a family who is not a coparcener cannot impeach an alienation (*m*). But in case of widows governed by Hindu Women's Rights to Property Act, 1917, see pages 95 and 96, and cases cited on foot-notes (*w*) and (*x*).

According to some Privy Council rulings and a Full Bench ruling of the Allahabad High Court, an alienation made by a *single* coparcener neither for legal necessity nor for the payment of an antecedent debt is *void*. According to later decisions of that Court, such an alienation is *voidable*: See § 269(1). If it is voidable, it is valid until it is set aside. Most of the cases cited in sub-§ (4) proceeded on the footing that the alienation was *voidable*. This gave rise to the question as to whether the non-alienating coparceners alone were *entitled to avoid* it or others also. The answer is as stated in sub-§ (4). If the alienation is *void*, it confers no *title* on the alienee, and most of the difficulties which arise if the alienation is treated as voidable especially where the alienation and the subsequent transfer are both made by the same coparcener disappear altogether, and the subsequent transferee would be entitled to contend as a matter of course that the alienation is a nullity (*n*).

**271. Limitation for setting aside sales.**—(1) The period of limitation for setting aside an alienation by a father of joint family property is twelve years from the *date when the alienee takes possession of the property* [Limitation Act, 1908, Sch. 1, art. 126]. If, however, the alienee has not taken possession the only right of the son will be to obtain a declaration

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(*i*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 87 I.C. 294, ('25) A.A. 339; *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657, 149 I.C. 543, ('34) A.O. 246.

(*j*) *Durga Prasad* v. *Bhajan* (1920) 42 All. 50, 58 I.C. 487, ('19) A.A. 6.

(*k*) *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 11 I.C. 220 [F.B.].

(*l*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 87 I.C. 294, ('25) A.A. 339.

(*m*) *Mt. Ram Dei* v. *Mt. Giyorsi* ('50) A.A. 76.

(*n*) See the judgment of Chamier, J., in *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 790-791, 11 I.C. 220 [F.B.].

that the deed of alienation is invalid and the limitation prescribed was six years under Article 120 of the old Limitation Act (*n*1).

Now see Article 109 of the new Limitation Act, 1963.

(2) The bar of limitation against an elder son who was a major at the date of the alienation by the father does not operate as a bar against a younger son, who was then a minor and brings a suit to set aside the alienation within three years of his attaining majority (*o*).

*Illustration*

*A* and his sons *B* and *C* are members of a joint Hindu family. In 1906 *A* sells one of the joint family properties to *D*, and delivers possession of the property to him. *B* was a major at the date of the sale. *C* was born in 1900 and he attained majority in 1918. *C* brings a suit against the father and *D* in 1919, that is, within 3 years of his attaining majority, to set aside the sale. If *B* had sued in 1919, his suit would have been barred. The failure of *B* to bring a suit within the period of limitation does not bar *C*'s suit (*p*), [*C*'s suit, it will be noted, is not barred by limitation.]

(3) But if an elder son becomes the manager and so capable of giving a discharge the bar against the elder son would bar the younger son also (*q*).

(4) The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of twelve years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at that date, but also the suit of a son not in existence at that date. The extension of three years given by sec. 6 of the Limitation Act cannot be availed of by the sons not in existence at the time of the alienation (*r*).

*Illustration*

*A* and his sons *B* and *C* are members of a joint Hindu family. In 1893 *A* sells one of the joint family properties to *D* and delivers possession of the property to him. In 1900 another son *E* is born to *A*. In 1920 *E* brings a suit against *D* to set side the sale. The suit is barred as it is brought more more than 12 years from the date on which *D* took possession. The period of limitation is not to be computed from the date of *E*'s *birth*. If it were to be computed from the date of *E*'s birth, the suit would not be barred, as it was brought within 3 years from his attaining majority (*r*).

**271A. Limitation.**—A suit by a Hindu to set aside an alienation of joint family property made before his birth by his grandfather without any justifying necessity is governed not by art. 126 but by art. 144. But the same principles apply. If the suit is brought more than 12 years after the date of alienation it is barred (*s*).

*Note.*—It may be noticed that the maintainability of the suit was assumed by the Judges and Advocates.

Now see Article 109 of the new Limitation Act, 1963.

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(*n*1) *Chintaman* v. *Bhagvan* ('28) A.B. 383. Also see *Bindeshri* v. *Sital* ('27) All. 702 which was a case under Art. 126.

(*o*) *Jawahir Singh* v. *Udai Parkash* (1926) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16, approving *Ganga Dayal* v. *Mani Ram* (1909) 31 All. 156, 1 I.C. 824, and disapproving *Vignewara* v. *Bapayya* (1893) 16 Mad. 436, and *Dordisami* v. *Nondisami Saluvan* (1915) 38 Mad. 118, 21 I.C. 410, ('15) A.M. 1201.

(*p*) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16, *supra*.

(*q*) *Karan Singh* v. *Mt. Tetar Kuer* (1937) 16 Pat. 422 (F.B.), 170 I.C. 362, ('37) A.P. 435.

(*r*) *Ranodip Singh* v. *Parmeshwar Prasad* (1925) 52 I.A. 69, 47 All. 165, 86 I.C. 249, ('25) A.PC. 33; *Seshamma* v. *Venkayya* ('57) A. Andh. Pra. 386; *Venugopalaswamy* v. *Visweswara* ('69) A.A.P. 24.

(*s*) *Jivaji* v. *Venkatesh Krishna* (1940) Bom. 109, 187 I.C. 663, ('40) A.B. 136.

## CHAPTER XIII

# COPARCENERS AND COPARCENARY PROPERTY—DAYABHAGA LAW

*Note.*—The general effect of the Hindu Women's Rights to Property Act, 1937, in case of death of a coparcener in the joint family governed by the Dayabhaga law has been pointed out under § 35. The Hindu Succession Act, 1956, which applies to Hindus governed by both the schools has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. The effect of that enactment is very far-reaching in case of a Mitakshara coparcenary as will be seen from section 6 of that enactment which applies only to persons governed by the Mitakshara law. But the general rules of succession laid down in that enactment applicable in case of death of a male as well as female Hindu have brought about very important and radical changes having some repercussions also on the rights of coparceners and incidents of coparcenery property in case of persons governed by the Dayabhaga law. The effect of those rules has been pointed out in the following paragraphs. Reference may also be made to Notes under section 16 of the Hindu Marriage Act, 1955, for the position and rights in a Dayabhaga coparcenary of a son or a daughter born of a marriage which is void or voidable under that enactment and who is to be deemed to be a legitimate child of the parents.

**272. Distinguishing features of Dayabhaga joint family.**—The conception of a coparcenary and of coparcenary property according to the Dayabhaga law is entirely distinct from that according to the Mitakshara law. The object of this chapter is to state the points of distinction between the Mitakshara law and the Dayabhaga law, such as have been noted in the Dayabhaga and in judicial decisions.

**273. Sons do not acquire any right by birth.**—According to the Mitakshara law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father, and on the death of the father the son takes the property, not as his heir, but by survivorship (§§ 224, 229).

According to the Dayabhaga law, the sons do not acquire any interest by birth in ancestral property. Their rights arise for the first time on the father's death. On the death of the father they take such of the property as is left by him, whether separate or ancestral, as heirs and not by survivorship (*t*). Since the sons do not take any interest in ancestral property in their father's lifetime, there can be no coparcenary in the strict sense of the word between a father and sons according to the Dayabhaga law, so far as regards ancestral property.

**274. Absolute power of father to dispose of ancestral property.**—Since the sons do not, according to the Dayabhaga law, acquire any interest by birth in ancestral property held by the father, the father can dispose of ancestral property, whether movable or immovable, by sale, gift, will or otherwise in the same way as he can dispose of his separate property (*u*).

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(*t*) Dayabhaga, chap. i, secs. 11-31, 38, 44, 50, chap. ii, sec. 8.

(*u*) *Ramkishore* v. *Bhoobunmoyee* (1859) Beng. S.D.A. 229, 250-251; *Debendra* v. *Brojendra* (1890) 17 Cal. 886. The same rule applies to property the succession to which is governed by the law of primogeniture; *Uddoy* v. *Jadublal* (1880) 5 Cal. 113; *Narain* v. *Lokenath* (1881) 7 Cal. 461; *Kunja Behari* v. *Gourhari* ('58) A.C. 105; *Patrik* v. *Jhulon* ('69) A. Manipur 33.

According to the Mitakshara, the powers of a father to dispose of ancestral property are limited [§ 258].

Section 30 of the Hindu Succession Act, 1956, now enables a male Hindu in a Mitakshara coparcenary to dispose of by will his interest in the coparcenary property. It also recognises in effect the right of a male Hindu governed by the Dayabhaga law to dispose of by will his interest in coparcenary property.

**275. No right of partition or to accounts against father.**—Since sons, according to the Dayabhaga law, do not acquire any interest by birth in ancestral property, they cannot demand a partition of such property from the father as they can under the Mitakshara law, nor can they call for an account of the management thereof from the father as they can under the Mitakshara law [§ 239]. The father is the *absolute owner* of the property, and the property being his own, he can manage it in any way he likes (*v*).

The rules as to the management of ancestral property by a manager, given in the last chapter, do not apply at all to a *father* under the Dayabhaga law. The reason is that he is *not a manager* of ancestral property; he is the owner, and sole owner, thereof. Besides, the term "manager" as used in Hindu law refers to the manager of a *coparcenary,* and as stated in § 273, there can be no coparcenary according to the Dayabhaga law between a father and sons even as regards ancestral property.

**276. Conception of ancestral property according to the Dayabhaga law.**—As under the Mitakshara law, so under the Dayabhaga law, ancestral property is that which is inherited from a father, paternal grandfather or great-grandfather. Under the Dayabhaga law, however, the male issue of the inheritor do not acquire any interest by birth in such property, as they do under the Mitakshara law [§ 223, sub § (1)].

**277. Coparceners according to the Dayabhaga law.**—According to the Mitakshara law the foundation of a coparcenary is first laid *on the birth of a son.* The son's birth is the starting point of a coparcenary according to that law. Thus if a Hindu governed by the Mitakshara law has a son born to him, the father and the son at once become coparceners (*w*).

According to the Dayabhaga law, the foundation of a coparcenary is that laid *on the death of the father.* So long as the father is alive, there is no coparcenary in the strict sense of the word between him and his male issue. It is only on his death leaving two or more male issues that a coparcenary is first formed. Before the Hindu Women's Rights to Property Act, 1937, his male issues inherited his property, separate as well as ancestral, as his heirs, but as between themselves they held it as coparceners, and the property inherited from the deceased was coparcenary property. On the death of any one of the coparceners, his heirs succeeded to his share in the coparcenary property [§ 281], and they became members of the coparcenary. Such heirs, in default of male issue, could be his widow or widows, or his daughter or daughters. These two, though females, got into the coparcenary, representing the share of their husband or father as the case might be. A coparcenary

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(*v*) Dayabhaga, chap. i, secs. 11-31, 38-44, 50, chap. ii, sec. 8. Reference may be made to *Makhan Lall* v. *Sushama Rani* ('53) A.C. 164, 57 C.W.N. 81.

(*w*) *Laldas* v. *Motibai* (1908) 10 Bom. L.R. 175.

under the Dayabhaga law could thus consist of males as well as females. Under the Mitakshara law, no female can be a coparcener with male coparceners [§ 217]. But even under the Dayabhaga law a coparcenary could not *start* with females. Thus if a person died leaving two or more widows, or two or more daughters, they could not constitute a coparcenary.

The effect of the Hindu Women's Rights to Property Act, 1937, was not to abolish or disrupt the Dayabhaga joint family. But the share of a coparcener in the coparcenary property (as in case of his separate property) devolved on his widow along with his male issue and if he did not leave any male issue his share devolved on his widow, daughter and other heirs as before.

The effect of the Hindu Succession Act, 1956, is not to abolish or disrupt the Dayabhaga joint family. But the share of a coparcener in the coparcenary property (as in case of his separate property) will devolve by succession according to the provisions of that Act upon the heirs there specified.

In case of a male Hindu governed by the Dayabhaga school dying intestate and leaving ancestral property, of which, according to the Dayabhaga law as interpreted by the Courts, he was in the position of an absolute owner, such property also will (as in case of his separate or self-acquired property) devolve by succession according to the provisions of that Act upon the heirs there specified.

The question of the formation of a coparcenary by operation of law and as to who can be members of such coparcenary in case of a male Hindu governed by the Dayabhaga school dying intestate after the coming into operation of that Act leaving separate or ancestral property and leaving him surviving as his heirs *inter alia* two or more male issue will depend on the same principles on which under the previous law a coparcenary could be formed consisting of males and females.

Reference may also be made to Notes under section 16 of the Hindu Marriage Act, 1955, for the position and rights in a Dayabhaga coparcenary of a son or daughter born of a marriage which is void or voidable under that enactment and who is to be deemed to be a legitimate child of the parents.

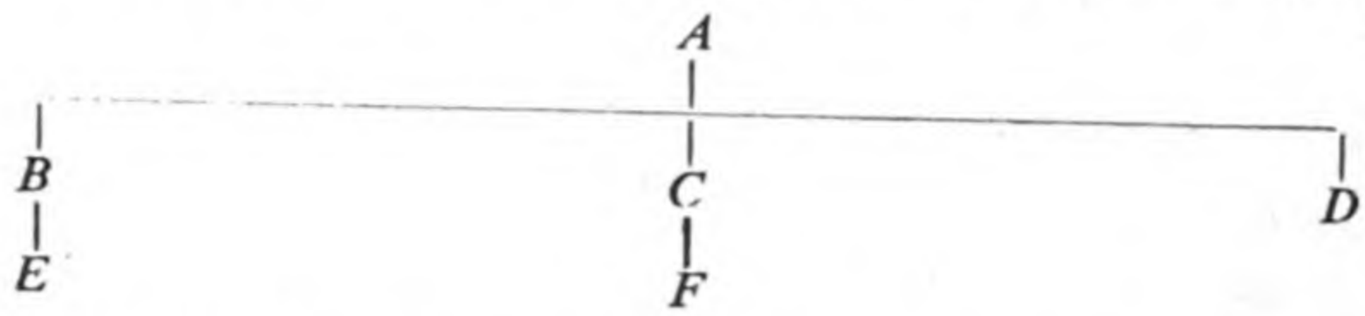
*A*, a Hindu governed by the Dayabhaga law, dies intestate leaving three sons *B*, *C* and *D*. The three brothers will inherit their father's property, and hold it as coparceners. If *B* dies leaving a widow, and *C* dies leaving a daughter, the widow and daughter will become coparceners with *D*.

Similarly, if *A* dies intestate leaving a son, a grandson, whose father is dead and a great-grandson whose father and grandfather are both dead, they all will inherit the property left by *A* (§ 88), and hold it as coparceners.

But if *A* dies leaving only one son, the son cannot by himself constitute a coparcenary. *A* must leave him surviving *at least two male issue* for a coparcenary to be formed as between them.

The formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition, but until then the heirs hold the property as coparceners. The distinction is this: two or more Mahomedans, Parsis or Christians, succeeding to the estate of a deceased person, take it as *co-heirs*, while two or more male issues of a Hindu succeeding to the property of their paternal ancestor take it *as coparceners, subject to all the incidents of coparcenary property.*

It will be seen from what has been stated above that a coparcenary under the Dayabhaga law may consist of brothers, or uncles and nephews, or of cousins and the like but it cannot consist of a father and sons, or of a grandfather and grandsons, or of a great-grandfather and great-grandsons. Thus if *A* dies leaving three sons *B*, *C* and *D* the brothers will be coparceners. If he dies leaving two grandsons, namely *E* and *F*, the cousin (*i.e.*, *E* and *F*) will be coparceners. If he dies leaving a son *D* and two grandsons *E* and *F*, the uncle [*D*] with his nephews [*E* and *F*] will be coparceners. If he dies leaving *B*, *C*, *D*, *E* and *F* the coparcenary will consists of *B*, *C* and *D* only. *E* and *F* do not take any




share of the inheritance, as their fathers are alive. Moreover they do not take by birth any interest in the property inherited by their respective fathers from *A* [§ 273]. They are not therefore coparceners. But if while the family is still joint, *B* dies leaving *E*, *E* will get into the coparcenary, taking *B*'s share.

**278. Coparcenary property.**—As under the Mitakshara law, so under the Dayabhaga law, coparcenary property may consist of ancestral property, or of joint acquisitions, or of property thrown into the common stock, and accretions to such property (*x*) [§§ 223, 227, 228].

**279. Each coparcener takes a defined share.**—The essence of a coparcenary under the Mitakshara law is unity of ownership. On the other hand, the essence of a coparcenary under the Dayabhaga law is unity of *possession*. It is not unity of *ownership* at all. The ownership of the coparcenary property is not in the whole body of coparceners. Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately the inheritance falls in. It does not fluctuate with births and deaths in the family. Even before partition any coparcener can say that he is entitled to a particular share, one-third or one-fourth. Thus if A dies leaving three sons, *B*, *C* and *D*, each son will take one-third, and each one will be the owner of his one-third share. The sons are coparceners in this sense that their *possession* of the property inherited from *A* is *joint*. It is the unity of *possession* that makes them coparceners. So long as there is unity of possession, no coparcener can say that a *particular* third of the property belongs to him; that he can say only after a partition. Partition then, according to the Dayabhaga law, consists in splitting up *joint possession* and *assigning specific portions* of the property to the several coparceners. According to the Mitakshara law, it consists in splitting up *joint ownership* and in defining the *share* of each coparcener.

No doubt, a coparcenary under the Mitakshara law also is characterized by unity of possession, but that is only an appendage to the unity of ownership. Such being the case it is not necessary to constitute a partition under that law that the unity of possession should also be destroyed and specific portions of the property assigned to the coparceners. It is quite enough if the unity of ownership is destroyed. and the share of each coparcener defined, so that any one coparcener can say that he is the owner of a definite share, one-third or one-fourth. Nothing further need be done. The members may continue *joint in possession*, but the coparcenary is dissolved. Thenceforward the share of each member will on his death pass to his heirs. The members having separated the principle of survivorship ceases to apply [§§ 322, 325].

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(*x*) *Sreemutty Soorjeemoney Dossee* v. *Denobundoo* (1856) 6 M.I.A. 526, 539.

**280. Rights of purchaser of coparcener's interest in execution.**—Since a coparcener under the Dayabhaga law takes a defined share in the property, a purchaser at a Court-sale of his share is entitled to be put into physical possession of that share (*y*). As to Mitakshara law, see § 289.

**281. No right of survivorship.**—As every coparcener under the Dayabhaga law takes a *defined* share of the coparcenary property, his share will on his death pass to his heirs in the order mentioned in § 88, and not to his coparceners by survivorship.

**282. Absolute power of coparcener to dispose of his share.**—Since every coparcener under the Dayabhaga law takes a defined share of the coparcenary property, it follows that a coparcener governed by that law can alienate his share by sale or mortgage, or dispose of it by gift or will, in the same manner as he can dispose of his separate property (*z*). On his death intestate, his share will go to his heirs.

The right of a coparcener under the Dayabhaga law to dispose of by will, his share of the coparcenary property, is also recognised in effect by sec. 30 of the Hindu Succession Act, 1956.

It has been held that where the share of a coparcener governed by the Dayabhaga law is sold in execution of a decree passed against him, the purchaser is entitled to be put into joint possession with the other coparceners (*a*). Similarly it has been held that a coparcener may lease out his own share, and put his lessee in possession (*b*).

**283. Manager and his power.**—It would seem that the powers of a manager under the Dayabhaga law are the same as those of a manager under the Mitakshara law (*c*). He can contract a debt for a joint family purpose, and a decree passed against him for such a debt as manager will bind the other members, though they are not parties to the suit (*d*) [§ 253]. He can also mortgage the family property for the purposes of the family business (*e*) [§ 242].

In a suit on a mortgage by two managing members of the family for a debt due by the family, the other members will not be liable until the remedy on the mortgage is exhausted. After the mortgaged properties are brought to sale, the other members may be liable (*f*).

**284. Enjoyment of coparcenary property.**—Since every coparcener under the Dayabhaga law takes a defined share of the coparcenary property, he is entitled to make any use he likes of the portion of the coparcenary property in his occupation (*g*). He may even lease out his share, and put his lessee in possession (*h*). But he must not do any act which is injurious

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(*y*) *Koonwar Bijoy* v. *Shama Soonduree* (1865) 2 W.R. (Mis.) 30; *Eshan Chunder* v. *Nund Coomar* (1867) 8 W.R. 239.

(*z*) *Kounla* v. *Ram Huree* (1827) 4 Beng. Sel. R 196 (new ed. 247); *Anunchand* v. *Kishen* (1805) 1 Beng. Sel. R. 115 (new ed. 153).

(*a*) *Rajanikanth* v. *Ram Nath* (1884) 10 Cal. 244.

(*b*) *Ram Debul* v. *Mitterjeet* (1872) 17 W.R. 420; *Macdonald* v. *Lalla Shib* (1873) 21 W.R. 17.

(*c*) But see *Balakrishna* v. *Muthusami* (1909) 32 Mad. 271, 274, 3 I.C. 878.

(*d*) *Dwarka Nath* v. *Bungshi* (1905) 9 C.W.N. 879.

(*e*) *Bemola* v. *Mohun* (1880) 5 Cal. 792.

(*f*) *Sukhadakanta Bhattacharjya* v. *Jogineekanta Bhattacharja* (1933) 60 Cal. 1197, 149 I.C. 878, ('34) A.C. 73.

(*g*) *Eshan Chunder* v. *Nund Coomar* (1867) 8 W.R. 239.

(*h*) *Ram Debul* v. *Mitterjeet* (1872) 17 W.R. 420.

to the coparcenary property (*i*), or which amounts to an infringement of the right of the other coparceners. Thus, he cannot enter into possession of a specific portion of joint agricultural land without the consent of the other coparceners, and claim to cultivate it for his own benefit (*j*). But if he is in occupation of a specific portion of such land by consent he may cultivate it in a proper course of cultivation, and appropriate the income for his sole use (*k*).

**285. Coparcener's right of partition.**—As under the Mitakshara law, so under the Dayabhaga law, every adult coparcener has a right to call for a partition of the coparcenary property (*l*).

**286. Presumptions as to coparcenary property.**—The presumptions with regard to joint family and joint family property which apply to cases under the Mitakshara law would seem to apply also to cases under the Dayabhaga law (*m*) [§ 233].

But there is no presumption under the Dayabhaga law that property purchased by a son in his name in the father's lifetime and of which the son has been in possession since the purchase is joint family property. The burden of proof in such a case lies on those who deny the ownership of the son (*n*). Where the property purchased by one of the sons is a house, even though the father and the sons are living in it, the onus of proving that it was thrown into the common stock, or that they also contributed to the acquisition, is on the other sons (*o*).

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(*i*) *Gopee Kishen* v. *Hem Chunder* (1870) 13 W.R. 322 [pulling down a common verandah].

(*j*) *Stalkarti* v. *Gopal* (1873) 20 W.R. 168.

(*k*) *Robert Watson & Co.* v. *Ramchund* (1891) 18 Cal. 10, 21, 17 I.A. 110, 120.

(*l*) *Srcemutty Soorjeemoney Dossee* v. *Denobundoo* (1856) 6 M.I.A. 526, 539.

(*m*) *See Charandasi Debi* v. *Kanai Lal* ('55) A.C. 206, 58 C.W.N. 980.

(*n*) *Sarada* v. *Mahananda* (1904) 31 Cal. 448; *Ramesh Chandra* v. *Hemendra* ('49) A.C. 519. Also see *Kunja Behari* v. *Gourhari* ('58) A.C. 105.

(*o*) *Hemchandra Ganguli* v. *Matilal Ganguli* (1933) 60 Cal. 1253, 149 I.C. 177, ('34) A.C. 68. Reference may also be made to *Kunja Behari* v. *Gourhari Ram* ('58) A.C. 105.

# CHAPTER XIV

# DEBTS—MITAKSHARA LAW

*Note.*—The law relating to "Debts" discussed in this Chapter has not been altered by the new legislation. Section 6 of the Hindu Succession Act has, however, bearing on the question of "Debts". Reference may be made to the Notes under that section *post.* Reference may also be made to sec. 30 of that enactment which now permits a coparcener in a Mitakshara coparcenary to dispose of by will his undivided interest in the coparcenary property.

*I. Liability of heirs for debts of ancestor*—§ 288.

*II. Undivided interest of coparcenary, when liable for his debts*—§ 289.

*III. Liability of joint family property for father's debts*—§§ 290-301.

**287. Contents of the Chapter.**—The present Chapter deals with "Debts". The subject may be considered under the following heads:—

I. Liability of *separate* property for debts.

II. Liability of the *undivided interest* of a coparcener for his debts.

III. Liability of *joint family property* for father's personal debts—

(i) where the property is sold in execution of a decree obtained against the father alone;

(ii) where the property is alienated by the father for the payment of an antecedent debt.

*Of debts in general.*—A debt may be contracted by a Hindu male *for his own private purposes,* or it may be contracted by him for the *purposes of the joint family.* Debts contracted for joint family purposes have been dealt with in §§ 234, 240-244. This and the next Chapter are confined to debts contracted by a Hindu for his own personal benefit. The present Chapter deals with the Mitakshara law of debts; the next Chapter with the Dayabhaga law of debts.

A Hindu may possess separate property. He may also be entitled to an undivided interest in coparcenary property. The separate property of a Hindu, whether he is joint or separate, is liable for the payment of his debts both in his lifetime and after his death. His undivided coparcenary interest is not liable *after* his death *unless it was attached or sold in his lifetime.* To this, however, there is an exception where a father or paternal grandfather or paternal great-grandfather dies leaving private debts. In such a case, if the debts are not of an immoral character, the entire joint family property including his sons' undivided interest therein is liable for the payment of his debts even after his death, though such interest may not have been attached in his lifetime. The reason is that a Hindu male is under a *pious obligation* to pay the private debts of his father, grandfather and great-grandfather, provided the debts are not of an immoral character. This is a special liability attaching to sons, grandsons, and great-grandsons according to the Hindu law, and it gave rise to several vexed questions which have now been settled by decisions of the highest tribunal. This liability, however, is *not a personal liability,* that is to say, their *separate* property is not liable to pay the personal debts of the ancestor. Their liability is confined to their *undivided interest in the joint family property.*

## *I.—Liability of separate property for debts*

**288. Liability of "heirs" for debts.**—As regards the liability of an *heir* of a deceased Hindu to pay the debts of the deceased, it is settled law that he is liable only to the extent of the assets inherited by him from the

deceased. The heir is *not personally* liable to pay the debts of the deceased, *not even if he be a son or grandson* (*p*).

The 'heirs' mentioned in this paragraph include all persons upon whom the interest, in the Mitakshara coparcenary property, of a male Hindu, who dies after the commencement of the Hindu Succession Act, 1956, devolves by testamentary or intestate succession as laid down in the *proviso* to section 6 of the enactment.

No distinction is made in this section between debts properly incurred by the deceased and debts incurred for an unlawful or immoral purpose because the debts are to be paid not out of the joint family property, but out of the separate property of the deceased.

A Hindu father passes a promissory note to his creditor in respect of a debt barred by limitation. Afterwards he dies leaving a son. He also leaves *separate* property. The son is bound to pay the creditor out of the separate estate of the deceased. He is not entitled to object on the ground that the note was in respect of a time-barred debt (*s*). See the Indian Contract Act, 1872, sec. 25(3).

### *II.—Undivided coparcener's interest when liable for his debt*

**289. Undivided coparcenary interest, when liable for coparcener's debt.**—(1) According to the Mitakshara law as applied in all the States, the undivided interest of a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt (*t*). If it is *attached in his lifetime*, it may be sold after his death whether the order for sale was made in his lifetime (*u*), or after his death (*v*). But it *cannot be attached after his death* (except where the coparcener is the father), for it then ceases to be his interest and passes to the other coparceners *by survivorship* (*w*). It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship. But see sub-paragraph (3) below.

(2) An attachment *before judgment* of the undivided interest of a coparcener not followed by a decree in his lifetime does not defeat the right of survivorship of the other coparceners (*x*). It is not settled whether attachment before judgment operates to defeat the right of survivorship in cases where such attachment is followed by a decree in the lifetime of the defendant. The High Courts of Bombay (*y*) and Patna (*z*) have held that

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(*p*) *Keral* v. *Ganpati* (1884) 8 Bom. 220; *Girdharlal* v. *Bai Shiv* (1884) 8 Bom. 309; *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Sakharam* v. *Govind* (1873) 10 Bom. H.C. 361; *Lallu* v. *Tribhuvan* (1889) 13 Bom. 653.

(*s*) *Narayanasami* v. *Samidas* (1883) 6 Mad. 293; *Ram Kishan* v. *Chhedi* (1922) 44 All. 628, 68 I.C. 235, ('22) A.A. 402.

(*t*) *Deendyal* v. *Jugdeep* (1877) 3 Cal. 198, 4 I.A. 247; *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Muneswari* v. *Jugal Mohini* ('52) A.C. 368 [effect of attachment]; *Bharamappa* v. *Rudrappa* ('55) A. Mys. 13.

(*u*) *Suraj Bunsi Koer* v. *Sheo Persad* (1879) 5 Cal. 148, 174, 6 I.A. 88, 109. See *Sheikh Karoo* v. *Rameshwar Rao* (1921) 6 Pat. L.J. 451, 458, 62 I.C. 905, ('23) A.P. 143 [mortgage decree].

(*v*) *Bithal Das* v. *Nand Kishore* (1901) 23 All. 106; *Faqir Chand* v. *Sant Lal* (1926) 48 All. 4, 89 I.C. 291, ('26) A.A. 157. See *Madho Parshad* v. *Mehrban Singh* (1891) 17 I.A. 194, 197, 18 Cal. 157, 161; *Sheo Maheep Bikram Singh* v. *Mahant Thakur Das* (1940) 15 Luck. 503, 187 I.C. 90, ('40) A.O. 200.

(*w*) See *Suraj Bunsi Koer* v. *Sheo Persad* (1879) 5 Cal. 148, 6 I.A. 88; (1891) 17 I.A. 194, 197, 18 Cal. 157, 161, *supra*.

(*x*) *Ramanayya* v. *Ragappayya* 17 Mad. 144; *Kalianna Goundan* v. *Masayappa Goundan* (1943) Mad. 397, 207 I.C. 579, ('43) A.M. 149.

(*y*) *Subrao* v. *Mahadevi* (1914) 38 Bom. 105, 27 I.C. 350, ('14) A.B. 256. See also *Laxman* v. *Vinayak* (1916) 40 Bom. 329, 33 I.C. 956, ('16) A.B. 262.

(*z*) *Sunder Lal* v. *Raghunandan* (1924) 3 Pat. 250, 83 I.C. 413, ('24) A.P. 465.

it does not. The High Court of Madras (*a*) has held that it does. The ground of the Madras decision is that where a decree follows on an attachment before judgment, no reattachment is necessary; therefore, the mere passing of the decree renders the attachment before judgment as effective as an attachment after decree. [See the Code of Civil Procedure, 1908, O. 38, r. 11.] But where the attachment comes to an end, the decree cannot be executed against coparceners who would get the property by survivorship (*b*). But see sub-paragraph (3) below.

(3) The *rules stated in this paragraph and the illustrations below* must be read subject to the provisions of sec. 6 of the Hindu Succession Act, 1956, and particularly to the *proviso* to that section in cases where that proviso is applicable. Reference may be made to Notes under sec. 6 of that enactment. Reference may also be made to sec. 30 of that enactment which now permits a coparcener in a Mitakshara coparcenary to dispose of by will his undivided interest in the coparcenary property.

*Illustrations*

(a) *A* and his nephew *B* are members of a joint Hindu family. *A* is indebted to *C* in the sum of Rs. 3,000. *C* may obtain a decree against *A*, and may enforce it in *A*'s lifetime by attachment and sale of *A*'s undivided interest in the joint property. But if *A*'s interest in the joint property is not attached in *A*'s lifetime it cannot be attached *after his death*.

(b) *A* and his brother *B* are members of a coparcenary. *A* is indebted to *C* in the sum of Rs. 3,000. *C* obtains a decree against *A* in *A*'s lifetime. Before any step is taken in execution of the decree, *A* dies leaving a widow and his brother *B*. He also leaves separate property worth Rs. 2,000. Here *A*'s separate property will pass to his widow as his heir, and *C* may enforce the decree by attachment and sale of that property. But he cannot attach *A*'s undivided interest in the coparcenary property for the balance of his debt, for that interest has passed to *B* by survivorship.

If, in the case put above, no suit was instituted by *C* against *A* in *A*'s lifetime, *C* could *institute* a suit against *A*'s widow after *A*'s death as his heir and legal representative, and obtain a decree against her, and enforce it by attachment and sale of *A*'s *separate* property inherited by her. But he cannot bring a suit against *B* to recover his debt out of the *coparcenary* property. Similarly, if *A* dies after suit, but before decree, *C* may *continue* the suit against *A*'s widow as his heir, and obtain a decree against her, and enforce it by attachment and sale of *A*'s *separate* property. But he cannot proceed against *A*'s undivided interest in the joint property. That interest will pass to *B* who will take it by survivorship free from the burden of the debt.

(c) *A* and his brother *B* are members of a joint family. *A* is indebted to *C* in the sum of Rs. 3,000. *C* obtains a decree against *A*, and in execution of the decree gets *A*'s interest in the joint property attached. *A* then dies leaving *B*. The interest of *A* in the joint property, having been attached in *A*'s lifetime, may be sold in execution *after A*'s *death*. The point to be noted is that if the share of a coparcener is *attached in his lifetime*, it may be *sold in execution after his death*. The *sale* may take place after the death of the debtor, but the *attachment* must take place in the lifetime of the debtor.

(d) A coparcenary consists of a father and son. The *son* dies indebted to *C* in the sum of Rs. 5,000. The son does not leave any separate property. *C* cannot proceed against the son's undivided interest in the coparcenary property. It would have been different if *C* had obtained a decree against the son, and attached his interest in the coparcenary property in his lifetime: *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76 [*A father* is under no religious obligation to pay the debts of his son].

It will be seen from what has been stated above, that a person lending money to a Hindu who has *no separate property* of his own, has no chance of recovering back his money, unless he obtains a mortgage or a charge on the undivided interest of the debtor

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(*a*) *Sankaralinga* v. *Official Receiver* (1925) 49 Mad. L.J. 616, 92 I.C. 504, ('26) A.M. 72.

(*b*) *Rama Asra* v. *The Official Receiver of South Canara* (1948) Mad. 701.

in the joint family property [§§ 268, 269], or where he has not obtained such a mortgage or charge, he obtains a decree against the debtor and attaches his undivided interest in the joint family property *in the lifetime of the debtor*. It is, however, different where the debtor is a father, grandfather or great-grandfather: see §§ 290-294.

As a general rule, the execution of a decree consists of two steps, namely attachment and sale. Where a creditor obtains a decree against a coparcener, the first step in execution, if he wants to proceed against the undivided interest of his debtor in the joint property, is to apply for attachment of the right, title and interest of the debtor in the joint property. After the right, title and interest is attached, the next step is the sale of such right, title and interest. After the property is sold, the purchaser is entitled to call upon the other coparceners to come to a partition with him, and if they refuse, to bring a suit against them for partition of the coparcenary property [§ 261].

### *III.—Liability of joint family property for father's debts*

**290. Pious obligation of son, grandson and great-grandson to pay ancestor's debts.**—(1) Where the sons (which expression throughout includes son's sons and son's son's sons) are joint with their father, and debts have been contracted by the father in his capacity of manager and head of the family *for family purposes* [§ 240], the sons *as members of the joint family* are bound to pay the debts to the extent of their interest in the coparcenary property [§§ 240-242].

Where the sons are joint with their father, and debts have been contracted by the father *for his own personal benefit*, the sons are liable to pay the debts *provided* they were not incurred for an illegal or immoral purpose [§ 293]. The liability to pay the debts contracted by the father, though for his own benefit, arises from an *obligation of religion and piety* which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality (*c*). The fact that the father was not the *karta* or manager of the joint family or that the family consisted of other coparceners besides the father and sons, does not affect the liability of the sons in any way. It exists irrespective of these facts (*d*).

(2) The pious obligation of sons, grandsons, great-grandsons to pay the ancestor's debts to the extent of their interest in the joint family property is not abrogated by the Hindu Succession Act, 1956 (*d*1).

(3) *Liability not personal.*—The liability of the son, grandson and great-grandson to pay the debts of their ancestor is not a personal one, that is to say, the father's creditor is not entitled to proceed against their person or their separate property. It is limited to their interest in the joint family pro-

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(*c*) *Hunooman Persaud* v. *Musumat Babooee* (1856) 6 M.I.A. 393, 412; *Girdharee Lall* v. *Kantoo Lal* (1874) 1 I.A. 321, 14 Beng. L.R. 187; *Suraj Bunsi Koer* v. *Sheo Persad* (1879) 5 Cal. 148, 6 I.A. 88; *Muttayan* v. *Zamindar of Sivagri* (1883) 6 Mad. 1, 9 I.A. 128; *Maruthappan* v. *Niraikulathan* (1937) Mad. 943, 169 I.C. 292, ('37) A.M. 434; *Chockalingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 849; *Jagmohan* v. *Ranchhoddas* (1945) Nag. 892; *Bithaldas* v. *Chandratan* ('55) A. Raj. 39; *Lakshminarasayya* v. *Papayya* ('55) A. Andh. Pra. 97 [liability of heirs of the son]; *Ramprasad Firm* v. *Bai Reva* ('70) A. Guj. 269 [Trade Debts—sons of a deceased partner in a firm].

(*d*) *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad* (1954) S.C.R. 177, (1953) 2 M.L.J. 789, ('53) A.SC. 487; *Lalta Prasad* v. *Gajadhar Shukul* (1933) 55 All. 283, 199 I.C. 181, ('33) A.A. 235; *Virayya* v. *Pardhasarathi Appa Rao* (1934) 57 Mad. 190, 149 I.C. 188, ('33) A.M. 690; *Chhotey Lal* v. *Ganpat Rai* (1935) 57 All. 176, 150 I.C. 411, ('34) A.A. 590 (F.B.); overruling *Official Liquidator, U.P. Oil Mills Co., Ltd.* v. *Jamna Prasad* (1933) 55 All. 417, 143 I.C. 762, ('33) A.A. 334. This applies to Mithila also where the law is the same as the law of the Mitakshara except in a few matters; *Sourendra Mohan* v. *Hari Prasad* (1926) 5 Pat. 135, 91 I.C. 1033, ('25) A.PC. 280.

(*d*1) Reference may be made to *Nathubhai* v. *Chhotubhai* ('62) A. Guj. 68.

perty (*e*), unless there is acceptance of personal liability in the course of judicial proceedings such as Insolvency Proceedings (*f*).

*Brihaspati's text.*—"He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house, a slave, a servant, a woman, or a quadruped." [Colebrooke, Vol. I, p. 334]. The liability to pay the father's debts arises from the religious obligation to rescue him from the penalties arising from the non-payment of his debt (*g*).

*Illustration*

A coparcenary consists of a father and son. The father borrows Rs. 5,000 from *C* for an immoral purpose. *C* may obtain a decree against the father and enforce it by attachment and sale of his interest in the joint family property *in the father's lifetime*. But if the father's interest is not attached in his lifetime, it cannot be attached after his death, and it will then pass to the son by survivorship. See § 289 and § 294(6).

(4) *Duration of liability.*—The pious obligation of the sons to pay the father's debts lasts only so long as the liability of the father subsists. If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay (*h*) even though the acknowledgment by the father is after a partition between the father and the son (*i*). The sons' liability is neither joint nor joint and several as those terms are ordinarily understood in English law (*j*).

Thus if the father is adjudicated an insolvent for debts contracted by him, and he afterwards obtains his discharge, the effect of the discharge is to release the father from those debts. No suit can therefore be maintained against the father for those debts, and since no suit can be maintained against the father, none can be maintained against the sons in respect of those debts (*k*).

(5) *Liability exists even in father's lifetime.*—It is well settled that the liability of the sons to pay the father's debts exists whether the father be alive or dead (*l*). This liability exists even where by a custom in the Punjab, the son cannot enforce partition during the father's lifetime (*m*).

There arose a conflict of opinion amongst various High Courts whether there was any pious obligation on the part of the sons to pay the father's debts in the lifetime of the father, or whether the obligation arose for the first time after the father's death. The conflict arose out of some observations of the Judicial Committee in *Sahu Ram's* case (*n*). In a later case, that of *Brij Narain Rai* v. *Mangla Prasad* (*o*), their Lordships of the Privy

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(*e*) *Peda Venkanna* v. *Sreenivasa* (1918) 41 Mad. 136, 142, 43 I.C. 225, ('19) A.M. 1175; *Sukhdeo* v. *Madhusudan* (1931) 10 Pat. 305, 132 I.C. 871, ('31) A.P. 177; *Bissessor Ram* v. *Ramakant Dubey* (1934) 13 Pat. 7, 151 I.C. 379, ('34) A.P. 187; *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A.L. 857; *Maya Debi* v. *Rajlakshmi* ('50) A.C. 1. The creditor can enforce this liability against any of the sons of the debtor, *Chandra Bhan* v. *Misrimal* ('55) A. Raj. 11.

(*f*) *Coimbatore Venkataramana Vilas Co. Ltd.* v. *Official Receiver, Coimbatore* (1940) Mad. 191, 186 I.C. 125, ('40) A.M. 30.

(*g*) For a brief exposition of the subject and the relevant texts, see the decisions of the Supreme Court in *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad* (1954) S.C.R. 177 and *Pannalal* v. *Naraini* (1952) S.C.R. 544, (1952) 2 M.L.J. 83, ('52) A.SC. 170. Also see *Jakati* v. *Borkar* ('59) A.SC. 282.

(*h*) *Lalta Prasad* v. *Gajadhar Shukul* (1933) 55 All. 283, 149 I.C. 181 ('33) A.A. 235.

(*i*) *Muniswami* v. *Kutti* (1933) 56 Mad. 833, 145 I.C. 404, ('33) A.M. 708; *Thadi Murali Mohana Reddi* v. *Medapati Gangaraju* (1942) Mad. 95, 197 I.C. 199, ('41) A.M. 772 (F.B.).

(*j*) *Narayanan* v. *Veerappa* (1917) 40 Mad. 581, 35 I.C. 918, ('17) A.M. 989.

(*k*) (1917) 40 Mad. 581, 35 I.C. 918, ('17) A.M. 989, *supra*.

(*l*) *Pannalal* v. *Naraini* (1952) S.C.R. 544, 553, (1952) 2 M.L.J. 83, ('52) A.SC. 170; *Brij Narain Rai* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Abdul Karim* v. *Ram Kishore* (1925) 47 All. 421, 86 I.C. 837, ('25) A.A. 327; *Badri Prasad* v. *Madan Lal* (1893) 15 All. 75, 79 [F.B.]; *Govind* v. *Sakharam* (1904) 28 Bom. 383, 389; *Ramasami* v. *Ulaganatha* (1899) 22 Mad. 49-63; *Debendra* v. *Fyzabad Bank* (1924) 3 Pat. 63, 75 I.C. 53, ('24) A.P. 94; *Thimmegowda* v. *Dyavamma* ('54) A. Mys. 93 (F.B.).

(*m*) *Nihal Chand Gopal Das* v. *Mohan Lal* (1932) 13 Lah. 455, 135 I.C. 197, ('32) A.L. 211.

(*n*) (1917) 44 I.A. 126, 40 All. 437, 443, 444, 39 I.C. 280, ('17) A.PC. 61.

(*o*) (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.

Council held that the observations in *Sahu Ram's* case referred to above were not necessary for the decision of the case, and that the sons were liable for the father's debts whether the father was alive or dead when the liability attached.

It may here be observed that under the old Hindu law the liability of the son to pay the father's debt did not arise until after the father's death. Under Hindu law as interpreted by the British Courts the liability exists even in the lifetime of the father. To this extent the British Courts have extended the liability of the son. In another respect, however, that liability has been curtailed, for while under the old Hindu law, the liability extended to the personal property of the son, it is now limited to his interest in the joint family property.

(6) *Debt contracted by father after partition.*—The son is not liable for a debt contracted by the father after partition.

(7) *Liability of son after partition for debt contracted by father before partition.*—A son is liable, even after the partition, for the pre-partition debts of his father which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition (*p*). Question, however, often arises: How is this liability to be enforced by the creditor?

(i) It is now held by all the Courts in India that if the suit is filed against the father before partition, the son is liable for a debt contracted by the father before partition (*q*).

(ii) But if the suit is filed after partition against the father the decree cannot be executed against the son (*r*). The decree against the father after the partition cannot be taken to be a decree against the son and no attachment and sale of the son's separate share would be permissible under sec. 60 of the Civil Procedure Code. A separate and independent suit must be instituted against the son before his share can be reached. This was the view taken in a large number of cases all of which recognised the liability of the son to pay the pre-partition debts of the father. *In Pannalal* v. *Naraini* (*t*) the Supreme Court observed that the principles underlying those decisions were sound.

In *Pannalal's* case it was observed that the position had been correctly stated by the Nagpur High Court in *Jainarayan* v. *Sonaji* (*s*) in the following passages:

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(*p*) *Pannalal* v. *Naraini, supra* (at p. 558); *Jakati* v. *Borkar* ('59) A.S.C. 282; *Sriramamurthi* v. *Official Receiver* ('57) A. Andh. Pra. 692; *Nathubhai* v. *Chhotubhai* ('62) A. Guj. 68; *Virdhachalam Pillai* v. *Chaldean Bank* ('64) A.S.C. 1425; *Ningappa* v. *Vithappa* ('71) A. Mys. 247; *Sydulu* v. *Venkateshwarlu* ('65) A.A.P. 318; *Varadammal* v. *Ambalal* ('71) A.M. 371; *Hanumayya* v. *Venkata Narasimha* ('65) A.A.P. 439 (adequate and sufficient provision).

(*q*) (Calcutta) *Kulada Prasad* v. *Haripada* (1913) 40 Cal. 407, 17 I.C. 257 [a case of partition constituted by conversion of son]. *Hari Charan* v. *Manakmall* ('64) A.C. 562.

(Madras) *Ramachandra* v. *Kondayya* (1911) 24 Mad. 555; *Jagnnatha Rao* v. *Viswesan* (1924) 47 Mad. 621, 80 I.C. 228, ('24) A.M. 682; *Subramania* v. *Sabapathy* (1928) 51 Mad. 361, 110 I.C. 141, ('28) A.M. 657 [F.B.].

(Bombay) *Annabhat* v. *Shivappa* (1928) 52 Bom. 376, 110 I.C. 269, ('28) A.B. 232.

(Allahabad) *Bankey Lal* v. *Durga Prasad* (1931) 53 All. 868 [F.B.], 135 I.C. 139, ('31) A.A. 512 (Settling the conflict between the earlier decisions).

(Patna) *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A.P. 275 (overruling an earlier decision).

(Lahore) *Jawahar Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I.C. 424, ('33) A.L. 116.

(Nagpur) *Firm Govindram Dwarkadas* v. *Nathulal* (1938) Nag. 10, 170 I.C. 724, ('37) A.N. 45.

(Oudh) *Jageshwar* v. *Manni Ram* (1927) 2 Luck. 561, 101 I.C. 907, ('27) A.O. 180; *Raghunandan* v. *Moti Ram* (1931) 6 Luck. 497 (F.B.).

(*r*) *Firm Govindram Dwarkadas* v. *Nathulal* (1938) Nag. 10, 170 I.C. 724, ('37) A.N. 45; *Ramayya* v. *Venkamraju* (1954) Mad. 834, ('54) A.M. 864 (F.B.); *Kuppan Chettiar* v. *Masa Goundan* (1937) Mad. 1004, 169 I.C. 400, ('37) A.M. 424; *Krishnasami* v. *Ramasami* (1899) 22 Mad. 519; *Ramachandran* v. *Ramachandra* ('56) A.M. 215; *Priya Shankar* v. *Radhey Shiam* (1945) All. 856; *Padmavatibai* v. *Manilal* ('59) A.B. 141, (1959) Bom. 81, 60 Bom. L.R. 1015.

(*s*) (1938) Nag. 136, ('38) Nag. 24, 29.

(*t*) (1952) S.C.R. 544; (1952) 2 M.L.J. 83, ('52) A.SC. 170.

"To say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. In our view, property can be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is, is found by looking at section 60. When one looks at section 60 one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within section 60. . . . It by no means follows that a son cannot be made liable. He could be made liable for his father's debts if he had become a surety; he can be made liable under the pious obligation rule. In neither of the cases put could his liability take the form of having his property seized in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution."

(iii) Another class of cases that falls under this head is where the suit in respect of a pre-partition debt is filed after partition but the father dies pending the suit and his separated son has been brought on record as his legal representative. The question arises whether the liability of the son under the pious obligation rule can be determined in execution proceedings or a separate suit has to be brought for this purpose. The position, here, would be materially different from that under the proposition stated immediately above. In *Pannalal* v. *Naraini* (*t*) the Supreme Court expressed disapproval of the view taken by a majority of judges in a Full Bench decision of the Patna High Court, *Atul Krishna* v. *Lala Nandanji* (*u*) and held *that* the remedy of the decree-holder in any such case against the share obtained by the son on partition lies in the execution proceedings and not by way of a separate suit. The son would in such proceedings be at liberty to show that the property in his hands is for certain reasons not liable to pay the debts of his father and all these questions would have to be decided by the executing Court under sec. 47 of the Civil Procedure Code.

The questions to be determined by the executing Court were indicated by Their Lordships of the Supreme Court at p. 566 of the report in *Pannalal's* case (*t*).

(iv) Also see §292.

**290A. Grandfather's share.**—Where a decree has been obtained against a Hindu who was a member of a joint family consisting of himself, his father and his son and the judgment debtor and his father died soon after, it was held that the liability of the son to pay the father's decree-debt covers even the share of the judgment debtor's father (*x*).

**291. Extent of liability of grandson and great-grandson.**—The son is bound to pay the father's debt with interest. So also is the grandson (*y*). It was at one time supposed that the pious obligation to pay ancestral debts did not extend beyond the grandson. But it has now been held by the Privy Council that the great-grandson is bound to pay the great-grandfather's debts, and that his liability is co-extensive with that of the son and grandson (*z*).

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(*t*) (1952) S.C.R. 544, (1952) 2 M.L.J. 83, ('52) A.SC. 170.

(*u*) (1935) 14 Pat. 732 (F.B.).

(*x*) *Shrawan* v. *Jangalya* (1945) Nag. 409.

(*y*) *Lachman Das* v. *Khunnu Lal* (1897) 19 All. 26 [F.B.]; *Ladu* v. *Gobardhan Das* (1925) 4 Pat. 478, 481-482, 86 I.C. 721, ('25) A.P. 470.

(*z*) *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105; *Sheo Ram* v. *Durga* (1928) 3 Luck. 700, 112 I.C. 288, ('28) A.O. 378 [F.B.].

In *Chet Ram* v. *Ram Singh* (*a*), the Judicial Committee observed, upholding the view expressed by the High Court of Allahabad (*b*), that there was no pious obligation on the grandson to pay the debts of his grandfather while his own father was living. But this view must now be taken to have been superseded by the decision of the same tribunal in *Masit Ullah* v. *Damodar Prasad* (*c*). In that case the joint family consisted of *A* and his son *B*. *A* sold an item of the joint family property to discharge a debt that was contracted by his grandfather. It was held that *B*'s interest in the property was bound by the sale, as the sale was made to liquidate his (*B*'s) great-grandfather's debt which *B* was under a pious obligation to pay.

It will be seen from §§ 289-291 that no coparcener *except a son, grandson or great-grandson* is liable for the private debts of any other coparcener. Thus a nephew is not liable for the debts of his uncle; therefore, if an uncle and nephew are members of a joint family, the nephew's interest in the joint property cannot be attached and sold in execution of a decree against the uncle (*d*).

**291A. Wife who has received share on partition.**—The doctrine of pious obligation cannot apply to the wife and it would seem that a wife who has received a share on partition between her husband and the sons cannot be liable to the creditor on the principles considered in the preceding paragraphs (*d*1).

**292. Creditor's suit.**—(1) *Suit against father.*—In a case where the son is under a pious obligation to pay the father's debt, the creditor may sue *the father alone* and obtain a decree against him, and he may execute the decree by attachment and sale of the entire interest of the father as well as the son in the joint family property, and the sale will bind the son though he was not made a party to the suit, unless the debt contracted by the father was for an immoral purpose. Even if the son was originally impleaded in the suit and the suit was afterwards withdrawn against him the decree against the father can be executed against the son's interest in the joint family property (*e*). In *Sidheshwar Mukherjee* v. *Bhubneshwar Prasad* (1954) S.C.R. 177, the Supreme Court held that the liability of the son has its basis entirely in the relationship between the father and son and is in no way dependent upon the constitution of the family either at the time when the debt was contracted or when the obligation is sought to be enforced. A person who has obtained a decree against a member of a joint Hindu family for a debt due to him is entitled to attach and sell the interest of his debtor in the joint family property, and, if the debt was not immoral or illegal, the interest of the judgment-debtor's sons also in the joint family property would pass to the purchaser by such sale even though the judgment-debtor was not the *karta* of the family and the family did not consist of the father and the sons only when the decree was obtained against the father and the properties were sold. It is not necessary that the sons should be made parties to the suit

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(*a*) (1922) 49 I.A. 228, 236, 44 All. 368, 375-376, 67 I.C. 569, ('22) A.A. 247.

(*b*) *Ram Singh* v. *Chet Ram* (1919) 41 All. 529, 51 I.C. 119, ('19) A.A. 415.

(*c*) (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105.

(*d*) *Ram Ratan* v. *Lachman Das* (1908) 30 All. 460; *Mathura* v. *Rajkumar* (1921) 6 Pat. L.J. 526, 62 I.C. 132, ('21) A.P. 447 [F.B.]; *Hari Prasad* v. *Sourendra* (1922) 1 Pat. 506, 525-526, 66 I.C. 945, ('22) A.P. 450.

(*d*1) See, however, *Nathubhai* v. *Chhotubhai* ('62) A. Guj. 68, 75, 76.

(*e*) *Krishnan* v. *Sami* (1940) Mad. 815, ('40) A.M. 544; *The Kumbakonam Mutual Benefit Fund Ltd.* v. *C. Ramaswami* (1947) Mad. 99; *Sreeniwasan* v. *Rangachari* ('53) A.M. 815; *Kumaji Sare Mal* v. *Kalwa Devadattam* ('58) A. Andh. Pra. 216; *Anantha Pai* v. *Kesava Pai* ('55) A. Tra-Co. 249; *Pannalal* v. *Naraini*, *supra* (*at p.* 553). The position would be different if the suit as against the son was dismissed on merits. *Maha Nirvani* v. *Bindeshri Prasad* ('52) A.A. 337; *Ramkrishun Lal* v. *Ugramohan Dass* ('60) A.P. 8. Of course, the rule cannot apply if the son has already parted with his interest in the property to a third party: *Jitan Mahto* v. *Manji Rai* ('64) A.P. 240.

or the execution proceedings. This view was re-affirmed by the Supreme Court in *Jakati* v. *Borkar* ('59) A.S.C. 282.

The rule laid down by the Privy Council in *Mst Nanomi Babuasin's* case (*f*) is not restricted in its application to cases where the father was the head of the family and in that capacity could represent his sons in the suit or execution proceedings, for subject to the right of the sons to assert and prove that the debt contracted by their father was not such as would be binding on them under the Hindu law, the father, even if he was not the *karta*, could represent his sons as effectively in the sale or execution proceedings as he could do if he was the *karta* himself.

If there is a partition after the decree, according to one view, the decree may be executed against the *joint family property* including the son's interest therein (*g*) but the sons should be made parties to the execution proceedings and unless that is done the father's interest alone would pass (*h*). According to another view, the creditor should bring another suit against the sons, obtain a decree against them which would be limited to the shares allotted to them on partition and then attach and sell the shares, unless the partition was not *bona fide* and was made with intent to defraud the general body of creditors, in which case the decree may be executed against the joint family property (*i*).

The last mentioned two decisions of the Bombay and Madras High Courts, as pointed out by the Supreme Court in *Jakati* v. *Borkar* (*i*1), must be confined to their own facts. It was observed in the case: "It is true that the right of the father to alienate for payment of personal debt is ended by partition but. . . . . it does not affect the pious duty of the sons to discharge the debt of the father. Therefore, where after attachment and a proper notice of sale the whole estate including the son's share, which was attached, is sold and the purchaser buys it understanding it to be the whole coparcenary estate, the presence of the sons *eo nomine* is not necessary because they still have the right to challenge the sale on showing the illegal or immoral purpose of debt. It was held that the partition which had taken place after the decree and pending execution proceedings did not relieve the sons of their pious obligation or their shares of their liability to be sold or be a means of reducing the efficacy of the attachment or impair the rights of the creditor.

If there is a partition during the pendency of the suit against the father, either the son can be made a party and a decree would follow as in sub-§ (2) below or the suit will proceed without the son and the decree will follow as above (*j*).

*Explanation.*—The partition that a creditor may have to envisage must, it is said in many decided cases, be *bona fide* and not made with intent to de-

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(*f*) (1885) 13 I.A. 1.

(*g*) *Kishan Sarup* v. *Brijraj* (1929) 51 All. 932, 955-956, 121 I.C. 257, ('29) A.A. 726; *Jageshwar* v. *Manni Ram* (1927) 2 Luck. 561, 101 I.C. 907, ('27) A.O. 180; *Nand Kishore* v. *Madan Lal* ('36) A.L. 64, ('decree before partition').

(*h*) *Ganpatrao* v. *Bhimrao*, 52 Bom. L.R. 154, ('50) A.B. 278, (1950) Bom. 114.

(*i*) *Kameshwaramma* v. *Venkata Subba Row* (1915) 38 Mad. 1120, 24 I.C. 474, ('14) A.M. 328 [decree obtained before partition].

(*i*1) ('59) A.SC. 282, 288. Also see, *Devadattam* v. *Union of India* ('64) A.SC. 880.

(*j*) See *Raghunandan Pershad* v. *Moti Ram*, 6 Luck. 497, 119 I.C. 449, ('29) A.O. 406, where the decree was in Dec. 1926, the partition was in Aug. 1926 and the suit was probably prior to August. The date of the suit does not appear in the report. See also *Jawahar Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I.C. 424, ('33) A.L. 116, where the partition was in Feb. 1927 but the date of the money decree against the father does not appear.

feat or defraud the creditors. In *Pannalal's case* (*k*) the Supreme Court pointed out that the expressions "*bona fide*" and "*mala fide*" have been frequently used in this connection in various decided cases. The use of such expressions far from being useful does not unoften lead to error and confusion. If by *mala fide* partition is meant a partition the object of which is to delay and defeat the creditors who have claims upon the joint family property, obviously this would be a fraudulent transaction not binding in law and it would be open to the creditors to avoid it by appropriate means. So also a mere colourable partition not meant to operate between the parties can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint. But a partition need not be *mala fide* in the sense that the dominant intention of the parties was to defeat the claims of the creditors; if it makes no arrangement or provision for the payment of the just debts payable out of the joint family property, the liability of the sons for payment of the pre-partition debts of the father will still remain (*k*).

In the above case Their Lordships of the Supreme Court further observed: "We desire only to point out that an arrangement for payment of debts does not necessarily imply that a separate fund should be set apart for payment of these debts before the net assets are divided, or that some additional property must be given to the father over and above his legitimate share sufficient to meet the demands of his creditors. Whether there is a proper arrangement for payment of the debts or not, would have to be decided on the facts and circumstances of each individual case. We can conceive of cases where the property allotted to the father in his own legitimate share was considered more than enough for his own necessities and he undertook to pay off all his personal debts and release the sons from their obligation in respect thereof. That may also be considered to be a proper arrangement for payment of the creditor in the circumstances of a particular case. After all the primary liability to pay his debts is upon the father himself and the sons should not be made liable if the property in the hands of the father is more than adequate for the purpose. If the arrangement made at the time of partition is reasonable and proper, an unsecured creditor cannot have any reason to complain. The fact that he is no party to such arrangement is, in our opinion, immaterial."

In *Virdhachalam Pillai* v. *Chaldean Bank* (*k*1) the father created a mortgage on property belonging to the joint family to discharge his antecedent debt and the respondent bank filed a suit on the mortgage, *inter alia* against the father and his minor son. There was a partition of the joint family properties subsequent to the mortgage and before filing of the suit by the bank. The mortgage was held binding on the son. The primary question for determination was the right of the secured creditor to proceed against the security, ignoring the partition. It was pointed out by the Supreme Court that the mortgage having been executed to secure an antecedent debt of the father the *bona fides* of the partition had no crucial significance since the mortgage was binding on the son. It was added that the extent to which the question of *bona fides* could be relevant, the onus was upon the son to establish that the partition was such as made proper and adequate provision for the discharge of the mortgage debt.

It may not be proper to say that a partition is not *bona fide* merely because it was entered into either pending the creditor's suit or after the decree in that suit, and with the object of avoiding attachment of the joint family property in execution of the decree in the creditors' suit (*l*).

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(*k*) *Pannalal* v. *Naraini* (1952) S.C.R. 544, 558, 559; *Kaushal Kishore* v. *Ram Dev* ('55) A. Punj. 193. As to renewal of prepartition debt by father see *Hanumayya* v. *Venkata Narasimha* ('65) A.A.P. 439.

(*k*1) *Virdhachalam Pillai* v. *Chaldean Bank* ('64) A.SC. 1425; *Pannalal* v. *Naraini supra* at p. 559. As to adequate and sufficient arrangement see *Hanumayya* v. *Venkata Narasimha* ('65) A.A.P. 439.

(*l*) *Balusami Ayyar, In re* (1928) 51 Mad. 417, 425, 112 I.C. 451, ('28) A.M. 735 [F.B.]; *Subramania* v. *Sabapathy* (1928) 51 Mad. 361, 368, 110 I.C. 141, ('28) A.M. 657; *Gaya Prasad* v. *Murlidhar* (1928) 50 All. 137, 104 I.C. 406, ('27) A.A. 714; *Kishan Sarup* v. *Brijraj* (1929) 51 All. 932, 936-37, 121 I.C. 257, ('29) A.A. 726; *Hirday Narain* v. *Ram Das* ('31) A.A. 606; *Khanna and Hari Raj* v. *Vishnu Datt* ('60) A. Punj. 548.

Where a partition between a father and son was not a mere colourable transaction and was in accordance with the proper shares in the property it is not liable to be impeached under section 53, Transfer of Property Act, although it was entered into with a view to prevent attachment of the son's share in execution of decrees obtained against the father after the partition. Only the father's share can be proceeded against (*m*).

(2) *Suit against father and son.*—Under similar conditions the creditor may sue both *father and son,* and obtain a decree against them for the debt due to him (*n*). It is open to the son in such a suit to show that the debt was incurred by the father (*o*) for an immoral purpose and to resist a decree against his share on that ground. It is not necessary for the son to show that immoral purpose was known to the lender (*p*). But a distinct connection must be established between the debt and the father's immorality (*q*). If he omits to do so, he will be precluded in execution proceedings from pleading that the debt was not binding on him on the ground that it was for an immoral purpose (*r*).

The son may be joined as a party to a suit on a promissory note executed by the father alone (*s*). See § 240(*4*).

If there is a partition between the father and the son after the debt has been incurred but before any suit is filed the creditor can reach the share allotted to the son on partition only by a suit to which the son is a party [*vide* § 290(7)(ii) and cases cited therein]. Such a suit would in the ordinary course be one both against the father and the son. The decree against the father would be the usual decree but against the son it would be limited to the share allotted to him on partition.

Even where the debt is a secured debt, the creditor may sue both father and son. If the mortgage is binding on the son also, being executed for an antecedent debt [§ 256(2)], or other legal necessity (§ 242) a mortgage decree follows. But if the mortgage was not effected for an antecedent debt or other legal necessity there will be a mortgage decree in Madras and Bombay but not in other States against the father but a money decree against the son (§ 259 and § 260) conditional on the debt not being realised by the sale of the father's share (*t*). See § 296(i). If there is a partition between the father and the son after the mortgage, the son is still liable to pay the debt unless it is incurred for illegal and immoral purposes. In such a case the son ought to be a party to the suit. As the father does not represent him, the equity of redemption in his share of the property would not be lost unless he is impleaded and is given an opportunity to redeem. If he is not impleaded in the suit against the father, there ought to be another suit against him or other proceeding giving him an opportunity to redeem before he is deprived of his share. There can be no objection to the maintainability of such a suit. If he obstructs delivery of the property to the purchaser, he may be allowed an opportunity to redeem in those proceedings. In such cases, he must redeem the whole of the debt and not merely his own share (*u*). The son himself may file a suit for a declaration that the mortgage is not binding on him [*vide* § 296(*1*)].

(3) *Son alone cannot be sued during father's lifetime.*—Where a debt has been contracted by the father for his personal benefit, he is primarily liable to discharge it. Such being the case, the son alone cannot be sued

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(*m*) *Schwebo* v. *Subbiah alias Shanmugham Chettiar* (1945) Mad. 138.

(*n*) *Ramasami* v. *Ulaganatha* (1899) 22 Mad. 49 [F.B.]; *Narayanan* v. *Veerappa* (1917) 40 Mad. 581, 582, 35 I.C. 918, ('17) A.M. 989; *Debendra* v. *Fyzabad Bank* (1924) 3 Pat. 63, 75 I.C. 53, ('24) A.P. 94.

(*o*) *Sat Narain* v. *Behari Lal* (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18.

(*p*) *Lakshmanaswami* v. *Raghavacharyulu* (1943) Mad. 717, 210 I.C. 98, ('43) A.M. 292; Reference may also be made to *Luhar Amrit Lal* v. *Doshi Jayantilal* (1960) 3 S.C.R. 842, 855, 856.

(*q*) *Brijmohan* v. *Mahabeer* (1936) 63 Cal. 194.

(*r*) *Kulitalai Bank* v. *Nagamanickam* (1955) 2 M.L.J. 485, ('55) A.M. 670; *Krishnanand* v. *Raja Ram* (1922) 44 All. 393, 66 I.C. 150, ('22) A.A. 116.

(*s*) *Ramasamayya* v. *Virasami* (1898) 21 Mad. 222, 224; *Narayanan* v. *Veerappa* (1917) 40 Mad. 581, 582, 35 I.C. 918, ('17) A.M. 989, supra; *Ramphul Singh* v. *Deg Narain* (1882) 8 Cal. 517.

(*t*) *Kandasami* v. *Kuppu* (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479; *Sami* v. *Ponnammal* (1897) 21 Mad. 28.

(*u*) *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Hem Raj* v. *Bashesher Das* (1933) 14 Lah. 22, 147 I.C. 693, ('33) A.L. 253.

during the father's lifetime (*v*). Nor can a son be rendered liable where the alienation does not bind the father's interest (*v*1).

(4) Father dying pending suit against him: See § 290 (6) (iii) above: Also see § 290 (2).

(4A) *Suit against the son after father's death there being no suit against the father.*—In such a case, the creditor may file a suit and obtain a decree against the son, and attach the entire interest of the father and son in the coparcenery property, and have it sold in execution of the decree. The son being under a pious obligation to pay the father's debts, he cannot claim the benefit of survivorship. It is assumed that the debt contracted by the father was not for an unlawful or immoral purpose. Such a suit may be filed and a decree obtained against the son, even if, at the time of the suit, the grandfather is living. The decree may be executed against the share of the father and the son in the ancestral property (*w*). Also see § 290 (2).

(5) In the case of a money claim there cannot be a second suit against the son after the father's death where a decree had been obtained against the father during his lifetime (*x*).

The decree can only be executed against the son, whether the son is regarded as being represented by the father or as a representative of the father within the meaning of sec. 53 of the Code of Civil Procedure (*x*), see § 294 (C). The Madras (*y*) and Allahabad decisions under the Code of Civil Procedure, 1882, allowing a second suit against the son on the judgment debt are of no practical importance.

**292A.** Where two brothers contracted a debt in respect of a joint family business the creditor is entitled to a decree against them after their separation in status by a partition (*z*).

**293. Limitation.**—(1) *Against father.*—Where the suit is brought against the father alone to recover a debt contracted by him for his own personal benefit, the period of limitation for the suit is, in the case of an unsecured debt, 3 years from the date when the debt becomes due and payable [Limitation Act, Sch. 1, arts. 57, 58, 66, 67]

(2) *Against son.*—Judicial opinion on the point is not uniform.

It has been held by the High Court of Madras that whether the suit is brought both against father and son, or it is brought against the son after the father's death, there is only one cause of action which arises equally against father and son at the time when the debt is due and payable, and limitation runs equally against them from that date (*a*). It has accordingly been held by that Court that a suit against the son after the father's death is governed by the same article of the Limitation Act as would be applicable if the suit were brought against the father himself, the reason given being that the suit against the son is as much a suit on a contract (that is, the father's contract of debt) as a suit against the father (*b*). According to this view, the period of limitation, in the case of an unsecured debt, is 3 years from the date when the debt becomes due and payable [Limi-

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(*v*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243, 247 [F.B.].

(*v*1) *Muniswamy* v. *Ramamurti* ('70) A.M. 406 [S. 53 Pro. Ins. Act].

(*w*) *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A.L. 857, dissenting from *Binda Prasad* v. *Raj Ballabh* (1926) 48 All. 245, 91 I.C. 785, ('26) A.A. 220.

(*x*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610.

(*y*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F.B.].

(*z*) *Ram Rakhan* v. *Raja Lal* (1944) Luck. 605.

(*a*) *Mallesam* v. *Jugala* (1900) 23 Mad. 292 [F.B.].

(*b*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F.B.].

tation Act, Sch. I, articles 57, 58, 66, 67]. On the other hand, it has been held by the High Court of Allahabad that the son's liability is not governed by the same article as the father's liability, but by article 120, the reason given being that the son not being a party to the contract, could not be sued on the contract. His liability arises from the pious obligation to pay the father's debt, and the only article applicable to the case is article 120. That article applies to suit for which no period of limitation is provided specifically by the Act, and the period prescribed by that article is 6 years from the date when "the right to sue accrues." Though there is a difference of opinion between the two High Courts as to the *period* of limitation for a suit against the sons, they are both agreed that the *starting point of limitation* in respect of the liability both of the father and the son is the same, namely, the date on which the debt becomes due and payable (*c*). A Full Bench of the Calcutta High Court has held in a case in which a suit was brought against the sons after the father's death, that the case was governed by article 120 of the Limitation Act, but the question whether "the right to sue" accrued on the date on which the debt incurred by the father becomes due and payable, or the date when the creditor after exhausting all his remedies against the father finds that the debt or a portion of it is still unsatisfied, or the date of the death of the father, was left open (*d*).

Now see Article 113 of the new Limitation Act of 1963, which corresponds to residuary Article 120 of the old Limitation Act, 1908. In view of the fact that the residuary Article 113 of the new Limitation Act, 1963, provides for a period of 3 years the difference of opinion between the High Courts referred to above is not now of any importance.

(3) *Where debt is secured by a charge.*—Where a debt contracted by the father is secured by a simple mortgage of joint family property or by a charge on such property created by him alone, and a suit is bought to *enforce the mortgage or charge*, then whether the suit is against the father alone, or both against father and son, or against the son after the father's death, the article of the Limitation Act governing the father's liability is article 132 which prescribes a period of 12 years from the date when the money sued for becomes payable. But the son, not being a party to the mortgage, is not bound by the *mortgage*, and art. 132 does not apply to his case.

He is liable, however, for the mortgage-debt *qua* debt, and his liability is governed, according to the Madras decision referred to in sub-§ (2), by one of the articles which prescribes a period of 3 years, and, according to the Allahabad and Calcutta decisions referred to in the same sub-section, by article 120 which prescribes a period of 6 years. According to the Madras decision, the mortgagee's suit against the son would be barred if brought more than 3 years after the accrual of the cause of action; according to the Allahabad and Calcutta decisions, it would be barred if brought more than 6 years after that date (*e*).

Now see Article 62 of the new Limitation Act, 1963.

**294. Sale of coparcenary property in execution of decree against father alone.**—The law on the subject-matter of this and paragraph 295 was first expounded by the Privy Council in *Muddan Thakoor* v. *Kantoo Lall* (*f*). The judgment in that case was summarized by their Lordships in *Suraj Bunsi Koer* v. *Sheo Persad* (*g*) in the following terms:—

(a) "That where joint ancestral property *has passed out of a joint family*, either (1) under a conveyance executed by a father in *con-*

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(*c*) *Narsingh* v. *Lalji* (1901) 23 All. 206. See *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 516.

(*d*) *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279.

(*e*) *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279; *Chandradeo Singh* v. *Mata Prasad* (1909) 31 All. 176, 179, lines 4-10, 1 I.C. 479 [F.B.].

(*f*) (1874) 14 Beng. L.R. 187, 1 I.A. 321.

(*g*) 6 I.A. 88, 106, 5 Cal. 148, 171.

*sideration of an antecedent debt, or* in order to raise money to pay *off an antecedent debt* [§ 295] *or* (2) *under a sale in execution* of a decree for the father's debt [§ 294C] his sons, by reason of their duty to pay their father's debts, cannot *recover* that property, unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that the debts were so contracted"; and

(b) "that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings".

The following passage from the Judgment of the Privy Council in *Mst. Nanomi Babuasin* v. *Modhun Mohun* (*h*) has now become classical:—

> "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

When the father became a Christian and was afterwards reconverted to Hinduism a sale in execution of a money decree against him does not pass the minor son's share in the family property, as the joint family was broken up when the father became a convert and there can be no reunion with the minor son (*i*).

**294A. Son's remedies before sale.**—(1) A debt contracted by the father *for his own personal benefit* may be secured by a mortgage of joint family property or it may be unsecured. In either case the creditor may obtain a *money decree* against the father alone, and may attach and bring to sale the entire joint family property including the son's interest therein in execution of the decree. The sons being under a pious obligation to pay the father's debt, cannot object to the attachment of their interest in the property on the ground that the debt was not for the benefit of the family. Nor can they object on the ground that they were not parties to the suit in which the decree was passed. *Prima facie* a decree obtained against *A* cannot be executed by attachment and sale of *B*'s property. But the position of sons in a joint Hindu family is, by reason of their pious duty to pay their father's debt, very different from that of an ordinary third party. The sons being under a pious obligation to pay the father's debt, the entire joint family property is liable to be attached and sold in execution of the decree against the father, *unless they show that the debt for which the decree was passed was incurred by the father for an immoral or illegal purpose* or successfully challenge the existence of the debt on which the decree is based (*j*).

There are two courses open to the sons. They may come in under O. 21, r. 58, of the Code of Civil Procedure, 1908, and object to the attachment and sale on either of the grounds mentioned above. The party against whom the order is made will then,

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(*h*) (1886) 13 Cal. 21, 35, 13 I.A. 1, 17, 18.

(*i*) *Vella Venkatasubbayya* v. *Yella Venkataramayya* (1944) Mad. 33.

(*j*) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 123, 187 I.C. 816, ('39) A.M. 867; *Maha Deo* v. *Rambir Singh* (1945) Lah. 67 (F.B.); *Bhagat Ram* v. *Ajudhia Parkash* ('60) A. Punj. 261. But see *Surendra Nath* v. *Saralia*; *Hindi Mahajani School* ('50) A. East Punjab 282 where it was held that where a creditor obtained a decree for debt against the father the sons cannot question the existence of the debt except by showing that the decree was obtained by fraud or collusion. At any rate the burden of proving non-existence of debt would be upon the sons. Also see § 292 *supra* and *Sidheshwar* v. *Bhubneshwar Prasad* (1954) S.C.R. 177; *Udmiram* v. *Balramdas* ('56) A.N. 76.

under O. 21, r. 63, be entitled to bring a suit in which the whole question as to whether there was a debt or not, or whether it was immoral or not, will be determined. If no such suit is filed within one year from the date of the order, the order will be conclusive (*k*); [see Limitation Act, 1918, Sch. I, art. 11]. The sons, however, are not bound to proceed under O. 21, r. 58. They may bring a suit against the decree-holder for a declaration that they are not bound by the decree and for an injunction restraining the decree-holder from selling the entire property, but their share will not be released from attachment, *unless they show that the debt for which the decree was obtained was tainted with immorality* (*l*). And in such a *suit ad valorem* court fees must be paid (*m*). It has been held in Bombay that the decree-holder himself may apply under O. 21, r. 66(2)(e) of the Civil Procedure Code to include the sons' interest in the proclamation of sale, and that the Court may on such an application deal with the sons' objection after giving notice to them (*n*).

(2) In the case of a mortgage by the father of joint family property, the creditor may obtain a *mortgage decree* against the father alone. Where the property is put up for sale in execution of a *mortgage decree,* no attachment takes place as in the case of a money decree. The sale is held in such cases under the final decree for sale passed in the mortgage suit. But the sale is always notified by proclamation under O. 21, r. 66, and the sons may at the time of sale give public notice to all intending purchasers that there was in reality no debt owing from the father or that the debt for which the decree was passed was contracted by the father for an immoral or illegal purpose. Where such notice is given, and the property is purchased after such notice, though it may be by a stranger to the suit, the sale will be set aside if the sons show, in a suit subsequently brought by them, that the debt was contracted for an immoral purpose; for the purchaser, though he may be a stranger to the suit, will then be taken to have had notice actual or constructive, of the sons' objection to the result of the sons' suit (*o*); see § 294E(1), para 2. But the sons are not bound to wait until the property is sold. They may bring a suit against the mortgagee for a declaration that they are not bound by the decree and for an injunction restraining the mortgagee from selling the entire property.

Where such a suit is brought, the question arises whether the sons' suit must fail unless they can establish that the debt for which the decree was passed was for an immoral purpose, as they have to do in a suit to set aside a *money* decree [see sub-§ (1)], or whether they are entitled to succeed if the mortgage was neither for legal necessity nor for the payment of an antecedent debt, *without* showing that the debt was contracted for an immoral purpose. It has been held in several cases that as in the case of a simple money decree, so in the case of a mortgage decree, the sons are not entitled to go behind the decree, except for the purpose of showing that the debt was

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(*k*) *Indar Pal* v. *The Imperial Bank* (1915) 37 All. 214, 28 I.C. 593, ('15) A.A. 126; *Mohan Lal* v. *Bala Prasad* (1922) 44 All. 649, 69 I.C. 754, ('22) A.A. 310; *Hammant Kashinath* v. *Ganesh Annaji* (1919) 43 Bom. 612, 51 I.C. 612, ('18) A.B. 13; *Madhusudan* v. *Iswari Dayi* (1921) 48 Cal. 341, 61 I.C. 25, ('21) A.C. 152; *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I.C. 121, ('21) A.L. 205.

(*l*) *Karam Singh* v. *Bhup Singh* (1905) 27 All. 16 [F.B.]; *Abdul Karim* v. *Ram Kishore* (1925) 47 All. 421, 86 I.C. 837, ('25) A.A. 327; *Sardari Lal* v. *Bharat National Bank* (1931) 12 Lah. 495 130 I.C. 836, ('31) A.L. 716; *Pirthi-Singh* v. *Man Chand* (1935) 16 Lah. 1077, 156 I.C. 539, ('35) A.L. 761.

(*m*) *Vinayakrao* v. *Mankunwarbai* (1943) Nag. 440, 202 I.C. 643, ('43) A.N. 70.

(*n*) *Ramchandra* v. *Bhagwant* (1929) 53 Bom. 777, 121 I.C. 435, ('29) A.B. 465.

(*o*) *Suraj Bunsi Koer* v. *Sheo Persad* (1878) 5 Cal. 148, 173, 6 I.A. 88, 106 (debt held to be immoral); *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104 (debt held not to be immoral).

tainted with immorality (*p*). The cases referred to above were prior in date to the Privy Council case of *Brij Narain* v. *Mangla Prasad* (*q*), decided in 1923. In that case the Judicial Committee laid down five propositions (see note under § 295 at p. 378, *infra*, or which the following three are material:—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity [see § 242].

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt [see § 294].

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate [see § 295].

The Supreme Court has in a number of cases expressed agreement with the decision of the Privy Council in *Brij Narain's* case and adopted the propositions there laid down (*qq*).

In *Fuqir Chand* v. *Hernam Kaur* (*qqq*) the Supreme Court had occasion to consider certain Full Bench decisions of High Courts on the meaning and effect of the second proposition in the Privy Council case about the effect of which there was difference of opinion. It was pointed out by the Supreme Court that:

(i) the son is under a pious obligation to pay all debts of the father, whether secured or unsecured. The second proposition applies not only to an unsecured debt but also to a mortgage debt which the father is personally liable to pay.

(ii) The second proposition applies in the case of a money decree for payment of debt before the sale is held and similarly it also applies in the case of a mortgage decree and the son is not entitled to interfere with the execution of the decree or with the sale of the property in execution proceedings (unless he can show that the debt was non-existent or tainted with immorality or illegality).

Another question which came up for decision by the Supreme Court in *Faqir Chand's* case was whether the son is entitled to impeach the mortgage of a joint family property made neither for legal necessity nor for payment of an antecedent debt, and if so, whether the remedy is available to him after the mortgagee has obtained a decree against the father on the mortgage. The question was answered in the affirmative overruling the contrary view taken by the High Court of Punjab (*qqqq*). It was held that in spite of

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(*p*) *Beni Madho* v. *Basdeo Patak* (1890) 12 All. 99; *Bhawani Baksh* v. *Ram Dai* (1891) 13 All. 216; *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]. See also *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479; *Raja Raghunandan* v. *Kumar* (1931) 10 Pat. 124, 126 I.C. 377, ('30) A.P. 521.

(*q*) (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.

(*qq*) *Faqir Chand* v. *Harnam Kaur* ('67) A.S.C. 727.

(*qqq*) See f.n. (*qq*) above.

(*qqqq*) *Faqir Chand* v. *Harnam Kaur* ('61) A. Punj. 325 (F.B.).

the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the son's interest in the property, and the son will be entitled to ask for a declaration that his interest has not been alienated either by the mortgage or by the decree. It was observed that "the first proposition in *Brij Narain's* case sets out the general rule regarding the powers of the managing member of a joint family to alienate or burden the estate. The second and third propositions lay down the special rules applicable when the managing member is the father, and deal specially with his powers to mortgage the estate for payment of his antecedent debt. Reading the first and the third propositions together, it will appear that a father who is also the manager of the family has no power to mortgage the estate except for legal necessity or for payment of an antecedent date."

In Oudh and Punjab (*r*), it was held that the word "debt" in the second proposition referred not only to a simple money debt but also to a mortgage debt, and that the sons' suit must fail unless they establish that the debt was for an immoral purpose. But a Full Bench of the Allahabad High Court (*s*) held that the word "debt" in the second proposition contemplated a simple money debt, and not a mortgage debt; further, that having regard to the first and third propositions, a mortgage by the father could only be upheld if it was made either for a legal necessity or for an antecedent debt, and in no other case, and that if the mortgagee failed to prove that the debt was contracted for either of those two purposes, the sons were entitled to have the mortgage decree set aside *without* showing that the debt was for immoral purposes.

It is important to note that the ruling in the abovementioned Full Bench case applied only where (1) the suit was to set aside a *mortgage* decree, and (2) the suit was brought *before* sale. Reference may also be made to a Full Bench decision of the Madras High Court (*t*).

In a later case the Bombay High Court agreed with the Full Bench decision of the Allahabad High Court and differed from the Punjab High Court (*u*), and the same view was taken by the Nagpur High Court in a still later decision (*v*).

It may be noticed that the above decisions were prior to the Supreme Court's decision in *Faqir Chand's* case and must be taken to have been overruled to the extent that they go contrary to what has been finally laid down in *Faqir Chand's* case.

**294B. Son's rights after sale.**—(1) *Money decree against father.*—Where the father has contracted a debt *for his own personal benefit*, the creditor may obtain a *money decree against the father alone*, and may enforce the decree by attachment and sale of the entire coparcenary property *including the son's interest therein*. The sons, *though not parties to the suit*, are bound by the sale by reason of their pious duty to pay their father's debt, and they cannot recover their share of the property unless they prove (and the burden lies upon them to prove) that the debt was contracted by the father for an immoral or illegal purpose. This rests on the theory that as the father can effect a sale *without suit* of the entire joint family property including his sons' in-

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(*r*) *Gouri Shankar* v. *Jang Bahadur* (1924) 27 Oudh Cases, 124, 79 I.C. 1008, ('24) A.O. 394; *Nand Lal* v. *Umrai* (1926) 1 Luck. 360, 93 I.C. 655, ('26) A.O. 321; *Faqir Chand* v. *Harnam Kaur* ('61) A. Punj. 138 (F.B.), (1960) 2 Punj. 325 (F.B.); *Jogindar Singh* v. *The Punjab & Sindh Bank Ltd., Amritsar* (1940) 21 Lah. 96, 186 I.C. 357 ('39) A.L. 585; *Nathu Lal* v. *Phool Chand* ('55) A.V.P. 6.

(*s*) *Jagdish Prasad* v. *Hoshyar Singh* (1929) 51 All. 136, 115 I.C. 775, ('28) A.A. 596 [F.B.].

(*t*) *Abdul Hameed* v. *Provident Investment Co. Ltd.* ('54) A.M. 961, (1954) Mad. 939, (1954) 2 M.L.J. 416; *Jagadesan* v. *Saraswathi Ammal* ('62) A.M. 174 (F.B.). Also see *Kalappa* v. *Venkatesh* ('62) A. Mys. 260.

(*u*) *Bharamappa Murdeppa* v. *Hanmantappa Tippanna* (1943) Bom. 568, ('43) A.B. 451.

(*v*) *Ganpat* v. *Rameshwar* (1946) Nagpur 741.

terest therein in favour of the creditor for the payment of an antecedent debt [§ 295], so the creditor may legally procure a sale of it *by suit* (*w*). The fundamental principle is that where joint family property is *sold* in execution of a decree (*x*), though obtained against the father alone, and for a debt contracted by him for his own personal benefit, the sons cannot claim to recover their share of the property unless they show that the debt was contracted by the father to the knowledge of the lender (*y*) for an immoral or illegal purpose (*a*) and that the purchaser had notice that it was so contracted (*b*).

A distinction has, however, been made by the Judicial Committee between the case where the purchaser at the execution sale is a stranger to the suit and the case where he is the decree-holder himself. The two leading cases on the subject are *Muddun Thakoor* v. *Kantoo Lall* (*c*) and *Suraj Bunsi Koer* v. *Sheo Persad* (*d*). It has been held by the Judicial Committee in those cases that *where the purchaser is a stranger to the suit,* the sons are not entitled to recover their share unless they prove (1) that the debt was contracted for an immoral or illegal purpose, *and also* (2) that the purchaser had notice that it was so contracted. It is not necessary for the purchaser to show that he made inquiry before the sale as to the nature of the debt.

The purchaser in execution is not bound to go behind the decree (*e*) or further back than to see that there was a decree against the father, and that the property sold was properly liable to satisfy the decree if the decree had been properly passed against the father; if he makes an inquiry to that extent and then purchases the property *bona fide* and for value, the sale is not liable to be set aside at the suit of the sons, and the purchaser is entitled to the entire property including the sons' interest therein. "Purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts contracted for an immoral purpose were so, are not bound to make inquiry beyond what appears on the face of the proceedings."

The abovementioned decisions of the Judicial Committee have been followed in a number of cases (*f*). The principle on which those decisions rest is that one who has *bona fide* purchased joint family property under an execution, and *bona fide* paid a valuable consideration, is protected against the suit

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(*w*) *Mst. Nanomi Babuasin* v. *Modhun Mohan* (1886) 13 Cal. 21, 36, 13 I.A. 1; *Kamasamayyan* v. *Virasami* (1898) 21 Mad. 222, 224; *Kunhali* v. *Keshava* (1888) 11 Mad. 64, 76.

(*x*) *Swaminatha* v. *Krishnaswami* (1947) Mad. 471 (decree on a promissory note).

(*y*) *Sat Narain* v. *Behari Lal* (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883 ('25) A.PC. 18; *Minakshi Nayudu* v. *Immudi* (1889) 12 Mad. 142, 16 I.A. 1 (original creditor advanced the loan *bona fide*).

(*a*) *Muddun Thakoor* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 200, 1 I.A. 321, 334; *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 171, 6 I.A. 88, 106; *Muttayan Chettiar* v. *Sangili* (1882) 6 Mad. 1, 9 I.A. 128; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 105; *Minakshi* v. *Immudi* (1889) 12 Mad. 142, 16 I.A. 1; *Sripat Singh* v. *Tagore* (1917) 44 Cal. 524, 44 I.A. 1, 39 I.C. 252, ('16) A.PC. 220; *Brij Narain* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Karan Singh* v. *Bhup Singh* (1905) 27 All. 16 [F.B.]. See also cases cited in sub-secs. (2), (3), (4) and (5); *Bhubaneshwar Prasad Narayan Singh* v. *Bihari Lal* (1935) 14 Pat. 436, 156 I.C. 350, ('35) A.P. 205; *Lakshmandas* v. *Karunakaran* ('57) A. Kerala 126.

(*b*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 171, 6 I.A. 88, 106; *Bhagut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 105; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625.

(*c*) (1874) 14 Beng. L.R. 187, 1 I.A. 321.

(*d*) (1880) 5 Cal. 148, 171, 6 I.A. 88, 106. See also *Muttayan Chettiar* v. *Sangili* (1882) 6 Mad. 1, 9 I.A. 128, where it was held that the law in the Madras State is not different.

(*e*) In *Mahabir Prasad* v. *Basdeo Singh* (1884) 6 All. 234, 238, it was held that the decree must be read with the plaint, so that the purchaser will be deemed to have notice of the allegation in the plaint.

(*f*) *Bhawani Bakhsh* v. *Ram Dai* (1891) 13 All. 216, 223; *Trimbak* v. *Narayan* (1884) 8 Bom. 481; *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 518-519; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357; 152 I.C. 487, ('35) A.A. 247; *Suryanarayana* v. *Ganesulu* (1953) 2 M.L.J. 439, ('54) A.M. 203; *Girija Sankar* v. *Nayan Chandra* ('52) A. Assam 5.

of the sons seeking to set aside the sale and to recover their share of the property.

But it is different if the decree-holder is himself the purchaser. In that case, all that is necessary for the sons to prove, to entitle them to recover their share, is that the debt for which the decree was passed was contracted for an immoral purpose. It is not necessary for them to prove the further fact that the purchaser had notice that the debt was so contracted. The reason is that where the purchaser is the decree-holder in the suit, he does not stand in the same position as a stranger to the suit, and he cannot therefore protect himself under the plea of being a purchaser without notice (*g*). It is also well established that even if the purchaser is a *stranger* to the suit, the sale will be set aside to the extent of the sons' interest in the property, if *before* the sale took place objection was taken by the sons that the debt for which the decree was obtained was contracted for an immoral purpose, and it is eventually proved that the debt was so contracted. The reason is that in such a case the purchaser will be taken to have had notice, actual or constructive, of the sons' objection, and, therefore, to have purchased with notice of the sons' claim and subject to the result of any suit that may be brought by the sons to recover their share of the property (*h*).

The same principles apply where the sale is sought to be set aside on the ground *that there was in reality no debt* owing by the father and that the decree was obtained by collusion between the creditor and the father. In such a case, if the purchaser be the decree-holder himself, the sons must show, to entitle them to succeed, that there was no debt in fact, and that is all that is necessary for them to prove (*i*). But if the purchaser be a stranger to the suit, the sons must show not only that there was no debt due by the father, but also that the purchaser had notice that there was no such debt (*j*).

The position, then, is that where joint family property is sold in execution of a decree against the father, then if the purchaser is the decree-holder himself, the sons are entitled to recover their interest merely by proof of the immorality or non-existence (*k*) of the debt. But if the purchaser is a stranger to the suit, they cannot recover their share unless they prove that the debt was contracted for an immoral or illegal purpose, *and also* that the purchaser had notice that it was so contracted (*l*).

The distinction between the case where the purchaser is a stranger and where he is the decree-holder himself was, as stated above, laid down by the Judicial Committee in *Muddun Thakoor's* case and *Suraj Bunsi Koer's* case. In some later cases, however, even where the purchaser was a stranger to the suit, the Judicial Committee appears to have

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(*g*) *Luchmun Dass* v. *Giridhur* (1880) 5 Cal. 855; *Ramphul Singh* v. *Deg Narain* (1882) 8 Cal. 517, 522; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Natasayyan* v. *Ponnusami* (1893) 16 Mad. 99, 103; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222; *Sripat Singh* v. *Tagore* (1917) 44 I.A. 1, 44 Cal. 524, 39 I.C. 352, ('16) A.PC. 220; *Trimbak Balkrishna* v. *Narayan Damodar* (1884) 8 Bom. 481 [the purchaser was the decree-holder's son]; *Joharmal* v. *Eknath* (1900) 24 Bom. 343; *Ram Chandar* v. *Muhammad* (1923) 45 All. 545, 73 I.C. 656, ('23) A.A. 591.

(*h*) *Suraj Bunsi Koer* v. *Sheo Persad* (1878) 5 Cal. 148, 6 I.A. 88 [debt held to be immoral]; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 105 [debt held not to be immoral]; *Mahabir Prasad* v. *Basdeo* (1884) 6 All. 234 [debt held to be immoral. See also *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 518-519 [debt held to be immoral].

(*i*) *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222; *Firm Pirthirajganeshdas* v. *Kishunlal* (1946) 25 Pat. 103.

(*j*) *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262, 274-275; *Mahabir* v. *Basdeo Singh* (1884) 6 All. 234, 238.

(*k*) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 123, ('39) A.M. 867, 187 I.C. 816; *Maha Deo* v. *Rambir Singh* (1945) Lah. 67 [F.B.].

(*l*) Reference may be made to *Abdul Hameed* v. *Provident Investment Co. Ltd.* ('54) A.M. 961 (F.B.) and *Ajit Singh* v. *Hem Raj* ('56) A. Punj. 139 where the question of limitation is considered. Also see *Jagadesan* v. *Saraswathi Ammal* ('62) A.M. 174 (F.B.).

laid down in general terms and without any reference to the necessity of notice, that the sons could successfully impeach a sale *merely by proof of the immorality of the debt* (*m*). But in all these cases, the fact of immorality had been disproved, so that the question of notice could not have arisen. Thus in *Mst. Nanomi Babuasin* v. *Modhun Mohun* (*n*), which was one of such cases, the Judicial Committee observed: "All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. *Assuming* they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale." The debt in that case was held not to be immoral, and the question of notice did not arise. In *Sripat Singh* v. *Tagore* (*o*), their Lordships said "The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the joint family property, *if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes.* In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." In this case also it was found that the debt was not incurred for an immoral purpose; moreover, the decree-holder himself was the purchaser. In *Brij Narain* v. *Mangla Prasad* (*p*), their Lordships, after reviewing the earlier cases on the subject, laid down five propositions of which the second was as follows: "If he is the father and the other members are the sons, he may, by incurring debt, *so long as it is not for an immoral purpose,* lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." But that was a case of a mortgage executed by the father for the payment of an antecedent debt and the question of notice was not referred to either in argument or in the judgment. In India too there have been cases in which it has been laid down that where the purchaser is a stranger to the suit, the sons can in a suit of their own successfully impeach the sale or resist the purchaser's suit for possession *merely by proof of the immorality of the debt.* But in these cases also the fact of immorality had been disproved, and the question of notice did not therefore arise (*q*).

*Illustrations*

(a) *A* and his son *B* are members of a joint family. *A* is indebted to *C* in the sum of Rs. 5,000. *C* obtains a personal decree against *A* alone, and in execution of the decree attaches the whole coparcenary property belonging to the joint family. *B* objects to the attachment of his interest in the property on the ground that the moneys borrowed by his father *A* from *C* were borrowed for an immoral purpose. It is proved that the amount was borrowed for an immoral purpose. The Court will set aside the attachment to the extent of the son's interest. Suppose now that *B* does not object to the attachment, and that the whole property including *B*'s interest is sold in execution of the decree, and it is purchased by *C*, the decree-holder, and *B* sues *C* to set aside the sale on the ground that the debt contracted by his father was for an immoral purpose. If the son succeeds in showing that the debt was so contracted the sale will be set aside to the extent of the son's interest in the property. If the son fails to show that the debt was immoral, the sale will be upheld in its entirety. But if the property is purchased by a stranger to the suit, the son cannot recover his share unless he proves not only that the debt was contracted for an immoral purpose, but that the purchaser had notice that it was so contracted.

(b) *A* and his son *B* are members of a joint family. *C* obtains a personal decree against *A* for Rs. 5,000 borrowed by *A* from *C* for his personal benefit, but not for an immoral purpose. *A* dies without paying the amount of the decree. *C* may, after *A*'s death, attach not only *A*'s share but also *B*'s share in the joint property, in other words attach the entire joint family property, and have the same sold in execution of the decree. The debt not having been contracted for an immoral purpose, the son's right to take by survivorship gives way to the supreme obligation to pay the father's debt. But if the debt was contracted for an immoral purpose, *C* could not after *A*'s death attach the interest either of *A* or *B*. The reason is that, as regards *A*'s interest, it will pass by survivorship to *B* [§ 289(2)], and as regards *B*'s interest, it cannot be held liable, the debt being of an immoral character.

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(*m*) *Mst. Nanomi Babuasin* v. *Modhun Mohun* (1886) 13 Cal. 21, 13 I.A. 1; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99; *Minakshi* v. *Immudi* (1889) 12 Mad. 142, 16 I.A. 1; *Mahabir Pershad* v. *Moheshwar Nath* (1890) 17 Cal. 584, 17 I.A. 11.

(*n*) (1886) 13 Cal. 21, 36, 13 I.A. 1. 18.

(*o*) (1917) 44 Cal. 524, 532, 44 I.A. 1, 4, 39 I.C. 252, ('16) A.PC. 220.

(*p*) (1924) 51 I.A. 129, 139, 46 All. 95, 104, 77 I.C. 689, ('24) A.PC. 50.

(*q*) *Mata Din* v. *Gaya Din* (1909) 31 All. 599, 3 I.C. 24 [purchaser's suit for possession]; *Dalip Narain* v. *Parmaoti* (1920) 42 All. 58, 67 I.C. 93, ('20) A.A. 310; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180; *Narayanacharya* v. *Narso Krishna* (1876) 1 Bom. 262.

(2) *Mortgage decree against father.*—The above rules apply not only to a sale in execution of *money decree* against the father, but to a sale in execution of *mortgage decree* against him. This happens when the mortgage executed by the father is neither for legal necessity nor for the payment of an antecedent debt. If the mortgage is created either for legal necessity or for an antecedent debt not tainted with immorality, the mortgage itself binds the sons' interest in the property. If the mortgage is neither for legal necessity nor for an antecedent debt, the mortgage as such is not operative on the sons' interest, but the sons are nevertheless under a pious obligation to pay the mortgage debt *qua* debt. In such a case, if a decree is passed against the father on the mortgage for the sale of the whole of the mortgaged property, and the property is *sold* in execution of the mortgage decree, the sons, though not parties to the mortgage suit, are bound by the sale, unless they show that there was no debt owing by the father (*r*), or that the debt in respect of which the mortgage was executed was incurred by the father to the knowledge of the lender (*s*) for an immoral or illegal purpose (*t*) and that the purchaser not being the decree-holder had notice that the debt was so incurred [*vide* cases cited under 294B (1).]. See § 296(1), cl. ii. As to the sons' remedies *before* sale, see § 294A. As to limitation reference may be made to the undermentioned decision of a Full Bench of the Madras High Court (*u*).

*Illustration*

A joint family consists of a father and sons. The father mortgages certain immovable property forming part of the joint family properties to secure a loan raised by him. The loan is not raised either for a legal necessity or for payment of an antecedent debt. The mortgagee sues the father alone and obtains a decree for the sale of the mortgaged property. The property is sold in execution, and it is purchased by the mortgagee himself. The sons, being under a pious obligation to pay their father's debt, are bound by the sale unless they show that the debt was tainted with immorality. There is no distinction in such cases between a debt secured by a mortgage and an unsecured debt: *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180. Had the mortgage been for family necessities or for the discharge of an antecedent debt, *the mortgage itself* would have bound the sons' interest in the mortgaged property and the sale in execution would have passed the sons' interest not by virtue of the decree, but by *virtue of the mortgage*.

(3) *Execution purchaser's suit for possession.*—The rules laid down above apply also to a suit by a purchaser at an execution sale against the sons for possession of the property purchased by him (*v*).

(4) *Burden of proving immorality of debt.*—Where in respect of their share the sons claim to set aside a sale in execution of a decree against the father, the burden lies upon them to prove that the debt was contracted for an immoral or illegal purpose (*w*). It is not necessary for the purchaser to

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(*r*) *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222.

(*s*) *Sat Narain* v. *Behari Lal* (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18.

(*t*) *Suraj Bunsi Koer* v. *Sheo Persad* (1878) 5 Cal. 148, 6 I.A. 88; *Mst. Nanomi Babuasin* v. *Modhun Mohun* (1886) 13 Cal. 21, 13 I.A. 1; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 724, 15 I.A. 99, 104, 105; *Lala Suraj Prosad* v. *Golab Chand* (1901) 28 Cal. 517; *Jamna* v. *Nain Sukh* (1887) 9 All. 493, 494; *Beni Madho* v. *Basdeo Patak* (1890) 12 All. 99; *Bhawani Bakhsh* v. *Ram Dai* (1891) 13 All. 216; *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180; *Kunhali* v. *Keshava* (1888) 11 Mad. 64, 76; *Tribeni* v. *Ramasray* (1931) 10 Pat. 670, 136 I.C. 49, ('32) A.P. 80 [F.B.]; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247; *Abdul Hameed* v. *Provident Investment Co. Ltd.* (1954) Mad. 939, ('54) A.M. 961; *Jagadesan* v. *Saraswathi Ammal* ('62) A.M. 174 (F.B.).

(*u*) (1954) Mad. 939, ('54) A.M. 961, *supra*.

(*v*) *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Mata Din* v. *Gaya Din* (1909) 31 All. 599, 3 I.C. 24.

(*w*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104; *Muddun Thakoor*

show that there was proper inquiry as to the purpose of the loan, or to prove that the money was borrowed in a case of necessity (*x*).

The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant and immoral life; there must be a distinct connection between the debt and the immorality set up by the sons (*y*).

(5) *Construction of execution proceedings.*—It is stated above that where the father has contracted a debt *for his own personal benefit,* the creditor may obtain a decree *against the father alone,* and may enforce the decree by attachment and sale of the entire joint family property including the sons' interest therein. But though the creditor *can* in execution of his decree sell the entire joint family property, he is not obliged to do so. He may put up only the father's interest for sale. If what is brought and sold is the father's interest alone, the purchaser is not, except in some cases in Bombay, entitled to the possession of *any part* of the property, and his only remedy is to bring a general suit for partition and for possession of the share which would be allotted to the father on such partition [§ 261 (1)]. But if what is brought and sold is the entire property, the purchaser is entitled to possession of the whole. It is, therefore, important in each case to inquire whether the sale passed the whole property including the sons' interest therein, or only the father's interest in the property. The determination of this question depends mainly on the terms of the execution and sale proceedings, such as the application for execution, warrant of attachment, warrant of sale and sale certificate. The Court will in each case look at the substance of the proceedings to see what the purchaser intended to buy and what he believed he was buying (*z*). "In cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded" (*a*). The price paid by the purchaser is also an element to be taken into consideration (*b*).

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v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321; (1878) 5 Cal. 148, 6 I.A. 88, *supra*; (1886) 13 Cal. 21, 13 I.A. 1, *supra*; (1891) 13 All. 216, *supra*; (1892) 14 All. 179 [F.B.], *supra*; *Brij Narain* v. *Mangla Prasad* (1924) 46 All. 95, 51 I.A. 129, 76 I.C. 689, ('24) A.PC. 50.

(*x*) (1888) 15 Cal. 717, 724, 15 I.A. 99, 104, *supra*.

(*y*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 15 I.A. 99; *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I.C. 121, ('21) A.L. 205; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247; *Sydulu* v. *Venkateshwarlu* ('65) A.A.P. 318.

(*z*) *Deendyal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247; *Baboo Hurdey Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 11 I.A. 26; *Mst. Nanomi Babuasin* v. *Modhun Mohun* (1886) 13 Cal. 21, 13 I.A. 1; *Daulat Ram* v. *Mehr Chand* (1888) 15 Cal. 70, 14 I.A. 187; *Mahabir Pershad* v. *Moheshwar Nath* (1890) 17 Cal. 584, 17 I.A. 11; *Pettachi Chettiar* v. *Sangili Vira Pandia* (1887) 10 Mad. 241, 248, 14 I.A. 84, 85; *Simbhunath* v. *Golap Singh* (1887) 14 Cal. 572, 14 I.A. 77; (1888) 15 Cal. 717, 15 I.A. 99, *supra*; *Minakshi* v. *Immudi* (1889) 12 Mad. 142, 16 I.A. 1; *Abdul Aziz* v. *Appayasami* (1903) 27 Mad. 131, 31 I.A. 1; *Sripat Singh* v. *Tagore* (1917) 44 I.A. 1, 44 Cal. 524, 39 I.C. 252, ('16) A.PC. 220; *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Sakharam Shet* v. *Sitaram* (1887) 11 Bom. 42; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Maruti* v. *Babaji* (1891) 15 Bom. 87; *Cooverji* v. *Dewsey* (1893) 17 Bom. 718; *Timmappa* v. *Narsinha* (1913) 37 Bom. 631, 21 I.C. 123, *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 46 I.C. 133, ('18) A.B. 101; *Dayanand* v. *Daji Narayan* (1926) 50 Bom. 793, 97 I.C. 754, ('26) A.B. 548; *Kunhali* v. *Keshava* (1888) 11 Mad. 64; *Ramphul Singh* v. *Deg Narain* (1882) 8 Cal. 517, 527; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Pem Singh* v. *Partab* (1892) 14 All 179 [F.B.]; *Sudhakar* v. *Gobardhan* ('52) A. Orissa 212; *Anantha Pai* v. *Kesava Pai* ('55) A. Tra. Co. 249.

(*a*) *Sripat Singh* v. *Tagore* (1916) 44 I.A. 1, 44 Cal. 524, 39 I.C. 252, ('16) A.PC. 220; *Mahabir Pershad* v. *Moheshwar Nath* (1890) 17 Cal. 584, 17 I.A. 11; *Cooverji* v. *Dewsey* (1893) 17 Bom. 718; *Dayanand* v. *Daji Narayan* (1926) 50 Bom. 793, 97 I.C. 754, ('26) A.B. 548.

(*b*) *Simbhunath* v. *Golap Singh* (1887) 14 Cal. 572, 14 I.A. 77; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262, 278; (1926) 50 Bom. 793, 799, 97 I.C. 754, ('26) A.B. 548, *supra*.

The following are some of the principles culled from decided cases:—

(i) "If the expressions by which the estate is conveyed to the purchaser [in execution] are susceptible of application either to the entirety or to the father's coparcenary interest alone, the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings" (c).

(ii) The words "right, title and interest" are ambiguous. They may refer to the father's interest only in the property or to the entire property. If it appears from the terms of the execution proceedings and from the intention of the parties that what was put up for sale and what was bought was the entire property, but the property is described in the certificate of sale as "the right, title and interest of the judgment-debtor," the sale will nevertheless pass the entire property. The presence of the words "right, title and interest" in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a coparcener (*d*). But if it is clear from the terms of the execution proceedings that what was put up for sale was the "right and share" of the judgment-debtor alone in the property, the sale will pass only the father's interest. The purchaser cannot claim the entire property merely because the decree-holder could have brought the whole property to sale, had he been so minded (*e*).

(iii) The mere fact that no reference is made in the proclamation of sale to the son's interest does not of itself afford a ground for holding that the son's interest did not pass at the sale (*f*).

(iv) If the creditor sues the father alone, and a consent decree is obtained against the father, whereby the father agrees to pay a specified sum within a specified period and by way of security mortgages his "right, title and interest" in certain joint family property, and agrees that in the event of non-payment the mortgaged property shall be sold by auction, and the property is afterwards sold, and a certificate of sale is issued to the purchaser stating that "whatever right, title and interest the judgment-debtor had in the said property, being extinguished from the date of the sale, is transferred to the purchaser," the purchaser is entitled to no more than the father's interest in the property. "When a man conveys his right and interest, and nothing more, he does not *prima facie* intend to convey away also rights and interest presently vested in others, even though the law may give him the power to do so." In such a case, if it is alleged by the purchaser that the sons assented to the decree and the mortgage, he should join them as parties to the execution proceedings (*g*).

(v) Where a mortgage is executed by the father of joint family property, the Court must take it that the entire property was mortgaged, unless the sons show that what was mortgaged was the father's interest only (*h*), or unless the mortgage itself purports to be one of the father's interest only (*i*). Where the mortgage is of the entire property, and a decree is passed for sale of the property, the sale will pass the whole property to the purchaser, notwithstanding the words "right, title and interest of the judgment-debtor" in the certificate of sale (*j*).

**294C. Execution of decree against father after his death.**—Where a decree has been passed against the father in respect of a debt incurred by

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(*c*) *Mst. Nanomi Babuasin* v. *Modhun Mohun* (1886) 13 Cal. 21, 36 13 I.A. 1, 18. In *Deendyal* v. *Jagdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247, also there was an ambiguity.

(*d*) (1890) 17 Cal. 584, 17 I.A. 11, *supra*; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 15 I.A. 99; (1886) 13 Cal. 21, 13 I.A. 1, *supra*; *Sakharam Shet* v. *Sitaram* (1887) 11 Bom. 42.

(*e*) (1877) 3 Cal. 198, 4 I.A. 247, supra; *Baboo Hurdei Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 11 I.A. 26; *Pettachi Chettiar* v. *Gangili Vira* (1887) 10 Mad. 241, 14 I.A. 84; *Abdul Aziz* v. *Appayasami* (1903) 27 Mad. 131, 31 I.A. 1; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Maruti* v. *Babaji* (1891) 15 Bom. 87; *Timmappa* v. *Narsinha* (1913) 37 Bom. 631, 21 I.C. 123; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 46 I.C. 133, ('18) A.B. 101. As to High Court Circulars, see (1926) 50 Bom. 793, 97 I.C. 754, ('26) A.B. 548, *supra*.

(*f*) (1926) 50 Bom. 793, 97 I.C. 754, ('26) A.B. 548, *supra*.

(*g*) *Simbhunath* v. *Golap Singh* (1887) 14 Cal. 572, 14 I.A. 77, 83.

(*h*) *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 15 I.A. 99.

(*i*) See *Simbhunath* v. *Golap Singh*, *supra*.

(*j*) *Trimbak* v. *Narayan* (1884) 8 Bom. 481.

him, and the father dies before the decree has been fully satisfied, the decree may be executed under sec. 53 of the Civil Procedure Code, 1908, by attachment and sale of the ancestral property in the hands of the sons, as if such property were the property of the deceased father which had come to the hands of the sons as his legal representatives, unless the debt was incurred for an illegal or immoral purpose. If the sons contend that the debt was incurred for an immoral purpose, the question has to be determined in execution proceedings, and not in a separate suit (*k*). If the contention of the sons is that there is really no debt the question cannot be enquired into in execution proceedings, but only in a regular suit (*l*).

This paragraph is based on secs. 50 and 53 of the Civil Procedure Code, 1908. See Mulla's Civil Procedure Code, notes to sec. 53. No attachment is necessary where a final mortgage decree for the sale of the property has been passed against the father in his lifetime, the property in that case is sold under and by virtue of the decree, without any previous attachment (*m*).

Section 53 applies in the case of the sons of a judgment debtor only and not in the case of his brother (*n*).

Section 53 does not apply to a case where the suit on a mortgage by the father was filed against the sons and grandsons, but was dismissed against the latter. The share of the grandsons cannot be attached and sold as it was not covered by the decree (*o*), but this principle cannot be availed of by after born sons and grandsons (*p*).

Nor does sec. 53 apply to a case where the suit against the father is filed after partition (*q*).

If the father dies leaving *sons and also his own father,* and subsequently the father's father dies, it has been held in Allahabad that the decree cannot be executed against the ancestral property in the hands of his sons (*r*). But this decision has been dissented from by the Punjab High Court (*s*). It is submitted that the former case was incorrectly decided.

**295. Sale or mortgage of coparcenary property by father for payment of antecedent debt.**—(1) *Antecedent debt.*—The father of a joint Hindu family may sell or mortgage the joint family property including the sons' interest therein to discharge a debt contracted by him *for his own personal benefit,* and such alienation binds the sons, provided—

(a) the debt was antecedent to the alienation, and

(b) it was not incurred for an immoral purpose (*t*).

The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debt not tainted with immorality. The mere circumstance, however, of a pious obligation does not validate the *alienation.* To validate an alienation so as to bind the son, there

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(*k*) Code of Civil Procedure, 1908, s. 53. *Umed* v. *Goman Bhaiji* (1896) 20 Bom. 385; *Shivram* v. *Sakharam* (1909) 33 Bom. 39, 1 I.C. 459; *Amar Chandra* v. *Sebak Chand* (1907) 34 Cal. 642 [F.B.]; *Sheikh Karoo* v. *Rameshwar Sao* (1921) 6 Pat. L.J. 451, 460-462, 62 I.C. 905, ('23) A.P. 143 [mortgage-decree against father]; *Narayan* v. *Sagunabai* (1925) 49 Bom. 113, 85 I.C. 181, ('25) A.B. 193.

(*l*) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 123, ('39) A.M. 867, 187 I.C. 816.

(*m*) *Sheikh Karoo* v. *Rameshwar Sao* (1921) 6 Pat. L.J. 451, 62 I.C. 905, ('23) A.P. 143.

(*n*) *Sheo Gopal* v. *Firm Ganesh Das Ram Gopal* (1938) Luck. 241, 168 I.C. 268, ('37) A.O. 327.

(*o*) *Raja Ram* v. *Raja Bakhsh Singh* (1938) 13 Luck. 61, 40 Bom. L.R. 277, 172 I.C. 5, ('38) A.P.C. 7; *Umakant* v. *Jitendra* (1949) A.P. 97.

(*p*) *Raja Bakhsh Singh* v. *Ram Swarup* (1944) Luck. 481.

(*q*) *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A.P. 275.

(*r*) *Binda Prasad* v. *Raj Belabh* (1926) 48 All. 245, 91 I.C. 785, ('26) A.A. 220.

(*s*) *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A.L. 857.

(*t*) *Sat Narain* v. *Sri Kishen Das* (1936) 63 I.A. 384, 17 Lah. 644, 38 Bom. L.R. 1129, 164 I.C 6, ('36) A.PC. 277.

must also be an antecedent debt (*u*). Generally, there is no question of legal necessity in such a case (*v*). But where the antecedent debts carried on compound interest and yet the mortgage effected by the father to discharge them provided for compound interest at a high rate with quarterly rests, to that extent, the onus is on the creditor to show that the loan could be obtained only on such terms and if no evidence is adduced the lender has not discharged the burden (*w*).

"Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be *truly independent of and not part of the transaction impeached* (*x*). A borrowing made *on the occasion of* the grant of a mortgage is not an antecedent debt (*y*) [see ills. (1) to (4)].

To constitute a debt an "antecedent" debt it is not necessary that the prior and subsequent creditors should be *different* persons. All that is necessary is that the two transactions must be dissociated in time as well as in fact (*z*). Hence where a previous mortgage deed is renewed in favour of the *same* mortgagee, and the consideration for the subsequent mortgage deed is the amount due on the earlier one, the alienation would be one for an "antecedent" debt (*a*), unless the first debt was a mere device and was incurred merely for the sake of creating an antecedence in time and with a view to support the subsequent deed (*b*). Where a mortgage was executed by the members of a joint family in favour of a stranger, who was a partner in a business with the family, in settlement of accounts of the firm, it was held that the debt being antecedent to the mortgage, the mortgage was binding on the son's share also (*c*). Where a father received certain sums of money on behalf of his minor widowed daughter under a compromise decree and executed an indemnity bond undertaking to indemnify the defendants against all losses resulting from the minor plaintiff raising disputes after attaining majority, charging some immovable property belonging to the joint family, it was held that the sons' share was not liable as there was no antecedence of debt (*d*).

The antecedent debt may be an unascertained sum of money. It may be a debt incurred in connection with a trade started by the father (*e*).

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(*u*) *Brij Narain Raj* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41; *Jogi Das* v. *Ganga Ram* (1917) 21 C.W.N. 957, 42 I.C. 791, ('17) A.PC. 76; *Chet Ram* v. *Ram Singh* (1922) 49 I.A. 228, 44 All. 368, 67 I.C. 569, ('22) A.PC. 247, affmg. (1919) 41 All. 529, 51 I.C. 119, ('19) A.A. 415.

(*v*) *Rama Rao* v. *Hanumantha* (1929) 52 Mad. 856, 121 I.C. 837, ('30) A.M. 326.

(*w*) *Bal Rajaram Tukaram* v. *Maneklal Mansukhbhai* (1932) 56 Bom. 36, 137 I.C. 717, ('32) A.B. 136.

(*x*) (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50, *supra*.

(*y*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 190, 1 I.C. 479 [F.B.]; *Chaturbhuj* v. *Govind Ram* (1923) 45 All. 407, dissenting from *Nathu* v. *Kundan Lal* (1911) 33 All. 242, 8 I.C. 836 [mortgage to pay off pre-emption decree]; *Shaikh Jan* v. *Bikoo* (1928) 7 Pat. 798, 116 I.C. 33, ('29) A.P. 130; *Buta Mal* v. *Gopal Singh* (1930) 11 Lah. 164, 122 I.C. 480, ('30) A.L. 1040.

(*z*) *Ramkaran Thakur* v. *Baldeo Thakur* (1938) 17 Pat. 168, 173 I.C. 292, ('38) A.P. 44; *Bharatpur State* v. *Sri Kishan Das* (1936) 58 All. 804 [F.B.], 162 I.C. 642, ('36) A.A. 327; *Thimmegowda* v. *Dyavamma* ('54) A. Mysore 93 [F.B.]; *Kalappa* v. *Venkatesh* ('62) A. Mys. 260.

(*a*) *Gopal Das* v. *Topan Das* (1935) 16 Lah. 624.

(*b*) *Ram Rekha Singh* v. *Ganga Prasad* (1927) 49 All. 123, 97 I.C. 514, ('26) A.A. 545 [F.B.]; *Badri Prasad* v. *Madan Lal* (1893) 15 All. 75, 80 [F.B.]; *Jai Narain* v. *Mahabir Prasad* (1927) 2 Luck. 226, 95 I.C. 857, ('26) A.O. 470; *Sheo Ram* v. *Durga* (1928) 3 Luck. 700, 108 I.C. 288, ('28) A.O. 378 [F.B.]; *Iqbal Singh* v. *Jasmer Singh* (1934) 15 Lah. 715, 153 I.C. 862, ('34) A.L. 296.

(*c*) *Nachimuthu Goundan* v. *Balasubramania Goundan* (1939) Mad. 422.

(*d*) *Alla Venkataramanna* v. *Palacherla Mangamma & Ors* (1944) Mad. 867.

(*e*) *Bal Rajaram Tukaram* v. *Maneklal Mansukhbhai* (1932) 56 Bom. 36, 137 I.C. 117, ('32) A.B. 136.

(2) *Burden of proving immorality of debt.*—It is for the alienee to prove that the antecedent debt existed or that after due inquiries he, in good faith, believed that it existed (*f*). The burden is then shifted upon the sons to prove that the debt was contracted by the father for an immoral or illegal purpose (*g*) and that the alienee had notice that the debt was so contracted (*h*). It is not necessary for the alienee to show that he made proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for the benefit of the family (*i*).

In *Luhar Amrit Lal* v. *Doshi Jayantilal* (*i*1) the Supreme Court accepted the proposition that the burden lies on the sons who challenge the alienation to prove not merely that the antecedent debt was immoral but also that the alienee had notice that the debt was so contracted. The Supreme Court also pointed out that the decisions of the Privy Council on the subject made no distinction between an alienation made for the payment of the father's antecedent debt and an alienation made in execution of a decree passed against him and in both cases the sons must prove not only the immoral character of the antecedent debt but also the knowledge of the alienee.

The proposition that "where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted" has been accepted by all Courts in India as the correct statement of the law on the point since 1879 when it was enunciated by the Privy Council in *Girdharee Lal* v. *Kantoo Lal* (*i*2) and *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (*i*3). In *Luhar Amrit Lal* v. *Doshi Jayantilal* mentioned above the Supreme Court accepted that proposition.

The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection between the debt and the immorality set up by the sons (*j*).

(3) *Alienation binds sons' interest.*—If the debt is antecedent to the alienation, the alienation is valid in its entirety, and it will pass not only the

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(*f*) *Jamsetji* v. *Kashinath* (1902) 26 Bom. 326, 336-337; *Jamna* v. *Nain Sukh* (1887) 9 All. 493; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 198-199, 1 I.C. 479; *Sahib Singh* v. *Girdhari Lal* (1923) 45 All. 576, 73 I.C. 1024, ('24) A.A. 24, *Subramanya* v. *Sadasiva* (1885) 8 Mad. 75. See Transfer of Property Act, 1887, s. 28; *Venkata Chenchayya* v. *Ramalingam* ('57) A. Andh. Pra. 744; *Venkateswarlu* v. *Venkata Narasimhan* ('57) A. Andh. Pra. 557; *Tolaram* v. *Beenjraj* ('57) A. Raj. 256.

(*g*) *Girdharee Lall* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321; *Suraj Bunsi Koer* v. *Sheo Pershad* (1878) 5 Cal. 148, 6 I.A. 88; *Balwant Singh* v. *Clancey* (1912) 39 I.A. 109, 34 All 296, 14 I.C. 629, affmg. 28 All. 508; *Joharmal* v. *Eknath* (1900) 24 Bom. 343; *Natasayyan* v. *Ponnusami* (1893) 16 Mad. 99; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636.

(*h*) *Suraj Bunsi Koer* v. *Sheo Persad*, 6 I.A. 88, 106, 5 Cal. 148, 171; *Darsu Pandey* v. *Bikarmajit Lal*, 3 All. 125. (The first part of the decision that the recital in the sale deed is enough to prove the antecedent debt and other necessities is not correct; but the second part relating to immorality and notice is correct); *Hanuman Singh* v. *Nanak Chand* 6 All. 193, 199; *Lal Singh* v. *Deo Narain Singh* 8 All. 279, 282.

(*i*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104; *Bapu Singh* v. *Bihari Lal* (1908) 30 All. 156; *Tulshi Ram* v. *Bishnath Prasad* (1928) 50 All. 1, 105 I.C. 885, ('27) A.A. 735.

(*i*1) (1960) 3 S.C.R. 842.

(*i*2) (1874) 1 I.A. 321, 14 Beng. L.R. 187.

(*i*3) (1880) 5 Cal. 148, 6 I.A. 88.

(*j*) *Sri Narain* v. *Lala Raghubans* (1912) 17 C.W.N. 124, 17 I.C. 729 [P.C.]; *Chintamanrao* v. *Kashinath* (1890) 14 Bom. 320; *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949; *Sita Ram* v. *Zalim Sing* (1886) 8 All. 231; *Balu Singh* v. *Behari Lal* (1908) 30 All. 156; *Tulshi Ram* v. *Bishnath Prasad* (1928) 50 All 1, 105 I.C. 885, ('27) A.A. 735; *Rallia Ram* v. *Balmokand* (1927) 8 Lah. 117, 101 I.C. 830, ('27) A.L. 60; *Ulfat Rai* v. *Tej Narain* (1927) 8 Lah. 632, 106 I.C. 176, ('28) A.L. 83; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636; *Shankar Rao* v. *Kanta Prasad* I.L.R. (1946) Nagpur 844; *Udmiram* v. *Balramdas* ('56) A.N. 76. Also see *Sydulu* v. *Venkateshwarlu* ('65) A.A.P. 318.

father's but also the son's interest in the property. Thus if the alienation is a *sale* of joint family property, the whole property will pass to the purchaser. Again if the alienation is a *mortgage,* the mortgagee may obtain a *mortgage decree* against the father alone for the sale of the whole of the mortgaged property including the sons' interest therein, and the sale in execution of the decree will bind the interest both of the father and the sons in the property.

(4) *Alienation after partition.*—The father has no power to alienate his son's share after a partition between him and the son, although the alienation may be in respect of a debt which was contracted before partition (*k*).

(5) *Alienation after attachment of son's share.*—The father has no power to alienate his son's share after it has been attached in execution of a decree. The decree may be one against the son in respect of a personal debt of the *son,* or it may be one against the father, or both against the father and the son, in respect of a personal debt of the *father* (*l*).

(6) Whether a sale or mortgage executed by the father passes the whole family property or only the father's interest therein depends on the terms of the deed (*m*).

(7) If the alienation be one for legal necessity, it is not necessary, to bind the sons' interest, to have recourse to the doctrine of antecedent debt (*n*).

(8) The expression "sons" in this section includes grandsons and great-grandsons. The expression "father" includes grandfather and great-grandfather. See § 291. Reference may also be made to Notes under sec. 16 of the Hindu Marriage Act, 1955.

*Illustrations*

(1) The father of a joint family lost heavily in speculation in gold and silver and to pay off the losses borrowed moneys on the mortgage of the joint family property. The mortgagee obtained a decree on the mortgage and sought to execute it by sale of the mortgaged property. The sons and wife of the mortgagor then sued for a declaration that the decree was not binding since the debt though antecedent was immoral. It was held that the antecedent debt was immoral but as the plaintiffs had failed to prove that the mortgagee had notice of the immoral character of the debt they were not entitled to succeed: *Luhar Amrit Lal* v. *Doshi Jayantilal* (1960) 3 S.C.R. 842: ('60) A.S.C. 964.

(2) The father of a joint family borrows Rs. 2,000 from *C* for his own use. Subsequently he executes a mortgage of the joint family property to *C* to secure the debt. It is not proved that the money borrowed was used by the father for immoral purposes. The mortgage binds not only the father's, but also his sons' interest in the property. Here the debt is *antecedent of the mortgage* in fact as well as in time (*o*).

(3) The father of a joint family governed by the Mitakshara law as applied in Uttar Pradesh, mortgages the joint family property in 1883 to secure an advance made to him *at the time of the execution of the mortgage.* In 1910 the mortgagee sues the father and his son for a sale of the mortgaged property. It is proved that the money was borrowed by the father for *his own personal benefit,* and not for any family necessity. Here the loan having been made at the time of the mortgage, there is no debt *antecedent* to the *mortgage.* The mortgage is therefore wholly invalid. It does not bind even the father's

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(*k*) *Rathna* v. *Aiyanachariar* (1908) 18 Mad. L.J. 599; *Krishnasami* v. *Ramasami* (1899) 22 Mad. 519, 521.

(*l*) *Subraya* v. *Nagappa* (1909) 33 Bom. 264, 2 I.C. 268.

(*m*) *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Simbhunath* v. *Golap Singh* (1887) 14 Cal. 572, 14 I.A. 77; *Pettachi Chettiar* v. *Sangili Vira* (1887) 10 Mad. 241, 14 I.A. 84; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 15 I.A. 99.

(*n*) *Lal Bahadur* v. *Ambika Prasad* (1925) 52 I.A. 443, 47 All. 795, 91 I.C. 471, ('25) A.PC. 264.

(*o*) *Madhusudan* v. *Bhagwan* (1929) 53 Bom. 444, 118 I.C. 788, ('29) A.B. 213.

share in the property. Nor is the mortgagee entitled even to a personal decree against the father or the sons, the claim for such decree being barred by limitation: *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280, ('17) A.PC 61.

(4) *S* and his sons are members of a joint Hindu family governed by the Mitakshara law as interpreted in Uttar Pradesh. In 1905 *S* mortgages the joint family property to *A*. In 1907 *S* executes a second mortgage of the same property to *B*. In 1908 *S* executes a mortgage of the property to *C* to pay off the earlier mortgages to *A* and *B*. *C* then sues *S* and his sons on the mortgage of 1908. It is not proved that the mortgages to *A* and *B* were executed by *S* for family necessity. Here the mortgage to *C* having been made to pay off the antecedent debts due to *A* and *B*, it binds the whole property including the sons' interest therein and *C* is entitled to a decree for sale of the whole property. *Brij Narain Rai* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50, *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 78 I.C. 619, ('24) A.A. 465; *Bhim Singh* v. *Ram Singh* (1924) 46 All. 301, 84 I.C. 13, ('24) A.A. 309; *Gauri Shanker* v. *Sheonandan* (1924) 46 All. 384, 78 I.C. 911, ('24) A.A. 543; *Kanhaiya Lal* v. *Niranjan Lal* (1925) 47 All. 351, 86 I.C. 98, ('25) A.A. 367; *Kuldip* v. *Ram Bujhawan* (1924) 3 Pat. 425, 83 I.C. 385, ('24) A.P. 454. [Note.—It is unnecessary in such a case to inquire whether the mortgages to *A* and *B* were executed to pay off a debt antecedent to either of the two mortgages. The *transaction impeached* is the mortgage to *C* and *that* mortgage was executed to pay off *the antecedent debts secured by the mortgages to A and B*.]

(5) The father of a joint family governed by the Mitakshara law executed a usufructuary mortgage of the joint family property to secure an advance *then* made to him for his own personal benefit. He then sold the equity of redemption to the mortgagee, the mortgage, being discharged out of the price and the balance paid to him. After the father's death, but during the lifetime of his sons, his grandson sued the purchaser to recover the property from him. It was held by the Judicial Committee that there being no debt *antecedent* to the *first alienation*, namely the mortgage, the mortgage and the sale were both invalid: *Chet Ram* v. *Ram Singh* (1922) 49 I.A. 228, 44 All. 368, 67 I.C. 569, ('22) A.PC. 247. This decision is clearly in conflict with the later decision in *Brij Narain's* case set forth in ill. (4) above, and it can no longer be regarded as good law. The test now laid down in *Brij Narain's* case [see ill. (4) above] is whether the *transaction impeached*, namely, the sale of the equity of redemption, was entered into to pay off an antecedent debt. There is no doubt that it was, the antecedent debt being the debt secured by the *mortgage*. If the case arose again, the sale would be treated as valid, as it was made to pay off an *antecedent* mortgage. Whether the mortgage itself was executed to pay off an antecedent debt is not material (*p*).

(6) The father of a joint family governed by the Mitakshara law as administered in Uttar Pradesh executed a deed of mortgage in 1900 of joint family property. In 1906 he sold the property for Rs. 13,000 of which Rs. 1,400 was paid to the mortgagee, the rest of the mortgage debt having been discharged long prior to 1906. The balance of the purchase money was applied by the father to his own purposes. It was held by the Judiciai Committee that the sale could not be supported as having been made to discharge an antecedent debt, and they upheld the decree of the Allahabad High Court setting aside the sale, upon the sons, who were the plaintiffs in the suit, paying Rs. 1,400 to the purchaser: *Jawahir Singh* v. *Udai Prakash* (1926) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16.

*Brij Narain Rai* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.—The leading case on the subject is *Brij Narain's* case. In that case the Judicial Committee, after observing that *Sahu Ram's* case (*q*) must not be taken to decide more than what was necessary for the judgment, namely, that a debt created by the mortgage itself is not an antecedent debt, expressed their dissent from several *dicta* in that case, and laid down the following propositions:—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity [see § 242].

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purposes, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt [see § 294].

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate [see § 295].

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(*p*) It is now so held in *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 296-297, 78 I.C. 619, ('24) A.A. 465.

(*q*) (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of, and not part of, the transaction impeached [see § 295].

(5) There is no rule that this result is affected by the question whether the father who contracted the debt or burdened the estate, is alive or dead.

The law as stated above by the Privy Council has been expressly approved by the Supreme Court in the undermentioned cases (*r*).

*Antecedent.*—In *Sahu Ram's* case their Lordships of the Privy Council speak of the doctrine of antecedent debt as having "arisen from the necessity of protecting the rights of third persons." In *Brij Narain's* case the doctrine is described as a part of the doctrine of pious obligation. The latter view must be taken to supersede the former view.

There was at one time a conflict of opinion as to the meaning of "antecedent debt." According to the Allahabad and Madras decisions, an antecedent debt meant a debt which existed *prior* to the date of sale or mortgage; money received *at the time of sale or mortgage* was not regarded as an antecedent debt (*s*). According to the Calcutta and Bombay rulings, a debt, though not existing *prior* to the date of *sale or mortgage*, was treated as an antecedent debt, if it was put into litigation in a subsequent *suit;* that is to say, if the father borrowed moneys on a mortgage of joint family property, and the sons subsequently sued to set aside the mortgage, the mortgage was upheld on the ground that the debt secured by it was antecedent to the suit (*t*). This was too fantastic a view to be taken of an antecedent debt. The earlier cases were reviewed by the Privy Council in *Brij Narain Rai* v. *Mangla Prasad* [see ill. (4)]. The test there laid down was whether the *transaction impeached* was entered into to pay off an antecedent debt, that is, a debt antecedent to the transaction [see the 4th proposition above.]

If the father of a joint Hindu family borrows moneys in 1918 on a *promissory note* for his own personal benefit, and, being unable to pay the debt, *mortgages* the joint family property in 1920, it is clearly a case of a debt *antecedent* to the *mortgage* and the mortgage binds his sons. But if no debt was contracted by the father antecedent to the mortgage, and a loan was obtained by him for the first time *at the time* when the mortgage was executed by him, the loan could not be regarded as an antecedent debt.

Suppose now that the father executes a mortgage to *A* of joint family property to secure an advance of Rs. 1,500 *then* made to him. [Here the mortgage is invalid, there being no antecedent debt]. He then borrows Rs. 2,000 from *B* and executes a mortgage to *B* to pay off the mortgage to *A*. Is the mortgage to *B* binding on the sons? Prior to the decision in *Brij Narain Rai's* case there was a conflict of opinion whether the mortgage to *B* could be treated as one for payment of an *antecedent* debt. It was held by the High Courts of Allahabad (*u*) and Lahore (*v*), that the mortgage to *A* not having been made to pay off an antecedent debt, the subsequent mortgage to *B* also which was made to pay off the mortgage to *A* could not be treated as one for payment of an antecedent debt; in other words, it was held that for debt to be an antecedent debt, it must be antecedent to the *first* alienation, namely, the mortgage to *A*, and not merely antecedent to the *alienation impeached*, namely, the mortgage to *B*. On the other hand it was held by the High Courts of Madras (*w*) and Patna (*x*), that the mortgage to *B* was binding on the sons as it was made to pay off an antecedent debt, being the debt secured by the mortgage to *A*. In *Brij Narain Rai's* case the Privy Council held that the view taken by the Madras High Court was correct.

The antecedent must be *real*. The antecedent would be unreal if the father borrowed money on a promissory note with the object *when he borrowed* that it should form part of a mortgage to be subsequently executed by him (*y*). Where no mortgage was intended

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(*r*) *Panna Lal* v. *Naraini* ('52) A.S.C. 170; *Virdhachalam Pillai* v. *Chaldean Bank* ('64) A.S.C. 1425.

(*s*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 190, 1 I.C. 479 [mortgage] [F.B.]; *Ram Dayal* v. *Ajudhia Prasad* (1906) 28 All. 328 [sale]; *Venkataramanayya* v. *Venkataramana* (1906) 29 Mad. 200 [mortgage] [F.B.].

(*t*) *Luchmun Dass* v. *Giridhar* (1880) 5 Cal. 855 [F.B.]; *Khalilul* v. *Gobind* (1893) 20 Cal. 328, 346; *Kishun* v. *Tipan Pershad* (1907) 34 Cal. 735, 747; *Chintamanrao* v. *Kashinath* (1890) 14 Bom. 320, 324-325; *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949.

(*u*) *Brij Narain* v. *Mangla* (1919) 41 All. 235, 35 I.C. 101, ('19) A.A. 324; *Ram Sarup* v. *Bharat Singh* (1921) 43 All. 703, 64 I.C. 763, ('21) A.A. 113.

(*v*) *Lakhu Mal* v. *Bishen Das* (1922) 3 Lah. 74, 66 I.C. 408, ('22) A.L. 291.

(*w*) *Armugham* v. *Muthu* (1919) 42 Mad. 711, 52 I.C. 525, ('19) A.M. 75 [F.B.].

(*x*) *Mathura* v. *Rajkumar* (1921) 6 Pat. L.J. 526, 62 I.C. 132, ('21) A.P. 447 [F.B.]; *Hari Prasad* v. *Sourendra* (1922) 1 Pat. 506, 66 I.C. 945, ('22) A.P. 450.

(*y*) (1921) 43 All 703, 64 I.C. 763, ('21) A.A. 113, *supra*.

at the time of advance of the loan but there was an agreement to execute a mortgage if and when called upon and a mortgage was subsequently executed, it was held that the mortgage was supported by antecedent debt (*z*).

In a suit on a mortgage bond dated 16-1-1922 for Rs. 3,000 executed by *B* and his 3 nephews for purpose of paying off—

(1) Rs. 750 the balance of consideration due under a sale deed dated 30-7-1919 obtained by *B* and his nephew *P* (brother of the 3 nephews above mentioned),

(2) Rs. 1,500 balance of consideration dated 19-11-1921 in favour of the aforesaid 3 nephews of *B* and a minor son of *P* and a son of *B*, the suit was contested by the sons of the 3 nephews (defendants 3 to 7) and a grandson of *B* (defendant 8) (*B* having died) on the ground that there was no legal necessity. It was held

(1) that there was no real antecedency between the suit mortgage bond and the sale-deed of 1921 but that the balance due under the sale-deed of 1919 was an antecedent debt.

(2) even as to the latter item the mortgage was not valid against the defendants (3 to 7) as their father executed it not for their own antecedent debt but for that of their uncle *B* and brother *P*.

(3) that the grandson of *B* (defendant 8) was not liable as the proportion for which *B* is liable on the suit mortgage bond could not be determined (*a*).

There must be a real debt due by the father. Therefore, where the only prior debt was due by a third party and the father executed as surety a hypothecation bond in favour of the creditor, it was held not to be binding on the son's share (*b*).

Where a father at the time of taking a mortgage agrees to pay off a prior mortgage the obligation so undertaken is an 'antecedent debt' which will support a mortgage of joint family property subsequently executed by the father in favour of the prior mortgagee in fulfilment of the obligation (*c*).

It has been held that where the father mortgages joint family property to pay off a prior mortgage on his *separate* property it cannot be said that the mortgage was one for the payment of an antecedent debt (*d*). In this case the separate property consisted of property which was inherited by the father from his cousin and that property was mortgaged by the cousin during his lifetime.

*Time-barred debt.*—The antecedent debt may be a time-barred debt. See § 299(2) below.

What is a debt:—

*Unliquidated damages.*—"Debt" ordinarily means a liquidated or ascertained sum of money as distinguished from unliquidated damages for breach of contract or for a tort. If a decree has been obtained against the father for damages for breach of contract or for a tort, the judgment debt constitutes a debt within the meaning of this section. But what if the amount of damages is not fixed by a decree or otherwise? Is the *liability* for damages a debt within this section? The question arose in a case before the Judicial Committee, but it was not decided (*e*). That was a case of a breach of contract by the father. It would seem on principle that a *liability* for damages constitutes a debt within this section; if the liability is antecedent to the alienation, the alienation will be binding on the sons though the amount of damages is fixed on the very day on which the alienation is made.

*Debt due but not payable.*—A debt may be an antecedent debt though the due date of payment has not yet arrived. Hence an alienation even before the due date of payment would be an alienation for an antecedent debt (*f*).

*Price payable under a pre-emption decree.*—A pre-emption decree does not carry any *order* for payment. It gives an *option* to the pre-emptor to obtain the property on making payment. There being thus no *obligation* to pay, the purchase money fixed by the decree does not constitute a debt (*g*). See Code of Civil Procedure, 1908, O. 20, r. 14.

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(*z*) *Venkataramaswami* v. *Imperial Bank of India* (1939) Mad. 7 [F.B.]

(*a*) *Mahabir* v. *Sukh Ram* (1942) All. 498, 201 I.C. 415, ('42) A.A. 361.

(*b*) *Ganga Saran* v. *Ganeshi Lal* ('39) A.A. 225; *Kesar Chand* v. *Uttam Chand* (1945) 72 I.A. 165.

(*c*) *Chatar Sen* v. *Raja Ram* (1938) All. 58, 173 I.C. 916, ('38) A.A. 44.

(*d*) *Nand Lal* v. *Umrai* (1926) 1 Luck. 360, 93 I.C. 655, ('26) A.O. 321.

(*e*) *Mian Karim Bakhsh* v. *Dargah Pir* (1931) 35 C.W.N. 1221, 133 I.C. 728, ('31) A.PC. 243.

(*f*) *Damodaram* v. *Bansilal* (1928) 51 Mad. 711, 111 I.C. 297, ('28) A.M. 566.

(*g*) *Kishen Sahai* v. *Raghunath* (1929) 51 All. 473, 116 I.C. 488, ('29) A.A. 139.

The father alone can alienate the son's share. In the case of a joint family, the privilege of alienating the whole of the joint family property for payment of an antecedent debt is the privilege only of the father, the grandfather and the great-grandfather. No other person has any such privilege. Hence if a joint family consists of two brothers *A* and *B* of whom *B* is a minor, *A* may alienate, if he so desires, his own share in the joint family property to pay off an antecedent debt of his father *F*, but he has no power to alienate the share of his brother *B*, in the property though *F* is also the father of *B* (*h*). Similarly if a joint family consists of *A* and his brother's son *B*, *B* being a minor, *A* may alienate his own share in joint family property to pay an antecedent debt of his father, *G*, but he has no power to alienate *B*'s share to discharge that debt though *G* is the grand father of *B* (*i*).

*Specific Performance.*—In a recent case the High Court of Bombay held that a mere agreement to alienate any joint family property cannot be enforced against the son on the ground that the agreement was effected by the father for a consideration which was formed by his own antecedent debts (*i*1).

**296. Alienation by father neither for legal necessity nor for antecedent debt—Son's liability.**—(1) It is clear from what has been stated above that an alienation by the father of joint family property neither for a legal necessity nor for the payment of an antecedent debt does not bind the son's interest in the property. In Bengal and Uttar Pradesh it does not bind even the father's interest in the property [§§ 268, 269]. But though the alienation *as such* does not bind the son's interest, the son being under a pious obligation to pay his father's debt *not tainted with immorality*, and the whole of the ancestral estate being liable for the payment of such debts, the alienee is entitled to realise *the debt*, that is, the money paid by the alienee to the father in consideration of the alienation, out of the entire ancestral estate (*j*).

By far the largest number of cases in which the above principle has been applied are cases of *mortgage* by the father of joint family property belonging to himself and his sons, where the mortgage is neither for legal necessity nor for payment of an antecedent debt. In such a case the son himself may sue for a declaration that the mortgage is not binding on his share and if he proves that the debt was contracted for illegal or immoral purposes to the knowledge of the lender he will be granted a declaration that the mortgage and the debt are not binding on him (*k*). In all these cases the mortgage *qua* mortgage cannot be enforced against the sons' interest in the mortgaged property, and *no mortgage decree* for the sale of that interest can be passed against the son. But the son is nevertheless under a pious obligation to pay the mortgage debt *qua* debt if it was not contracted for an illegal or immoral purpose. The son may therefore be successfully sued for the father's *debt*, and the decree passed in such suit may be enforced in execution by sale of

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(*h*) *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 78 I.C. 619, ('24) A.A. 465.

(*i*) *Rameshra* v. *Kalpu Rai* (1924) 46 All. 264, 84 I.C. 84, ('24) A.A. 538.

(*i*1) *Jaiprakash* v. *Lilabai* ('63) A.B. 100.

(*j*) *Sami Ayyangar* v. *Ponnammal* (1898) 21 Mad. 28; *Venkataramanaya* v. *Venkataramana* (1906) 29 Mad. 200 [F.B.]; *Kandasami* v. *Kuppu* (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479; *Ramasami* v. *Ulaganatha* (1899) 22 Mad. 49 [F.B.]; *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F.B.]; *Luchman Dass* v. *Giridhur* (1880) 5 Cal. 855 [F.B.]; *Gunga Prosad* v. *Ajudhia Pershad* (1882) 8 Cal. 131; *Khalilul Rahman* v. *Gobind Pershad* (1893) 20 Cal. 328; *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal. 735; *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) I.C. 279 [F.B.]; *Jamna* v. *Nain Sukh* (1887) 9 All 493; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 194, 208, 1 I.C. 479 [F.B.]; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909; *Narsingh* v. *Lalji* (1901) 23 All. 206; *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949; *Chintamanrao* v. *Kashinath* (1890) 14 Bom. 320; *Polavarapu Lingayya & Ors.* v. *Vupputuri Punnayya & Ors.* (1942) Mad. 502, 198 I.C. 588, ('42) A.M. 183, *Contra Hiralal* v. *Jagdish* ('59) A. Raj. 254, 8 Raj. 850.

(*k*) *Krishnaji Lakshman* v. *Vithal* (1888) 12 Bom. 625.

the entire ancestral estate including the sons' interest therein (*l*). Cases under this head may be divided into three classes, namely—

(i) Where the suit to enforce the mortgage is brought both against the father and the sons.

(ii) Where such suit is brought against the father alone.

(iii) Where such suit is brought against the sons after the father's death.

(i) In dealing with these cases it must be remembered that according to the law as administered in Madras and Bombay, a coparcener can mortgage his undivided interest in coparcenary property, and the mortgage binds his interest in the property [§ 268]. In Bengal and Uttar Pradesh no coparcener can mortgage even his own interest in the coparcenary property *without the consent* of the other coparceners, with the result that the mortgage does not bind even the mortgagor's share in the property [§ 269]. Where a suit, therefore, is brought against the father and sons on a mortgage executed by the father neither for legal necessity nor for payment of an antecedent debt, the mortgagor in Madras is entitled to (1) a *mortgage decree* against the father for the sale of his interest, and (2) *if* the net proceeds of the sale of the father's interest are found to be insufficient to pay the amount due to the mortgagee, also to a *decree against the father personally* under O. 34, r. 6, of the Code of Civil Procedure, 1908, and a decree for the sale of the entire joint family property including the sons' interest therein (*m*). In Bombay, the mortgage decree directs a sale in execution of the entire joint family property including the son's interest therein instead of directing a sale piecemeal as in Madras (*n*). In Uttar Pradesh, the mortgage does not bind even the father's interest in the property. Hence no *mortgage decree* can be passed for the sale even of the father's interest. The only decree that can be passed is a money decree against the father and a decree for a sale in execution of the entire joint family property including the sons' interest therein (*o*). The result, it seems, should be the same in Bengal, but it has there been held that the mortgagee is entitled to a *mortgage decree* against the father for the sale of his interest in the property, and also to a decree, *if* the net proceeds of the sale of the father's interest be insufficient to pay the amount due to the mortgagee under the decree, for the sale of the sons' interest in the entire joint family property so far as may be necessary to satisfy the amount due (*p*). But where the mortgagee asks for a money decree against the father only and not against the son or where the suit was dismissed against the sons (*q*), the decree cannot be

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(*l*) *Kandasami* v. *Kuppu* (1920) 43 Mad. 121, 55 I.C. 320, ('20) A.M. 479; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 194, 1 I.C. 479 [F.B.].

(*m*) (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479, *supra*; *Sami Ayyangar* v. *Ponnammal* (1898) 21 Mad. 28; *Venkataramanaya* v. *Venkataramana* (1906) 29 Mad. 200 [F.B.].

(*n*) *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949; *Chintamanrav* v. *Kashinath* (1890) 14 Bom. 320.

(*o*) *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 208, 1 I.C. 479 [F.B.]; *Jamna* v. *Nain Sukh* (1887) 9 All. 493; *Jai Narain* v. *Mahabir Prasad* (1927) 2 Luck. 226, 236, 95 I.C. 857, ('26) A.O. 470; *P. A. Maha Nirvani* v. *Bindeshri Prasad* (1952) 1 All. 109, ('52) A.A. 337.

(*p*) *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal. 735; *Luchmun Dass* v. *Giridhur* (1880) 5 Cal. 855 [F.B.]; *Gunga Prosad* v. *Ajudhia Pershad* (1882) 8 Cal. 131; *Khalilul Rahman* v. *Gobind Persad* (1893) 20 Cal. 328; *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279 [F.B.].

(*q*) *Kesho Ram* v. *Musammat Ram Dulari* (1942) 17 Luck. 319, 196 I.C. 680, ('42) A.O. 9; *P. A. Maha Nirvani* v. *Bindeshri Prasad* (1952) 1 All. 109, ('52) A.A. 337.

executed against the son's interest in the joint family property (*r*). See note below, "Consideration of Calcutta cases referred to in the section."

(ii) The next case is where the mortgagee sues the father alone. In such a case the mortgagee may, at his option, obtain a simple money *decree* against the father for the whole of the mortgage debt, and have the entire joint family property, including the sons' interest therein, sold in execution of the decree (*s*). The sons, *though* not *parties to the suit*, are bound by the *sale* by reason of their pious duty to pay their father's debt and they cannot recover their share of the property unless they prove that the debt was contracted by the father for an immoral purpose [§ 294].

Or the mortgagee may, at his option, obtain a *mortgage decree* for the sale of the mortgaged property. In this case also, if the entire mortgaged property is *sold* in execution of the decree, the sons, *though not parties to the suit*, are not entitled to recover their share of the property unless the debt was contracted by the father for an immoral purpose [see the cases cited in § 294B(2)]. This rule has not been altered by s. 85 of the Transfer of Property Act, 1882, now replaced by O. 34, r. 1, of the Code of Civil Procedure, 1908. The effect of the decisions since the passing of the Transfer of Property Act is that where ancestral property belonging to a joint-family *has been* sold in execution of a decree for sale on a mortgage executed by the father for his sole benefit, the son cannot maintain a suit for redemption of their interest in the property sold solely upon the ground that they had not been made parties to the suit of the mortgagee, nor is their position improved by the fact that the property at the execution sale was purchased by the mortgagee. Their suit must be based upon some ground which would free them from liability as sons in a joint Hindu family to pay their father's debts, namely, the non-existence of the debt or the immoral character of the debt (*t*).

As to the sons' remedy before suit, see § 294A(2).

(iii) The last case is where the suit is brought by the mortgagee against the sons after the father's death. In this case the mortgagee may obtain a money decree against the sons which may be enforced by a sale of the entire joint family property, unless the suit against the sons is barred by limitation [§ 293(2)]. He is also entitled, in Bombay (*u*) and Madras, to a mortgage decree limited to the father's interest in the mortgaged property, provided that the suit as a mortgage suit is not barred by limitation. In Uttar Pradesh no mortgage decree can be passed against the father's interest whether the father be alive or dead; it follows that if the suit against the sons is barred by

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(*r*) *Jainarayan Mulchand* v. *Sonaji* (1938) Nag. 136, 174 I.C. 621, ('38) A.N. 24; *Bijai Raj Singh* v. *Ram Padarath* (1936) 11 Luck. 523, 58 I.C. 490, ('36) A.O. 139.

(*s*) Is the mortgagee entitled to have the *mortgaged* property sold? See Code of Civil Procedure, 1908, O. 34, r. 14.

(*t*) *Debi Singh* v. *Jia Ram* (1903) 25 All. 214 [F.B.]; *Lal Singh* v. *Pulandar Singh* (1906) 28 All. 182; *Balwant Singh* v. *Aman Singh* (1911) 33 All. 7, 7 I.C. 112; *Kehri Singh* v. *Chunni Lal* (1911) 33 All. 436, 9 I.C. 476; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222; *Palani* v. *Bangayya* (1899) 22 Mad. 207; *Ramkrishna* v. *Vinayak* (1910) 34 Bom. 354, 5 I.C. 867; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247. In *Bhawani Prasad* v. *Kallu* (1895) 17 All. 537 [F.B.], the sons' suit was brought before sale. See also *Kanhaiya Lal* v. *Raj Bahadur* (1902) 24 All. 211; *Lalla Suraj* v. *Gulab Chand* (1901) 28 Cal. 517.

(*u*) See *Chintamanrao* v. *Kashinath* (1890) 14 Bom. 320.

limitation, the mortgagee has no remedy at all in respect of his claim (*v*). There is no Calcutta decision bearing on the question whether a mortgage decree can be passed against the father's interest *after his death* (*w*).

(2) *Where the debt is immoral.*—If the debt contracted by the father is tainted with immorality, the mortgagee is not entitled to proceed against the son's interest at all. All that he is entitled to, in Bombay and Madras, is a mortgage decree limited to the father's interest in the mortgaged property. So too, it seems, in Bengal. In Uttar Pradesh, a mortgage by the father of his own undivided interest without the consent of the sons does not bind even the father's interest in the property, and the mortgagee is not entitled to a mortgage decree limited even to that interest. But he may obtain a money decree against the father which he may execute by a sale of the father's interest in the joint family estate (*x*). Also see § 290 (2).

*Consideration of Calcutta cases referred to in the section.*—The principle that a *sale* of mortgaged property in execution of a mortgage decree passed against the father alone on a mortgage executed by him neither for legal necessity nor for an antecedent debt, passes not only the father's, but the sons' interest in the property [sub-§ (1) (ii)], was established by the rulings of the Privy Council in *Mst. Nanomi* v. *Modhun* (*y*) decided in 1886 and *Bhagbut* v. *Girja Koer* (*z*), decided in 1888. The principle that no *mortgage decree* can be passed against the sons in a suit on such a mortgage was first laid down by a Full Bench of the Calcutta High Court in 1880 in the case of *Luchmun Dass* v. *Giridhar* (*a*). In two later cases (*b*), it was held by the Court of Calcutta that since a *sale* in execution of a mortgage decree against the father alone passes not only the father's, but the sons' interest in the mortgaged property as decided in the two Privy Council cases, the Court could also pass *a mortgage decree* against the sons, and that the Full Bench ruling in *Luchmun Dass's* case (*c*) was no longer good law since the Privy Council decisions. In both these cases the Court overlooked the fact that there was a distinction between the position of the son where the mortgage created by the father was *sought to be enforced* against his interest in the property, and his position *after the sale* in execution of the decree against the father; that distinction, whether it was logical or not, has long since been recognised. In two cases (*d*), again it was held by that Court that the aforesaid Full Bench ruling was superseded by s. 85 of the Transfer of Property Act, 1882, now O. 34, r. 1, of the Code of Civil Procedure, 1908. All these decisions were subsequently overruled by a Full Bench of the same High Court in *Brijnandan* v. *Bidya Prasad* (*e*), and it was held that there was nothing either in the above mentioned decisions of the Privy Council or in the provisions of s. 85 of the Transfer of Property Act to justify the view that a mortgage created by a father was operative as such against the sons, and that the decision in the Full Bench case that no mortgage decree can be passed against the sons, but only a money decree, was still good law. It was also held that as the charge could not be enforceable against the sons, article 132 of the Schedule to the Indian Limitation Act, 1908, had no application and that article 120 governed the case.

It has been stated above that though according to the Mitakshara law as administered in Bengal, the father cannot alienate his own undivided interest in the coparcenary property without the consent of his sons, the Calcutta High Court has held that the mortgagee is entitled to a mortgage decree against the father. The leading case on the subject is *Luchmun Dass* v. *Giridhur* (*f*) decided by a Full Bench in 1880. The facts of the case are stated in *Khalilul Rahman* v. *Gobind Pershad* (1893) 20 Cal. 328, 342-348, and the decree passed by the High Court after the Full Bench had returned the answers to the question

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(*v*) See *Chandradeo Singh* v. *Mata Prasad* (1909) 31 All. 176, 179, 1 I.C. 479 [F.B.].

(*w*) See *Madho Parshad* v. *Mehrban Singh* (1891) 18 Cal. 157, 17 I.A. 194, which was a case of sale.

(*x*) *Shiva Nath* v. *Tulshi Ram* (1926) 48 All. 1, 89 I.C. 480, ('25) A.A. 801. But see Code of Civil Procedure, 1908, O. 34, r. 14.

(*y*) (1886) 13 Cal. 21, 36, 13 I.A. 1.

(*z*) (1888) 15 Cal. 717, 721, 724. 15 I.A. 99.

(*a*) (1880) 5 Cal. 855.

(*b*) *Maheshwar* v. *Kishun* (1907) 34 Cal. 184; *Sheo Narain* v. *Mokshoda Das* (1913) 17 C.W.N. 1022, 19 I.C. 878.

(*c*) See *Jamna* v. *Nain Sukh* (1887) 9 All. 493, 494; *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal. 735, 745-746.

(*d*) *Biswanath* v. *Jagdip* (1913) 40 Cal. 342, 17 I.C. 577, (1913) 17 C.W.N. 1022, 19 I.C. 878, *supra*.

(*e*) (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279 [F.B.].

(*f*) (1880) 5 Cal. 855.

submitted to them is set forth on p. 354 of the report. In *Luchmun Dass's* case, the lower Court had passed a *mortgage decree* for the sale of the father's interest but it wholly dismissed the mortgagee's suit against the sons. In so doing the Court purported to follow an earlier ruling of the same High Court (*g*). The question before the Full Bench was as to the extent of the liability of the *sons* in respect of the mortgage debt. There was no question as to whether a mortgage decree could be passed against the *father*. On the question before them the Full Bench held that no mortgage decree could be passed against the sons, but the sons being under a pious obligation to pay the father's debt, their share was liable to be sold if the net sale proceeds of the father's interest were not sufficient to satisfy the mortgagee's claim in full.

**297. Where purchase money applied in part only in payment of antecedent debt.**—It sometimes happens that joint family property is sold by the father of a joint family for the payment of an antecedent debt, but the whole of the price is not proved to have been *applied* in payment of such debt, and the sale is challenged by the sons on that ground. In such a case, if the sale was necessary to discharge the debt, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied in payment of the debt does not invalidate the sale, the reason being that the purchaser is not bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied in payment of the debt is considerable or small (*h*). See §§ 189, 245.

The above principles have been laid down by the Judicial Committee in cases of sales by the manager of joint family property for legal necessity, but the same principles apply to cases of sales by the father for the payment of an antecedent debt.

In an earlier Privy Council case where one property was sold for Rs. 2,000, and Rs. 338 was not proved to have been applied in payment of the father's debts, and another property was subsequently sold for Rs. 2,000 and Rs. 1,847 was not proved to have been applied in payment of the debts, their Lordships set aside both the sales conditionally on payment by the sons, who were the plaintiffs in the suit, to the purchaser of the sums actually applied in payment of the debts (*i*). It is conceived that if such a case arose again, both the sales would be upheld if the conditions stated in the section were satisfied. See notes to §§ 189 and 245.

**298. Immoral (avyavaharika) debt.**—Sons, grandsons and great-grandsons are bound to pay all debts contracted by the father, grandfather or great-grandfather except the following debts (*j*):—

I: (1) debts for spirituous liquors;

(2) debts due for losses at play;

(3) debts due for promises made without consideration;

A promissory note for a time-barred debt is not a promise without consideration (*k*).

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(*g*) *Bheknarain* v. *Januk* (1877) 2 Cal. 438.

(*h*) *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37 [case of legal necessity] *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121; *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105 [case of legal necessity]; *Gokha Ram* v. *Sham Lal* (1922) 3 Lah. 426, 77 I.C. 174, ('23) A.L. 268 [antecedent debt]; *Buta Mal* v. *Gopal Singh* (1930) 11 Lah. 164, 122 I.C. 480, ('30) A.L. 1040. The decision in *Sanmukh* v. *Jagarnath* (1924) 46 All. 531, 83 I.C. 83, ('24) A.A. 708 [antecedent debt], is no longer good law; see the judgment in 54 I.A. 79, referred to above; *Bansilal* v. *Shivlal* (1953) 55 Bom. L.R. 350, (1953) Bom. 1045, ('53) A.B. 361.

(*i*) *Banwari Lal* v. *Mahesh* (1918) 45 I.A. 284, 41 All. 63, 49 I.C. 540, ('18) A.PC. 118.

(*j*) *Khalilul* v. *Gobind* (1893) 20 Cal. 328, 336, 337.

(*k*) *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 787, 80 I.C. 684, ('24) A.A. 551 [F.B.].

(4) debts contracted under the influence of lust or wrath;

(5) debts for being surety for the appearance or for the honesty of another (*l*);

(6) unpaid fines (*m*);

(7) unpaid tolls; and

(8) any debt which is *avyavaharika* which is rendered by Colebrooke as equivalent to a debt for a cause "repugnant to good morals."

II: The burden of proving that the debt was *avyavaharika* or illegal is on the son (*m*1).

*Surety.*—According to Yagnavalkya there are three classes of sureties, to wit, sureties (1) for appearance, (2) for confidence, and (3) for payment (*n*). Brihaspati adds a fourth class which is very much similar to the third and differs from it in this respect that whereas a surety for payment binds himself personally to pay the loan, in the other form he undertakes to produce the property of the debtor, out of which the creditor may obtain satisfaction (*o*). In the first two classes the liability of the surety is purely personal and does not extend to sons except where the surety obtains a pledge from the debtor to ensure his safety, and in such cases the creditor is entitled to realise his claim from the pledge even if the surety is dead. In the other two classes, viz., when the surety undertakes to pay off the debts or to produce the goods of the debtor, the sons are liable to discharge the obligation incurred by the father but their liability extends to making good the principal of the loan and not the interest (*p*). Under the Mitakshara law the grandsons are not liable in any case for debts contracted by their grandfather as surety (*q*). The decision in *Narayan* v. *Venkatacharya* (*r*) which held that under the Mitakshara law the grandson would be liable to pay the suretyship debt of the grandfather in case the latter had received consideration for the same is apparently based upon a misapprehension of the texts of Mitakshara which nowhere lay down a proposition of this kind (*s*). The view of the Bombay High Court however receives some support from a text of Mayukha (*t*). A guarantee given by the father for payment of *rent* by a tenant is a guarantee for payment of a debt (*u*), and so is a guarantee for payment of money that may be decreed against a defendant in a suit (*v*). A debt incurred by a father as a surety for payment of money is binding on the son as a mere money debt but a hypothecation of the family property for such a debt is not binding on the property (*w*). But a surety bond hypothecating joint property by which the father guarantees payment of loss that may be caused to the estate of a minor by misappropriation or waste by a guardian is a bond for the honesty of another [see cl. (5) above], and is not binding on the sons (*x*); unless the security bond is executed for a debt of the father (*y*); if under such a bond the property is sold, the son is entitled to recover his share therein (*z*). If the surety bond is executed for payment of a debt due from a third party and the father undertakes no personal liability, the obligation is confined to the property if any that is charged by him for satisfaction of the claim. No question arises in such cases of the son's duty to pay the father's debt

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(*l*) *Tukarambhat* v. *Gangaram* (1899) 23 Bom. 454, 456, 458. See also *Mahabir* v. *Siri Narayan* (1918) 3 Pat. L.J. 396, 46 I.C. 27, ('18) A.P. 345; *Dandapani* v. *Ghumsur* ('56) A. Orissa 144.

(*m*) *Nhance* v. *Hureeram* (1814) 1 Bor. 84, 90.

(*m*1) For instance see *Sitaram* v. *Radhabai* ('68) A.SC. 534.

(*n*) Yagnavalkya, Chapter II, v. 53.

(*o*) Sen's Hindu Jurisprudence, p. 320.

(*p*) *Ibid*, pp. 322-323; *Sitaramayya* v. *Venkataramanna*, 11 Mad. 373; *Chettikulam* v. *Chettikulam Kumara*, 28 Mad. 377; *Tukarambhav* v. *Gangaram*, 23 Bom. 454; *Rasik Lal* v. *Singheswar*, 39 Cal. 843; *Audilaxamma* v. *Raghurami* ('70) A.A.P. 158 (F.B.); *Thangathammal* v. *Arunachalam* ('19) A.M. 831.

(*q*) *Sarwan* v. *Kunji Lal*, ('51) A. Madhya Bharat p. 49; *Dwarka* v. *Kishan Das*, 55 A.A. 675.

(*r*) *Narayan* v. *Venkatacharya* (1904) 28 Bom. 408.

(*s*) *Dwarka* v. *Kishan Das*, 55 All. 675.

(*t*) Mayukha Ch. V, s. 3, VI.

(*u*) *Maharaja of Benares* v. *Ramkumar* (1904) 26 All. 611.

(*v*) *Mata Din* v. *Ram Lakhan* (1930) 52 All. 153, 120 I.C. 555, ('30) A.A. 87; *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

(*w*) *Thakur Satrohan Singh* v. *Uma Dutt* (1936) 11 Luck. 404, 157 I.C. 653, ('35) A.O. 455; *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

(*x*) *Kottapalli Lakshminarayana* v. *Kanuparti Hanumantha Rao* (1935) 58 Mad. 375, 154 I.C. 431, ('35) A.M. 144.

(*y*) *Kesar Chand* v. *Uttam Chand* (1945) 72 I.A. 165, (1945) 2 M.L.J. 160.

(*z*) *Choudhuri* v. *Hayagriba* (1931) 10 Pat. 94, 138 I.C. 414, ('32) A.P. 162; *Krishna* v. *Rama* ('64) A. All. 17.

by reason of any pious obligation, because there is no debt due by the father (*a*). It has been held by the Patna High Court that a debt incurred by a father for standing surety against embezzlement by a tahsildar is not binding on the sons (*b*) [see cl. (5) above]. But it has been held by the same High Court that the sons are liable for money borrowed by their father to enable his wife's cousin to refund money which he had misappropriated or could not account for (*c*).

*Debt for a cause repugnanat to good morals.*—The fundamental rule is that the sons are not liable for debts incurred by a father which are *avyavaharika*. Colebrooke translates it as "debts for a cause repugnant to good morals." Apararka explains it as not righteous or proper, and Balambhatti as not for the benefit of the family (*d*). In *Jakati* v. *Borkar* (*d*1) the Supreme Court observed that the translation of the term given by Colebrooke may well be taken to represent its correct meaning and that the term did not admit of a more precise definition. The relevant texts on the subject have been examined in numerous decisions. A very recent decision on the subject related to income tax (*d*2).

Where money was borrowed by the father for the purpose of defraying the expenses of the marriage of his concubine's grand-daughter, it is *avyavaharika* even if the concubine was in his continuous and exclusive keeping (*e*).

A debt may arise out of a contract as where money is borrowed by the father or it may arise out of an act which amounts to a *criminal offence, e.g.*, theft, or it may arise out of a *tort or civil wrong.*

Money borrowed by a father for payment to a Hindu woman as a bribe to induce her to take one of his sons in adoption is an avyavaharika debt, and the sons are not liable for it (*f*). So is money borrowed to pay a fine inflicted for a criminal offence (*g*). The High Court of Madras has held that money borrowed to pay the cost of a suit *in forma pauperis* brought by the father knowing it to be false is an *avyavaharika* debt (*h*). The Calcutta High Court has held that money borrowed by the father for litigation to set up an adoption is not an *avyavaharika* debt and that the sons are liable for it (*i*). It has been held that the sons are liable to pay the costs of a suit decreed against the father, though the litigation was imprudent (*j*) or the defence raised by him was dishonest (*k*).

Where money is obtained by a father by committing a criminal offence, *e.g.*, theft and a decree is passed against him for the money so obtained by him, the sons are not liable for the decretal amount (*l*). The same rule applies in respect of money taken by a father and misappropriated under circumstances which constitute *the taking itself* a criminal offence (*m*), *e.g.*, misappropriation by the father as a guardian of money belonging to the minor (*n*), or a criminal breach of trust (*o*). No decree can be passed against the sons of a stake-holder of a chit fund in respect of the latter's liability to a subscriber as the debt is illegal (*p*). [See also *Sesha Ayyar* v. *Krishna Ayyar* (1936) 59 Mad. 562, 162 I.C. 68, ('36) A.M. 225, where it was held by a Full Bench that such a fund was a lottery and by three Judges out of five that its promoters were guilty of offences under both parts of section 294A of the Indian Penal Code.] Where the father's debt was, at its inception, a just and true debt, the subsequent dishonest conduct of the father cannot affect its nature. Thus, when the father withheld a promissory note allotted in a partition

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(*a*) *Lingbhat* v. *Parappa* (1949) 52 Bom. L.R. 846, ('51) A.B. 1. Otherwise where there is personal liability of the father: *Hindustan Commercial Bank Ltd.* v. *Sohanlal* ('70) A. Punj. & H. 67 (F.B.).

(*b*) *Satya Charan* v. *Satpir* (1919) 4 Pat. L.J. 309, 51 I.C. 791, ('19) A.P. 422.

(*c*) *Benares Bank Ltd.* v. *Jagdip* (1921) 6 Pat. L.J. 198, 62 I.C. 465, ('21) A.P. 9.

(*d*) See *Bai Mani* v. *Usafali* (1921) 33 Bom. L.R. 130, 133, 136 I.C. 173, ('31) A.B. 229.

(*d*1) ('59) A.S.C. 282, 286.

(*d*2) *J. D. Rao* v. *I.T.O.* ('70) A.A.P. 426 (F.B.). See *f.n.* (*o*1) at p. 389, *infra.*

(*e*) *Lakshmanaswami* v. *Raghavacharulu* (1943) Mad. 717, 210 I.C. 98, ('43) A.M. 292.

(*f*) *Sitaram* v. *Harihar* (1911) 35 Bom. 169, 8 I.C. 625.

(*g*) *Garuda Sanyasayya* v. *Nerella Murthenna* (1918) 35 Mad. L.J. 661, 48 I.C. 740, ('19) A.M. 943.

(*h*) *Kirit Singh* v. *Chandra Kali Kaur* (1951) 30 Mad. L.J. 89, 41 I.C. 105.

(*i*) *Khalilul* v. *Gobind* (1893) 20 Cal. 328.

(*j*) *Paryag* v. *Kasi* (1909) 14 C.W.N. 659, 6 I.C. 258.

(*k*) *Kirit Singh* v. *Chandra Kali Kaur* (1951) 30 Pat. 826, ('51) A.P. 587. The correctness of certain propositions in this decision was doubted in a more recent case of the same Court, *Sudhansu* v. *Mt. Ramjhari* ('57) A.P. 115. The decision in *Kirit Singh's* case was overruled by a Full Bench of the same High Court in *Sheodhar* v. *Sitaram* ('62) A.P. 308. *Peerumal Chetty* v. *Province of Madras* (1955) Mad. 1179, ('55) A.M. 382 [court-fees].

(*l*) *Pareman Dass* v. *Bhattu* (1897) 24 Cal. 672.

(*m*) *Mahabir Prasad* v. *Basdeo Singh* (1884) 6 All. 234; *McDowell & Co.* v. *Ragava* (1904) 27 Mad. 71; *Jagannath* v. *Jugal Kishore* (1926) 48 All. 9, 89 I.C. 492, ('26) A.A. 89; (1931) 33 Bom. L.R. 130, 136 I.C. 173, ('31) A.B. 229, *supra.*

(*n*) (1931) 33 Bom. L.R. 130, 136 I.C. 173, ('31) A.B. 229, *supra.*

(*o*) *Srimati Widyawanti* v. *Jai Dayal* (1932) 13 Lah. 356, 140 I.C. 220, ('32) A.L. 541.

(*p*) *Muniyandia* v. *Muthusami* (1939) Mad. 70.

decree to the opposite party which he was directed to deposit in Court his conduct in first filing a forged note and then filing the real note after it was barred cannot save the son's liability under the decree passed against the father for the loss (*q*). Where a father is under a *civil* liability to account for money received by him, *e.g.*, as an administrator of the estate of a deceased person, or as a trustee, or as an agent or manager, and he fails to account, and a decree is passed against him for money not accounted for by him, the sons are liable for the amount of the decree though the father may have retained the money dishonestly, provided the retention itself does not amount to a criminal offence, that is, the offence of criminal breach of trust or criminal misappropriation (*r*). Where the receipt of the money was lawful at the time of the receipt, even the subsequent commission of an offence by the father does not save the son's liability (*s*). The burden is on the sons to show that the retention itself amounted to a criminal offence (*t*). When the removal of certain materials from a mortgaged house by the father amounted to a civil wrong and not a crime, a decree passed against the father personally could be executed against the son, as the debt is not immoral (*u*).

A Hindu father erects a dam which obstructs the passage of water to the property of his neighbour. The Court finds that the father had no right in law to erect the dam and a decree is passed against the father for damages. Are the sons liable for the amount of the decree? It has been held by the High Court of Bombay in *Durbar* v. *Khachar* (*v*) that they are not liable, the reason given being that such a debt is *avyavaharika,* that is a debt which the father ought not, "as a decent and respectable man," to have incurred. This interpretation of the word *avyavaharika* has not been accepted by the High Court of Calcutta. According to that Court, the sons are liable for a decree against the father for damages on account of injury caused to crops by obstruction of a channel (*w*). They are also liable for a decree against the father for mesne profits (*x*). The view taken in *Durbar's* case has also been disapproved by the High Court of Madras (*y*). The High Court of Allahabad has also dissented from that view, and held that the sons are liable for money borrowed by the father to defend a suit for defamation (*z*), or to defend himself against charges of forgery and fabrication (*a*); also that they are liable for a decree against the father for damages for wrongfully cutting down trees (*b*). The authority of the decision in *Durbar's* case was treated as doubtful in a later Bombay case where it was held that a debt contracted by father in a trade carried on by him in contravention of the Government Servants' Conduct Rules was not *avyavaharika,* the liability in such a case being merely civil as distinguished from criminal (*c*).

In *Jakati* v. *Borkar* (c1) the Supreme Court held that the liability of a father who is a managing director of a co-operative bank and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties cannot be termed as "repugnant to good morals."

When a father purported to sell joint property for satisfaction of antecedent debts, and covenanted with the purchaser, that in case any dispute arose regarding the property he would make good the loss, and the son obtained a decree from the Court, that the

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(*q*) *Hemraj alias Babu Lal & Ors.* v. *Khem Chand & Ors.* (1943) All. 727, 209 I.C. 344, 70 I.A. 171, ('43) A.PC. 142; *Loganathan* v. *Naicker* ('69) A.M. 15.

(*r*) *Natasayyan* v. *Ponnusami* (1893) 16 Mad. 99, 104; *Kanemar* v. *Krishna* (1908) 31 Mad. 161 [manager]; *Gurunatham* v. *Raghavalu* (1908) 31 Mad. 472 [administrator]; *Venkatacharyulu* v. *Mohona* (1921) 44 Mad. 214, 61 I.C. 530, ('21) A.M. 407 [agent]; *Gursarn Das* v. *Mohan Lal* (1923) 4 Lah. 93, 76 I.C. 907, ('23) A.L. 399 [manager]; *Hanmant* v. *Ganesh* (1919) 43 Bom. 612, 51 I.C. 612, ('18) A.B. 13 [trustee]; *Toshanpal* v. *District Judge of Agra* (1929) 51 All. 386, 112 I.C. 748, ('28) A.A. 582 [Secretary of a School Committee]. See also *Jai Kumar* v. *Gauri Nath* (1906) 28 All. 718, 720; *Mohant Gadadhar* v. *Ghana Shyam Das* (1918) 3 Pat. L.J. 533, 47 I.C. 212, ('18) A.P. 391; *Venkateswara Temple* v. *B. Radhakrishna* ('63) A.A.P. 425 (F.B.).

(*s*) *Alapati Anandarao & Ors.* v. *The President, Co-operative Credit Society, Pedatadepalli & Ors.* (1941) Mad. 27, 191 I.C. 755, ('40) A.M. 828; *Sita Ram* v. *Tarachand* ('62) A. Raj. 136.

(*t*) *Toshanpal Singh* v. *District Judge of Agra* (1934) 56 All. 548, 61 I.A. 350, 151 I.C. 33, ('34) A.PC. 328.

(*u*) *Hiradas* v. *Jagannath* (1945) Nagpur 998.

(*v*) (1908) 32 Bom. 348.

(*w*) *Chhakauri* v. *Ganga* (1912) 39 Cal. 862, 12 I.C. 609. See *Kirpal Singh* v. *Balwant Singh* (1913) 40 Cal. 288, 17 I.C. 666 [P.C.] which turned upon a special custom of agriculturists in the Punjab.

(*x*) *Peary Lal* v. *Chandi Charan* (1906) 11 C.W.N. 163; *Ramsubramania* v. *Sivakami* (1925) A.M. 841; *Laxmi Pati Rao* v. *Kristarao,* 52 Bom. L.R. 342, ('50) A.B. 356.

(*y*) *Venugopala* v. *Ramanadhan* (1914) 37 Mad. 458, 14 I.C. 705, ('14) A.M. 654 [costs of litigation].

(*z*) *Sumer Singh* v. *Liladhar* (1911) 33 All. 472, 19 I.C. 624.

(*a*) See *Beni Ram* v. *Man Singh* (1912) 34 All. 4, 11 I.C. 663.

(*b*) *Chandrika* v. *Narain* (1924) 46 All. 617, 79 I.C. 1036, ('24) A.A. 745.

(*c*) *Ramkrishna* v. *Narayan* (1916) 40 Bom. 126, 31 I.C. 301, ('15) A.B. 280.

(*c*1) ('59) A.S.C. 282.

sale was not binding on his share of the property, he could still be made liable for the debt of the father arising out of the covenant in the sale deed. To ascertain whether the debt of the father is tainted or not the extent of hardship it imposes upon the sons is not a relevant consideration (*d*).

The Patna High Court has held that the sons are liable for money borrowed by the father to meet the expenses of defending himself against a charge under the Cattle Trespass Act, 1871 (*e*), but they are not liable for a decree passed against the father for damages for malicious prosecution (*f*); nor for the costs of a suit dishonestly brought by the father on the basis of a fraudulent and collusive sale deed (*g*); nor for mesne profits and costs awarded against the father who had forcibly and wrongfully dispossessed a Math of its properties (*g*1).

Where money was borrowed by the father for assisting in the prosecution of a person accused of the murder of a member of the family, it was held that the debt though not one for a legal necessity was not illegal or immoral (*h*). Where the father executed a mortgage of the ancestral properties and a major portion of the amount borrowed was spent in defending a criminal charge against him it was held that the debt was binding on the son (*i*).

Where the father has taken a lease for a term but continued in possession after the expiry of the term, the sons are liable for the mesne profits as the possession is not necessarily immoral (*j*).

*Commercial debt.*—The text of Gautama, chapter XII, s. 41, to the effect that the sons are not liable for their father's commercial debts has long become obsolete, and sons are now liable for simple money debts incurred by the father in the course of business even though started by the father himself (*k*). [§ 240]. A debt incurred by the father in connection with buying and selling of shares which resulted in loss is not an immoral debt (*l*). If a money decree is passed against the father alone for such debt, the sons cannot resist in execution (*m*). Such debts though speculative are good as antecedent debts to support a further mortgage (*n*) as they are not repugnant to good morals (*o*).

*Income Tax.*—Income Tax due from a father cannot be regarded as *avyavaharika* debt on the ground that the assessment was made on the basis of concealment of true income by the father (*o*1).

**299. Time-barred debt.**—(1) The Hindu law does not recognise any rule of limitation for the recovery of debts. A Hindu, therefore, is bound according to that law to pay a debt owing by him, though it is barred by the statute of limitations; if he dies without paying the debt, his sons are under a moral and religious obligation to discharge the debt. But a Hindu is not bound since the enactment of the Indian Limitation Act, 1963, and the Acts which preceded it, to pay a time-barred debt, and it has accordingly been held that if the debt was barred against the father, the sons are no longer under a

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(*d*) *Ramamurthi* v. *Kuppaswami* ('50) A.M. 621, (1950) 1 M.L.J. 499.

(*e*) *Hanumat* v. *Sonadhari* (1919) 4 Pat. L.J. 653, 62 I.C. 734, ('20) A.P. 708.

(*f*) *Sunder Lal* v. *Raghunandan* (1924) 3 Pat. 250, 83 I.C. 413, ('24) A.P. 465; *Raghunandan Sahu* v. *Badri Teli* (1938) All. 330, 175 I.C. 607, ('38) A.A. 263.

(*g*) *Darbeshwari* v. *Raghunath* (1949) 28 Pat. 165, ('49) A.P. 515.

(*g*1) *Sheodhar* v. *Sitaram* ('62) A.P. 308 (F.B.).

(*h*) *Marudhappan* v. *Niraikulathan* (1937) Mad. 943, 169 I.C. 292, ('37) A.M. 434.

(*i*) *Ananga Bhusan* v. *Uchhab Sahu* ('55) A. Orissa 179.

(*j*) *Pashupat Pratap Singh* v. *Lalat Bahadur Singh* (1945) All. 5.

(*k*) *Achutaramayya* v. *Ratnajee* (1926) 49 Mad. 211, 92 I.C. 977, ('26) A.M. 323 [hardware trade]; *Annabhat* v. *Shivappa* (1928) 52 Bom. 376, 110 I.C. 269, ('28) A.B. 232; *Venkateshwara Rao* v. *Ammayya* ('39) A.M. 561.

(*l*) *Gulalchand* v. *Vadilal* ('50) A. Kutch 78.

(*m*) *Chotkao Singh* v. *Hasan* (1930) 5 Luck. 184, 119 I.C. 458, ('29) A.O. 458; *Pirthi Singh* v. *Mam Chand* (1935) 16 Lah. 1077, 156 I.C. 539, ('35) A.L. 761.

(*n*) *Khem Chand* v. *Narain Das* (1925) 6 Lah. 493, 498, 89 I.C. 1022, ('26) A.L. 41; *Venkatasami* v. *Palaniappa* (1929) 52 Mad. 227, 117 I.C. 716, ('29) A.M. 153.

(*o*) *Chotkao Singh* v. *Hasan* (1930) 5 Luck. 184, 119 I.C. 458, ('29) A.O. 458; *Kalwa Devadattam* v. *Union of India* ('58) A. Andh. Pra. 131.

(*o*1) *Radhakrishnam* v. *Union of India* ('59) A.M. 71, (1959) Mad. 181. Also see *J. D. Rao* v. *I.T.O.* ('70) A.A.P. 426 (F.B.) [arrears of income-tax in respect of separate business prior to partition].

pious obligation to pay such debt (*p*). But a Hindu father may, like any other debtor, pass a promissory note for a time-barred debt. Such a note constitutes a binding contract having regard to the provisions of s. 25(3) of the Indian Contract Act, 1872, and it may be enforced against him, and after his death, against the sons. The sons, however, are liable only to the extent of the estate, whether ancestral or self-acquired, which has come to their hands on the father's death (*q*). The liability in such a case does not rest upon any obligation moral or religious, but on the general principle of the Anglo-Indian law. Even if the sons themselves execute a promissory note for a time-barred debt of their father after the father's death, the note is available only against the ancestral or self-acquired property, which has come to their hands. There is nothing in sec. 25(3) of the Contract Act to render them personally liable on such a note (*r*).

(2) A time-barred debt, under the Hindu law, is not *avyavaharika,* that is to say, it is not immoral. It has accordingly been held that when the father alienates joint family property in consideration of a debt that is barred by the law of limitation, the alienation is binding on the sons (*s*).

**300. Debt contracted by father during minority or other disability.**— A promissory note passed by the father for a debt contracted by him during his minority or while he was a ward of the Court Wards is void (*t*), and the son is under no pious obligation to pay it. The pious obligation, however, arises if the note is renewed by the father after attaining majority (*u*).

**301. Summary of the Chapter.**—(1) The separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death (§ 288).

(2) The *undivided interest* of a coparcener in coparcenary property is *always* liable for the payment of his debts *in his lifetime* (§ 289).

(3) Sons, grandsons and great-grandson are liable to pay the debts of their ancestor if they have not been incurred for an immoral or unlawful purpose. Their liability, however, is confined to their interest in the coparcenary property; it is not a personal liability so that a creditor of the ancestor cannot proceed against the person or against the separate property of the sons, grandsons or great-grandsons. Also see § 290(2).

(4) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, a creditor of the ancestor is entitled to attach and sell not only the

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(*p*) *Subramania* v. *Gopala* (1910) 33 Mad. 308, 7 I.C. 898; *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 782, 80 I.C. 684, ('24) A.A. 551 [F.B.]; *Achutanand* v. *Surjanarain* (1926) 5 Pat. 746, 753-754, 93 I.C. 991, ('26) A.P. 427.

(*q*) *Narayanasami* v. *Samidas* (1883) 6 Mad. 293; *Ram Kishan* v. *Chhedi Rai* (1922) 44 All. 628, 68 I.C. 235, ('22) A.A. 402.

(*r*) *Asa Ram* v. *Karam Singh* (1929) 51 All. 983, 119 I.C. 109, ('29) A.A. 586.

(*s*) *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 80 I.C. 684, ('24) A.A. 551 [F.B.]; *Jagdambika* v. *Kali* (1930) 9 Pat. 843, 129 I.C. 130, ('31) A.P. 40; *Parmanand Misir* v. *Gur Prasad* (1936) 11 Luck. 393, 157 I.C. 567, ('35) A.O. 500.

(*t*) *Baldeo* v. *Bindeshri* (1922) 44 All. 388, 66 I.C. 128, ('22) A.A. 215.

(*u*) *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I.C. 121, ('21) A.L. 205.

interest of the ancestor, but also the interest of the sons, grandsons and great-grandsons in the joint family property in execution of a decree obtained by him against *the ancestor alone.* Also see §290 (2).

(5) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, the ancestor can sell or mortgage not only his own interest, but the interest of the sons, grandsons, and great-grandsons in the joint family property, to pay an *antecedent debt of his own.*

(6) The undivided interest of a coparcener in coparcenary property is not liable for payment of his debts after his death if it has devolved by survivorship only upon collateral members of the coparcenary. Reference may be made to § 289 (3).

# CHAPTER XV

# DEBTS—DAYABHAGA LAW

*Note.*—As under the Mitakshara law, so under the Dayabhaga law a debt may be contracted by a Hindu for purposes of the joint family or for his own private purposes. Debts contracted for joint family purposes have been dealt with in §§ 234, 240 and 244. The rules laid down in those paragraphs apply to cases both under the Mitakshara and the Dayabhaga law. The present chapter deals with the Dayabhaga law of debts contracted by a Hindu for his own private purposes. The Dayabhaga law of debts is very simple, for no question can arise under that law as to the special liability of sons and grandsons as it does under the Mitakshara law. The reason is that under the Dayabhaga law sons do not acquire by birth any interest in ancestral property as they do under the Mitakshara law [§§ 273-274]. And, further, each coparcener under the Dayabhaga law takes a defined share in the coparcenary property which he can deal with at his pleasure and which on his death passes to his heirs and not to the surviving coparceners [§§ 279-282].

**302. Debts—Bengal School.**—(1) As under the Mitakshara law, so under the Dayabhaga law, the separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death.

(2) As each coparcener under the Dayabhaga law takes a *defined interest* in the coparcenary property, which on his death passes not by survivorship to his coparceners, but to his heirs by succession such interest is liable for the payment of his debts not only in his lifetime but also after his death, as assets in the hands of his heirs.

(3) Since sons, grandsons and great-grandsons do not under the Dayabhaga law acquire any interest by birth in ancestral property, the father can sell or mortgage the whole of the ancestral property in his hands for the payment of his debts, whatever may be the character of the debts.

On the death of a Hindu governed by the Dayabhaga law, his separate property as well as his undivided interest in coparcenary property passes to his heirs and they become assets of the deceased in their hands. Therefore, if he dies leaving debts, the heirs are bound to pay the debts not only out of the separate property left by the deceased but also out of his undivided interest in the coparcenary property. The heirs, however, are not personally liable for the debts of the deceased, not even if they be the sons, grandsons or great-grandsons of the deceased (*v*). Compare with this § 288 above.

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(v) *Abdul Rahman* v. *Gajendra Lal* (1938) 1 Cal. 132.

# CHAPTER XVI

# PARTITION AND REUNION—MITAKSHARA LAW

*Note.*—The rules relating to joint family and partition really form part of the same branch of law. The Hindu Women's Rights to Property Act, 1937, in its consequence touched many branches of Hindu law such as joint family and partition, maintenance, etc., and illustrated how piecemeal legislation can result in anomalies and unexpected situations. The general effect of that enactment in case of death of a coparcener in the joint family governed by the Mitakshara law has been pointed out under § 35. The Hindu Succession Act, 1956, has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. Speaking generally it does not interfere with the special rights of those who are members of a Mitakshara coparcenary but it is important to note that section 6 of that enactment recognises the rights upon the death of a coparcener of certain of his preferential heirs to claim an interest in the property that would have been allotted to him if there had in fact been a partition immediately before his death and the principle of devolution as also the rules of partition considered in this chapter are affected to that extent. Certain provisions of the Hindu Adoption and Maintenance Act, 1956, also have bearing on the rules relating to partition and are discussed in this chapter. Reference may be made to that Act and sec. 6 of the Hindu Succession Act, 1956, and notes thereunder for the changes brought about in the rules relating to partition by the new legislation. Reference may also be made to Notes under sec. 16 of the Hindu Marriage Act, 1955, for the position and rights in a joint Hindu family of a son or daughter born of a marriage which is void or voidable under the latter enactment and who is to be deemed to be a legitimate child of the parents.

*I. What property is divisible on partition*—§§ 303-305.
*II. Persons entitled to a share on partition*—§§ 306-318.
*III. Restraint against partition*—§§ 319-320.
*IV. Allotment of shares*—§ 321.
*V. Partition how effected*—§§ 322-335.
*VI. Re-opening of partition*—§§ 336-339.
*VII. Effect of partition*—§§ 340-341.
*VIII. Re-union*—§§ 342-344.
*IX. Partition created by so-called will*—§ 345.

## I. PROPERTY LIABLE TO PARTITION

**303. Subject of Partition.**—The only property that can be divided on a partition is coparcenary property [§ 221]. Separate property cannot be the subject of partition [§ 222], nor can property which by custom descends to one member of the family to the exclusion of other members, *e.g.*, a Raj or principality (*w*).

*Ancestral property.*—It was thought at one time that a son could not enforce a partition of ancestral *movables* against his father. But it is now established that a son is entitled to a partition of movable (*x*) as well as of immovable property against his father (*y*).

*Property indivisible from its nature.*—Where property is in its nature indivisible as, for instance, in the case of animals, furniture, etc., it may be sold and its value distributed; or it may be valued and retained by one coparcener exclusively and the amount credited to his share. In the case of a well, it may be enjoyed by the coparceners in turns or jointly (*z*). Where a strip of land is reserved as a common passage by a decree in a suit

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(*w*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M.I.A. 570; *Chintamun* v. *Nowlukho* (1876) 1 Cal. 153, 2 I.A. 263; *Adrishappa* v. *Gurushidappa* (1880) 4 Bom. 494, 7 I.A. 162; *Kachi Kalitana* v. *Kachi Yuva* (1905) 28 Mad. 508, 32 I.A. 261; *Bodhrao* v. *Nursing Rao* (1856) 6 M.I.A. 426.

(*x*) *Jagmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 578; *Cassumbhoy* v. *Ahmedbhoy* (1888) 12 Bom. 280.

(*y*) *Suraj Bunsi Koer* v. *Sheo Prasad* (1880) 5 Cal. 148, 165, 6 I.A. 88, 100.

(*z*) *Govind* v. *Trimbak* (1912) 36 Bom. 275, 6 I.C. 521.

for partition for the use of the coparceners, none of them is entitled to a partition of that strip (*a*). Where a stock broker's card is issued by the Stock Brokers' Association in the name of a coparcener he must account for its value at the time of the partition (*b*).

*Idols and places of worship.*—Family idols and places of worship are not divisible [Manu, ch. ix, verse 219]. They may be held by the members by turns, or the Court may direct possession to be given to the senior member with liberty to the other members to have access to them for the purpose of worship (*c*). A *thakurbari* is not divisible (*d*). The High Court of Calcutta has held that in the absence of any dedication of a building for the worship of the family idol, the building should not be excluded from partition merely because it is used for the worship of the idol. The Court may, however, in such a case give an option to a coparcener or coparceners willing to maintain the building as a place of worship to buy it at a valuation (*e*).

*Right of way.*—A right of way will be presumed to have remained joint, if there is no evidence that it was allotted to a particular member at the time of partition (*f*).

*Share allotted on partition.*—Where a coparcener, who is joint with his male issue separates from his father, brothers, or other coparceners, the property allotted to him at the partition is separate property as regards the divided members, but ancestral as regards his male issue [§ 223, sub-§ (4)]. Such property is, therefore, divisible as between him and his male issue, but, the members who have already separated are not entitled to share in it. If he dies without leaving a male issue, it will descend to his heirs (*g*).

*Separate property.*—Coparcenary property alone is liable to partition. Separate property is not liable to partition at all; it belongs absolutely to the owner thereof. As to what is separate property, see §§ 230-232 above.

*Mode of allotment.*—The principle of partition is that if property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to a coparcener by partition (*h*).

**304. Property available for partition.**—(1) In order to determine what property is available for partition, provision must first be made for joint family debt which are payable out of the joint family property, personal debts of the father not tainted with immorality (*i*), maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughters (*j*). Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of the widow (*k*) and mother of the last male holder (*l*). After this is done, an account must be taken of the joint family property in the hands of the manager and other members of the family, according to the rule laid down in the next following section.

Also see the Note at the beginning of this chapter.

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(*a*) *Shantaram* v. *Waman* (1922) 47 Bom. 389, 68 I.C. 682, ('23) A.B. 85.

(*b*) *Champaklal Chimanlal* v. *Sodagar Amubhai* (1944) Bom. 619.

(*c*) *Damodardas* v. *Uttamram* (1893) 17 Bom. 271; *Mitta Kunth* v. *Neerunjun* (1874) 14 Beng. L.R. 166; *Pramatha Nath* v. *Pradyumna Kumar* (1925) 52 I.A. 245, 260, 52 Cal. 809, 826, 87 I.C. 305, ('25) A.PC. 139.

(*d*) *Madanmohan* v. *Shaha* (1930) 57 Cal. 570, 124 I.C. 327, ('30) A.C. 173.

(*e*) *Sachindra* v. *Hem Chandra* (1931) 35 C.W.N. 151, 132 I.C. 688, ('31) A.C. 573; *Rajcoomaree* v. *Gopal* (1878) 3 Cal. 514.

(*f*) *Nathubhai* v. *Bai Hansgavri* (1912) 36 Bom. 379, 15 I.C. 818.

(*g*) *Kantama Natchiar* v. *The Rajah of Shivagunga* (1863) 9 M.I.A. 539, 543; *Sivagnana* v. *Periasami* (1878) 1 Mad. 312, 5 I.A. 61.

(*h*) *Ashanullah* v. *Kali* (1884) 10 Cal. 675.

(*i*) *Venkareddi* v. *Venku Reddi* (1927) 50 Mad. 535, 100 I.C. 1018, ('27) A.M. 471. In Re *Official Assignee* v. *Venkayya* ('65) A.M. 60.

(*j*) Strange's Hindu Law, vol. ii. p. 313; *Mussammat Bholi Bai* v. *Ducarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A.L. 32; *Vaikuntam* v. *Kallapiran* (1900) 23 Mad. 512.

(*k*) See *Vaidyanatha* v. *Aiyasamy* (1909) 32 Mad. 191, 200, 1 I.C. 408.

(*l*) *Nand Rani* v. *Krishna Sahai* (1935) 57 All. 997, 156 I.C. 23, ('35) A.A. 698.

(2) *Marriage expenses, etc., after a suit for partition.*—As to the marriage expenses of *male* members of the family it has been held by the Judicial Committee (*m*), reversing a decision of the Madras High Court (*n*), that since the *institution* of a suit for partition by a member of a joint family effects a severance of the joint status of the family, a male member of the family who is then unmarried is not entitled to have a provision made on partition for his marriage expenses, although he marries before the decree in the suit is made.

The case, however, of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree (*o*).

It is only for the marriage expenses of the father's daughters or sisters that provision should be made out of the joint family property. The marriage expenses of the son's daughters form only the liability of his branch and not of the whole joint family unlike the case of the father's daughters (*p*). Thus if *A* has a son *S* and a daughter *D* by one wife, and a son *S*2 and a daughter *D*2 by another wife, and *S* brings a suit for partition, and *D*2 is married after the institution of the suit, one-third of her marriage expenses should be deducted out of his one-third share, and as regards one-third of the marriage expenses of *D* his one-third share in the property may be charged with such expenses. But *S* is not liable for the marriage expenses of his brother's (*S*2's) daughter, if any, she being the daughter of a collateral. Her marriage expenses should come out of her own father's share (*q*). The same rule applies to the expenses of betrothal ceremonies of daughters. As regards the expenses of the thread ceremony of the members of the family it has been held that provision should be made for them on partition (*r*).

As to marriage expenses *while the family is joint*, see § 440 below.

Also see the Note at the beginning of this chapter.

(3) It is settled law that it is only after provision is made for all these expenses, that what is described as 'taking of accounts' can take place. This expression is apt to be somewhat misleading because as a general rule (apart from exceptions noted in the next section and § 238) this taking of accounts is no more than an inquiry into the extent of the property as it existed when partition was demanded.

*Funeral ceremonies of the mother.*—Under the Hindu Law, the sons are bound to perform *at their expense* the funeral ceremonies of their widowed mother even if she leaves *stridhana* and the *stridhana* descends to her daughters (*s*). If no provision is made for expenses of such ceremonies on a partition between the sons, then if one of the sons performs the ceremonies at his own expense, he is entitled to a contribution from his brothers (*t*).

*Adverse possession.*—It has been held by the High Court of Madras (*u*), dissenting from the High Court of Bombay (*v*), that possession, though exclusive, of a coparcener of

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(*m*) *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.PC. 201; *Mussammat Bholi Bai* v. *Dwarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A.L. 32; *Venkatarayudu* v. *Sivaramakrishnayya* (1935) 58 Mad. 126, 153 I.C. 368, ('34) A.M. 676.

(*n*) *Narayana* v. *Ramalinga* (1916) 39 Mad. 587, 36 I.C. 428, ('17) A.M. 477.

(*o*) *Rajagopala* v. *Venkataraman*, 51 C.W.N. 829 (P.C.).

(*p*) *Ramchandra* v. *Seeniathal* (1955) Mad. 732, ('54) A.M. 1011.

(*q*) *Subbayya* v. *Ananta* (1930) 53 Mad. 84, 121 I.C. 113, ('29) A.M. 586.

(*r*) *Jairam* v. *Nathu* (1906) 31 Bom. 54.

(*s*) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26.

(*t*) *Vaidyanatha* v. *Aiyasami* (1909) 32 Mad. 191, 200 I.C. 408. See Contract Act, ss. 69-70.

(*u*) *Kamarappa* v. *Saminatha* (1919) 42 Mad. 431, 52 I.C. 470, ('19) A.M. 531. Reference may also be made to *Lakshmi Reddy* v. *Lakshmi Reddy* ('57) A.SC. 314; *Bujahwan Singh* v. *Shyama Devi* ('64) A.P. 301.

(*v*) *Vishnu* v. *Ganesh* (1897) 21 Bom. 325.

a *portion* of the joint property for upwards of 12 years is not *adverse* against the other coparceners, if *all* the coparceners are in joint possession of the *rest* of the joint property. The other coparceners are therefore entitled to partition also of that portion of the property. As to exclusion from joint family, see § 235(3a).

*Maintenance and marriage expenses.*—Where a coparcener spends his own money for the maintenance of those persons whom the late proprietor was bound to maintain, *e.g.*, his widow and daughters, and for the marriage expenses of the late owner's daughter he is entitled to payment on partition of the amount so spent by him (*w*).

**305. Mode of taking accounts.**—(1) No coparcener is entitled to call upon the manager to account for his *past* dealings with the joint family property, unless he establishes fraud, misappropriation or improper conversion [§ 238].

(2) No charge is to be made against any coparcener because a large share of the joint income was spent on his family in consequence of his having a larger family to support (*x*). Similarly no credit is to be given to any coparcener because a smaller share of the income was spent on him and his family.

It was held by the Nagpur High Court that an agreement which provides that certain items of expenditure were to be treated as individual and not joint, to be debited at the time of partition to the individual coparcener, is not repugnant to Hindu law (*y*).

(3) A coparcener who is *entirely excluded* from the enjoyment of the family property is entitled to an account of the income derived from the family property, and to have his share of the income ascertained and paid to him, in other words he is entitled to what are called mesne profits (*z*). Mesne profits may also be allowed on partition where the family property or any part thereof has been held by a coparcener who claims it as his exclusive property (*a*), or where an arrangement has been made between the coparceners to enjoy the family property in specific and distinct shares, and the enjoyment of those shares is disturbed (*b*). Except in cases of this character, mesne profits are not recoverable in a suit for partition, and the partition must be made of *property as it exists at the time when partition was demanded* (*c*).

The above rule does not mean that the parties are bound to accept the statement of the *Karta* as to what the family properties are. An inquiry in that behalf would be directed by the Court in a manner usually adopted in such cases. In what manner this inquiry should be held would depend on the facts and circumstances of the case (*c*1).

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(*w*) *Mussammat Bholi Bai* v. *Dwarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A.L. 32; *Rajagopalan* v. *Venkatarama*, 51 C.W.N. 829 (P.C.).

(*x*) *Abhaychandra* v. *Pyari Mohan* (1870) 5 Beng. L.R. 347, 349.

(*y*) *Shridhar* v. *Martand* (1954) Nag. 479, ('54) A.N. 361.

(*z*) *Krishna* v. *Subbanna* (1884) 7 Mad. 564; *Venkata* v. *Narayya* (1879) 2 Mad. 128, 136-137, 7 I.A. 38, 51; *Venkata* v. *The Court of Wards* (1882) 5 Mad. 236, 9 I.A. 125. See Code of Civil Procedure, s. 2(12) and O. 20, r. 12.

(*a*) *Bhivrav* v. *Sitaram* (1895) 19 Bom. 532.

(*b*) *Shankar* v. *Hardeo* (1889) 16 Cal. 397, 16 I.A. 71.

(*c*) *Pirthi Pal* v. *Jowahir Singh* (1887) 14 Cal. 493, 14 I.A. 37; *Lakshman* v. *Ramchandra* (1876) 1 Bom. 561; *Konerrav* v. *Gurrav* (1881) 5 Bom. 589; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 561; *Narayan* v. *Nathaji* (1904) 28 Bom. 201, 208; *Parmeshwar* v. *Gobind* (1916) 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500; *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236. Also see *Laxman* v. *Bayabai* (1955) Nag. 656, ('56) A.N. 241.

(*c*1) *Narayanswami* v. *Ramkrishna* ('65) A.SC. 289.

One member is not in general entitled on partition to interest on money collected but not invested by another. Where one member had to pay more income-tax than was really due on behalf of the family by reason of his negligence he is not entitled to a credit for the excess amount (*d*).

"Money laid out by one member of the family upon the improvement or repair of the property, or for any other object of common benefit, would constitute a debt to him from the rest of the family only if the money which he had expended were advanced out of his separate property, without an intention of making a present of it to the family. He would then be entitled to reimbursement for his outlay as well on partition as before it" (*e*). This statement of the law is unexceptionable. It must, however, be taken with the corollary that where a manager sues for partition, after his right to contribution in respect of certain money expended by him on account of the joint family is barred by Art. 107 of the Limitation Act, he is not entitled to set off this amount in adjustment of equities between the parties (*f*).

*Interest on mesne profits.*—As to interest on mesne profits, see the undermentioned case (*g*).

## II. PERSONS ENTITLED TO A SHARE ON PARTITION

**306. Persons entitled to a share.**—Every coparcener is entitled to a *share* upon partition (*h*). But every coparcener has not an unqualified right *to enforce or sue for* a partition [see §§ 307-308].

Also see Hindu Women's Rights to Property Act, 1937, § 35 *supra,* for the rights of a widow, a predeceased son's widow and the widow of a predeceased son of a coparcener. Reference may also be made to sec. 6 of the Hindu Succession Act, 1956, and notes thereunder. The rules stated in §§ 307 to 318 below must now be read in the context of sec. 6 of the Hindu Succession Act, 1956, and particularly the proviso to that section.

**307. Sons, grandsons and great-grandsons.**—Every adult coparcener is entitled to demand and sue for partition of the coparcenary property at any time. In Bombay it has been held that without the assent of his father a son is not entitled to a partition if the father is *joint* with his own father, brothers, or other coparceners, though he may enforce a partition against the father if the father is separate from them (*i*). The other High Courts do not recognize any such exception (*j*).

It has been held in the undermentioned case (*j*1) decided under the Mayukha School of Mitakshara that assent of the father is not necessary to a suit, against the grandfather and his collaterals, for partition by metes and bounds where there had already been severance of status (*j*1).

*Son born of a marriage void or voidable under the Hindu Marriage Act, 1955.*—Reference may be made to Notes under sec. 6 of the Hindu Succession Act, 1956, and sec. 16 of the Hindu Marriage Act, 1955, for the position and rights in a Hindu coparcenary of a son born of a marriage which is void or voidable under the latter enactment and who is to be deemed to be a legitimate child of the parents.

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(*d*) *Yasobadra Nainar* v. *Somanthabadran* (1936) 59 Mad. 154, 160 I.C. 602, ('36) A.M. 12.

(*e*) Mayne, 11th ed., p. 517.

(*f*) *Subramanian* v. *Kumarappa* ('55) A.M. 144, (1955) 1 M.L.J. 355.

(*g*) *Ramasamy* v. *Subramania* (1923) 46 Mad. 47, 74 I.C. 804, ('23) A.M. 147.

(*h*) *Sartaj Kuari* v. *Deoraj Kuari* (1888) 10 All. 272, 287, 15 I.A. 51, 64.

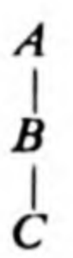
(*i*) *Apaji* v. *Ramchandra* (1812) 16 Bom. 29 [Telang, J., dissenting]; *Rai Bishen Chand* v. *Amaida Koer* (1884) 6 All. 560, 574, 11 I.A. 164, 179; *Jivabhai* v. *Vadilal* (1905) 7 Bom. L.R. 232 [a case under the Mayukha].

(*j*) *Jogul Kishore* v. *Shib Sahai* (1883) 5 All. 430 [F.B.] [Stuart, C.J., dissenting]; *Rameshwar* v. *Lachmi* (1904) 31 Cal. 111, 128-129; *Subba* v. *Ganasa* (1895) 18 Mad. 179, 183; *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A.P. 96.

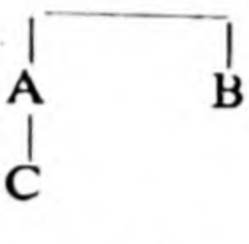
(*j*1) *Jaswantlal* v. *Nichabhai* ('64) A. Guj. 283.

*Illustrations*

(a) If a joint family consists of a father and sons, the sons can enforce a partition of the joint family property against the father (*k*). Similarly, if a joint family consists of a grandfather and grandsons, the grandsons can enforce a partition against the grandfather (*l*). Likewise, if a joint family consists of a great-grandfather and great-grandsons, the great-grandsons can enforce a partition against the great-grandfather (*m*). Thus far there is no difference of opinion between the various High Courts.




(b) A joint Hindu family consists of *A*, *B* and *C*, *A* being *C*'s grandfather, and *B* being *C*'s father. *C* sues *A* and *B* for a partition of the joint family property. Is *C* entitled to a partition? According to the Bombay High Court he is not, unless his father (*B*) consents to the partition. In the view taken by that Court the father *obstructs* the sons's right to a partition. According to the other High Courts, *C*, taking as he does a vested interest in the ancestral property by birth can compel a partition even during the lifetime of his father [*B*].




(c) A joint family consists of *A*, *B* and *C*, *A* being *C*'s father and *B* being *C*'s uncle. *C* sues *A* and *B* for partition. Is *C* entitled to a partition? According to the Bombay High Court, he is not, unless his father (*A*) consents to a partition. According to the other High Courts, he is.

The conflict of decisions referred to above has arisen from different readings of the same text of the Mitakshara; see Mitakshara, chapter I, section 5, verse 3.

In *Sartaj* v. *Deoraj* (*n*), their Lordships of the Privy Council said: "The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, *so connected with the right to a partition*, that it does not exist where there is no right to it."

*The Punjab.*—See *Hari Kishan* v. *Chandu Lal* (1917) Punj. Rec. No. 105, p. 408, ('18) A.L. 291 [F.B.].

**308. Minor coparceners.**—(1) Where a suit is brought on behalf of a minor coparcener for partition, the Court should not pass a decree for partition, unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from danger (*o*).

In *Pedasubhayya* v. *Akkamma* (*o*1) the Supreme Court pointed out that it is in the exercise of its jurisdiction over minors that the Court requires to be satisfied that the next friend of a minor has in instituting a suit for partition acted in his interest. It also pointed out that what brings about the severance in status is the institution of the suit by the next friend, the decree of the Court merely rendering it effective by deciding that what the next friend had done was for the benefit of the minor. In a recent case the Supreme Court has reiterated that view (*o*2). Reference may also be made to §§ 325 and 330 *post*.

Where an adult coparcener in possession of the family property is wasting the property, or sets up an exclusive title in himself, or otherwise denies the minor's rights, or declines to provide for the minor's maintenance, it is in the

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(*k*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 165, 6 I.A. 88, 100; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528; *Kali Parshad* v. *Ram Charan* (1876) 1 All. 159 [F.B.].

(*l*) *Nagalinga* v. *Subbiramaniya* (1862) 1 Mad. H.C. 77; *Laljeet* v. *Rajcoomar* (1874) 12 Beng. L.R. 373.

(*m*) West and Buhler, 4th ed., p. 622.

(*n*) (1888) 10 All. 272, 287, 15 I.A. 51, 64.

(*o*) *Mahadev* v. *Lakshman* (1895) 19 Bom. 99 [maintenance refused]; *Bholanath* v. *Ghasi Ram* (1907) 29 All. 373 [suit against father]; *Thangam* v. *Suppa* (1889) 12 Mad. 401; *Kamakshi* v. *Chidambara* (1866) 3 Mad. H.C. 94; *Damoodur* v. *Senabutty* (1882) 8 Cal. 537; *Nagappa* v. *Subramanian* (1946) Mad. 103; *Chinna Venkata* v. *Venkata Rama* ('57) A. Andh. Pra. 93.

(*o*1) ('58) S.C. 1042.

(*o*2) *Venkata Reddi* v. *Lakshmama* (1963) A.S.C. 1601, (1964) 1 S.C.J. 45. Also see *Nabisha Begum* v. *Alumiya Thaver* ('66) A.M. 111.

minor's interest that the family property should be partitioned, and the minor's share set apart and secured for him (*o*). But if there be nothing to show that the partition would be for the benefit of the minor, the Court should refuse to direct partition (*p*).

The reason is that generally speaking "the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several coparceners;" moreover the minor would as the result of a partition lose the benefit of survivorship which he might obtain if the family continued joint (*q*). The Privy Council has held that the fact that there had been increased estrangement between the father and the two minor sons by his first wife, on whose behalf a suit for partition was brought, and the fact that two sons were born to the second wife of the father were not good grounds for holding that the suit for partition was in the interests of the minor (*r*).

(2) But though a *suit* cannot be brought for partition on behalf of a minor except in the cases mentioned above, the minority of a coparcener is no bar to a partition between the coparceners. A partition by agreement, though entered into during the minority of a coparcener, is binding on the minor, *unless it is unfair or prejudicial to his interests.* If the partition is unfair or prejudicial to the minor's interests, the minor may, on attaining majority, have it set aside by proper proceedings so far as regards himself. He may also, on attaining majority, enforce the agreement by suit, and it is no answer to the suit that he was not a party to the agreement (*s*). Where the family consists of an adult and a minor, the adult coparcener can put an end to the joint status by his conduct and declaration (*t*).

*Institution of a suit for partition by minor, whether operates as a partition.*—See § 325 (I) (ii). As to minor attaining majority pending such suit see the undermentioned cases (*u*).

**309. Son begotten at time of partition, but born after partition.**—A son, who was in his mother's womb at the time of partition, is entitled to a share though born after partition, as if he was in existence at the time of partition. If no share is reserved for him at the time of partition, he is entitled to have the partition re-opened and share allotted to him (*w*).

*Illustrations*

(a) *A* and his two sons *B* and *C* are members of a joint Hindu family. The father and sons propose to divide the joint family property. *A*'s wife, *X*, is pregnant at the time, and the pregnancy is known to the family. In such a case, the property should be divided into five parts, of which *A*, *B*, *C* and *X* will each take one part, and the fifth part should be set apart to abide the event so that if a son is born, it may be allotted to him, and if a daughter is born, it may be divided again between *A*, *B*, *C* and *X*.

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(*o*) See same citation on p. 398.

(*p*) *Bachoo* v. *Mankorebai* (1905) 29 Bom. 51-60, affirmed on appeal (1907) 31 Bom. 373, 379, 34 I.A. 107 [suit by a posthumous son against an adopted son—partition refused]; *C. Sriramamurthi* v. *Official Receiver* ('57) A. Andh. Pra. 692.

(*q*) (1886) 3 Mad. H.C. 94, 96, 98, *supra.*

(*r*) *Appalaswami* v. *Suryanarayana Murti* (1948) Mad. 440 (P.C.).

(*s*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 30 I.A. 139 [agreement held to be fair]; *Chanvirappa* v. *Danava* (1895) 19 Bom. 593 [ditto]; *Awadh* v. *Sita Ram* (1907) 29 All. 37 [agreement enforced at suit of minor]; *Lal Bahadur* v. *Sispal* (1892) 14 All. 498 [where the full share of the minor was not assigned to him]; *Krishna Bai* v. *Khangowda* (1894) 18 Bom. 197 [where no share was reserved for the minor at all]; *Hiralal* v. *Fulchand* ('56) A. Sau. 89; *Chanam* v. *Narayan* ('57) A. Hyd. 29.

(*t*) *Dnyaneshwar Vishnu* v. *Anant Vasudeo* (1936) 60 Bom. 736, 38 Bom. L.R. 579, 164 H.C. 632, ('36) A.B. 290; *Mogalappa* v. *Vithoba* ('55) A. Hyd. 21 (F.B.). [All members were minors].

(*u*) *Rukhmabai* v. *Ramratan* (1951) Nag. 367, ('51) A.N. 350; *Rama Rao* v. *Venkata* ('37) A.M. 274, 276.

(*w*) *Yekeyamian* v. *Agniswarian* (1870) 4 Mad. H.C. 307; *Kalidas* v. *Krishan* (1869) 2 Beng. L.R. [F.B.] 103, 118-121; *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105, 108-109; *Mandliprasad* v. *Ramcharanlal* (1947) Nagpur 848; *Jagat Krishna* v. *Ajit Kumar* ('64) A. Orissa 75.

(b) *A* and his son *B* are members of a joint family. The father and son divide the joint property between themselves, each taking one-half. Five months after the partition a son *C* is born to *A*. The partition should be re-opened and the property should be divided into three parts, each member taking one-third.

*After-born sons.*—A son born after partition may have been begotten either *at the time of partition* or *subsequent to the partition*. The present section deals with the former case; the next section deals with the latter case. As to the rights of a son in his mother's womb see notes to § 270 above.

**310. Son begotten as well as born after partition.**—A father separating from his sons may or may not reserve to himself a share on partition. The rights of a son born as well as begotten after partition are different according as the father has or has not reserved a share to himself.

(1) Where the father *has reserved* a share to himself, a son who is begotten as well as born after partition is not entitled to have the partition re-opened; but in lieu thereof he is entitled, after the father's death to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to the entire exclusion of the separated sons (*x*).

Thus if *A* has three sons *B*, *C* and *D*, and he *separates from them all*, reserving one-fourth share to himself, and a son *F* is born to *A* three years after the partition, *F* will take on *A*'s death the one-fourth share allotted to *A* at the partition and also the whole of *A*'s separate property to the entire exclusion of *B*, *C* and *D*. If *A* has dissipated his share, and leaves no property, *F* takes nothing (*y*). Next suppose, that *A* does not separate from all the three sons, but separates from *B* alone and remains joint with *C* and *D*, and *F* is subsequently born to *A*. In this case *C*, *D* and *F* will, on *A*'s death, all take in equal shares the portion of the joint property allotted to *A*, *C* and *D* at the partition, and also *A*'s separate property; that is to say, the separate property of *A* and the portion of the joint family property allotted to *A*, *C* and *D* at the partition will be divided equally among *C*, *D* and the after-born son *F* (*z*). The same principle applies if *A* separates from *B* and *C*, and remains joint with *D*, and *F* is subsequently born to *A*.

But now see sec. 8 of the Hindu Succession Act, 1956. Section 8 has now abolished distinction between a divided son and an undivided son in the matter of inheritance of the father's separate property. See commentary on sec. 8 of the Hindu Succession Act.

The rule of Hindu law that where upon a partition, a share has been allotted to the father, a son begotten or born afterwards is not entitled to re-open the partition, applies even when no actual division of the property has taken place and severance of joint status has been effected only by institution of a suit for partition (*a*).

(2) Where the father *has not reserved* a share to himself on a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition reopened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property (*b*).

Where at a partition between a father, his son by the first wife and two sons by the second wife a small item was allowed to the father for maintenance, with a clause that an after-born son should be provided out of the share allotted to his mother and full brothers, it was held that the right of the after-born son to re-open the partition was not affected by the clause (*c*).

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(*x*) *Kalidas* v. *Krishan* (1869) 2 Beng. L.R.F.B. 103, 118-121; *Nawal Singh* v. *Bhagwan Singh* (1882) 4 All. 427.

(*y*) *Shivajirao* v. *Vasantrao* (1909) 13 Bom. 267, 272, 2 I.C. 294; *Anjaneyulu* v. *Ramayya* ('65) A.AP. 177 (F.B.).

(*z*) *Ganpat* v. *Gopalrao* (1899) 23 Bom. 636. See this case criticised in Ghose's Hindu Law, 3rd ed., pp. 572-573. See also *Fakirappa* v. *Yellappa* (1898) 22 Bom. 101; *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 2 I.C. 519.

(*a*) *Bhagwat Ram* v. *Ramji Ram* (1947) 51 C.W.N. 909 (P.C.). See *Venkata Reddi* v. *Sidda Reddi* (1947) Mad. 603.

(*b*) *Chengama* v. *Munisami* (1897) 20 Mad. 75.

(*c*) *Athilinga Gounder* v. *Ramaswami Goundar* (1945) Mad. 297.

**311. Adopted son.**—As to the share of an adopted son in a partition:—

(1) between him and after-born natural sons of his adoptive father, see § 497;

(2) between him and other coparceners, see § 499(2).

Reference may also be made to § 336 for the right of a son validly adopted by the widow of a deceased coparcener to re-open a partition.

**312. Illegitimate son.**—(1) An illegitimate son of a Hindu may be a son by concubine who is a *dasi*, or he may be a son by a concubine who is not a *dasi*. A *dasi* is a concubine who is in the exclusive and continuous keeping of a Hindu. An illegitimate son of a Hindu by a *dasi* is called *dasiputra* (*d*). We are here concerned only with a *dasiputra*.

(1a) Reference may be made to Notes under section 6 of the Hindu Succession Act, 1956, and section 16 of the Hindu Marriage Act, 1955, for the position and rights in a Hindu coparcenary of a son born of a marriage which is void or voidable under the latter enactment and who is to be deemed to be a legitimate child of the parents.

(2) Illegitimate sons of the three regenerate classes [§ 1] are not entitled to inheritance or to any share on partition; they are entitled to maintenance only (*e*). This proposition is founded on the Mitakshara, ch. I, s. 12, para 3.

(3) Illegitimate sons of Sudras are entitled to certain rights of inheritance and partition. The text of the Mitakshara bearing on the subject is as follows:

> "The son begotten by a Sudra of a female slave [*dasiputra*] obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate *for half a share;* that is let them give him half [as much as is the amount of one brother's] allotment": Mitakshara, chap. i, sec. 12, para. 2.

A Sudra father may be joint with his collaterals or he may be separate from them. The above text refers to the estate of a separated householder (*f*).

The following propositions are well established:—

(1) The illegitimate son of a Sudra does not acquire by birth any interest in his father's estate. He cannot therefore enforce a partition against his father in his life-time (*g*). But the father may, in his life-time, give him a share of his property, even a share equal to that of a legitimate son (*h*). The gift by the father of some property, describing it as his self-acquired property, for maintenance, does not separate the illegitimate sons in respect of the joint family property (*i*).

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(*d*) *Rahi* v. *Govind* (1876) 1 Bom. 97, 110; *Sadu* v. *Baiza* (1880) 4 Bom. 37 [F.B.]; *Krishnayya* v. *Muttusami* (1884) 7 Mad. 407, 412; *Brindavana* v. *Radhamani* (1889) 12 Mad. 72, 86; *Soundararajan* v. *Arunachalam* (1916) 39 Mad. 136, 33 I.C. 858, ('16) A.M. 1170; *Sarasuti* v. *Mannu* (1879) 2 All. 134; *Hargobind* v. *Dharam Singh* (1884) 6 All. 329; *Rajani Nath Das* v. *Nitai Chandra Dey* (1921) 48 Cal. 643, 63 I.C. 50, ('21) A.C. 820 [F.B.].

(*e*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51; *Chuoturya* v. *Sahub Purhulad* (1857) 7 M.I.A. 18.

(*f*) *Ranoji* v. *Kandoji* (1885) 8 Mad. 557, 561.

(*g*) *Raja Jogendra* v. *Nityanand* (1891) 18 Cal. 151, 155, 17 I.A. 128, (1880) 4 Bom. 37, 44-45, *supra*.

(*h*) *Karuppanna* v. *Bulokam* (1900) 23 Mad. 16; *Packiriswamy* v. *Doraswamy* (1931) 9 Rang. 266, 132 I.C. 817, ('31) A.R. 216.

(*i*) *Sakharam Satu* v. *Shamrao* (1932) 34 Bom. L.R. 191, 137 I.C. 572, ('32) A.B. 234.

(2) On the father's death, however, he succeeds to his estate as a coparcener with the legitimate son of his father, with a right of survivorship, and he is entitled to enforce a partition against the legitimate son (*j*). In *Gur Narain Das* v. *Gur Tahal Das* (*k*) the Supreme Court held that though an illegitimate son of a Sudra cannot enforce partition during his father's lifetime, he can enforce partition after his father's death if the father was separate from his collaterals and has left separate property and a legitimate son. On a partition between an illegitimate and a legitimate son, the illegitimate son takes only one-half of what he would have taken if he were legitimate, that is, the illegitimate son takes one-fourth, and the legitimate son takes three-fourth (*l*). If either of them dies before partition, the survivor takes the whole estate (*m*).

Where a legitimate son has obtained property by way of partition of the joint family property, which he held along with his collaterals, such property would be ancestral property in his hands, obtained by virtue of the right which he possessed to represent his father. Such property would be held by him in coparcenary with his illegitimate half brother, notwithstanding the fact that the father died undivided with his brothers. A claim to a share in such property is within the ambit of the rights given to the illegitimate son under the texts (*m*1).

(3) If the father was joint at his death with his collaterals, *e.g.*, his brothers or their sons, or his uncles or his sons, the illegitimate son is not entitled to demand a partition of the joint family property, but he is entitled as a member of the family to maintenance out of such property, provided his father left no separate estate (*n*).

See notes to § 43, nos. 1-3, "Illegitimate sons."

**313. Absent coparcener.**—An absent coparcener stands on the same footing as a minor, and his right to receive a share extends to his descendants (*o*).

The right of the descendants, however, would be subject to the law of limitation; see the Indian Limitation Act, 1963, Schedule Arts. 65 and 110.

**314. Purchaser.**—A purchaser of the undivided interest of a coparcener *at a sale in execution of a decree can* demand partition according to all schools. A purchaser of the interest of a coparcener *by private contract* can claim partition in Bombay, Madras and Madhya Pradesh, but not in Bengal or Uttar Pradesh. The reason is that according to the Mitakshara law as interpreted in Bengal and Uttar Pradesh, a coparcener cannot sell his interest in the coparcenary [§§ 260 and 261].

A *gift or devise* by a coparcener of his undivided interest is void according to the Mitakshara law as applied in *all* the States [§258]. Therefore, a *donee* or a *devisee* of

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(*f*) *Shamrao* v. *Mannabai* (1948) Nag. 678.

(*k*) (1952) S.C.R. 869, ('52) A.S.C. 225.

(*l*) *Kamulammal* v. *Visvanathaswami* (1923) 50 I.A. 32, 46 Mad. 167, 71 I.C. 643, ('23) A.P.C. 8; *Uderam* v. *Thaggu* (1949) Nag. 248; *Gur Narain Das* v. *Gur Tahal Das* (1952) S.C.R. 869, 875, ('52) A.S.C. 225.

(*m*) *Raja Jogendra* v. *Nityanand* (1891) 18 Cal. 151, 17 I.A. 128.

(*m*1) *Dorai Babu* v. *Gopalakrishna* ('60) A.M. 501.

(*n*) *Vellaiyappa Chetty* v. *Natarajan* (1932) 55 Mad. 1, 53 I.A. 402, 134 I.C. 1084, ('31) A.P.C. 294; *Ranoji* v. *Kandoji* (1885) 8 Mad. 557; *Sadu* v. *Baiza* (1880) 4 Bom. 37, 44-45 [F.B.]; *Thangam* v. *Suppa* (1889) 12 Mad. 401; *Karuppa* v. *Kumarasami* (1902) 25 Mad. 429; *Gopalasami* v. *Arunachelam* (1904) 27 Mad. 32; *Parvathi* v. *Thirumalai* (1887) 10 Mad. 334; *Krishna Kumar* v. *Sheo Prasad* (1947) Nag. 162.

(*o*) Strange's Hindu Law, vol. i, p. 206; vol. ii p. 341.

an undivided interest cannot sue for partition (*p*). But now see secs. 30 of the Hindu Succession Act, 1965, which permits devise of a coparcenary interest by a coparcener.

**315. Wife.**—(1) A wife cannot herself demand a partition (*q*), but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (*r*). Where at a partition between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share but that in the partition the value of the ornaments taken by her must be taken into account (*s*).

Where a son institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants and a preliminary decree is passed, the mother does not become owner of the share allotted to her until the preliminary decree is carried out and there is a division by metes and bounds. Therefore a mortgagee suing on a mortgage before the property is actually divided can obtain a valid mortgage decree without impleading the mother (*t*). This does not mean that the sons can defeat the right of the mother merely by omission to apportion her a share and place her in its possession. So where the sons while partitioning the property did not allot any share to the mother and the mother did not give her consent to the same it was held that the share of the mother in the property could not be attached in execution of a decree against the sons (*t*1).

In a suit by a son for partition and separate possession of his share after setting aside an alienation of the joint family property made by his father, the mother who is a party is entitled to a share if the Court comes to the conclusion that the alienation was not binding on the family. The alienation can be upheld only to the extent that it affects the father's interest (*u*).

(2) The expression "wife" in relation to "sons" includes their step-mother (*v*).

(3) If the wife has *stridhana* given to her by her husband or father-in-law, its value should be deducted from her share (*w*).

(4) The above rules also apply when a father himself makes a partition of ancestral property among his sons [§ 325].

*Illustrations*

(a) *A* has two wives *B* and *C*, a son *D* by *B*, and four sons by *C*. *D* sues his father *A* for partition. Each of these eight persons is entitled to a one-eighth share including *B* and *C*: *Dular Koeri* v. *Dwarkanath* (1905) 32 Cal. 234. [See as to mother, § 316, below.]

(b) *A* has a wife *B*, two sons by *B*, and a son *C* by a predeceased wife. *C* sues his father *A* for partition. Each of these five persons is entitled to a one-fifth share including *B*: *Jairam* v. *Nathu* (1907) 31 Bom. 54.

*Madras State.*—In Southern India the practice of allotting shares upon partition to females has long since become obsolete (*x*).

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(*p*) *Baba* v. *Timma* (1884) 7 Mad. 357 [F.B.].

(*q*) *Punna Bibee* v. *Radha Kissen* (1904) 31 Cal. 476.

(*r*) *Dular Koeri* v. *Dwarkanath* (1905) 32 Cal. 234 [suit for partition by son against father]; *Jairam* v. *Nathu* (1906) 31 Bom. 54 [ditto]; *Sunarun* v. *Chunder Mun* (1882) 8 Cal. 17; *Partap Singh* v. *Dalip Singh* (1930) 52 All. 396, 125 I.C. 762, ('30) A.A. 537; *Dhanabati Bibi* v. *Pratapmull Agarwalla* (1934) 61 Cal. 1056, 154 I.C. 655, ('35) A.C. 131; *Jagat Krishna* v. *Ajit Kumar* ('64) A. Orissa 73.

(*s*) *Radhabai* v. *Pandharinath* (1942) Nag. 534, 194 I.C. 724, ('41) A.N. 135.

(*t*) *Pratapmull Agarwalla* v. *Dhanabati Bibi* (1936) 63 I.A. 33, 63 Cal. 691, 38 Bom. L.R. 323, 159 I.C. 1080, ('36) A.P.C. 20; *Bhiwra* v. *Renuka* ('52) A.N. 215.

(*t*1) *Laltabai* v. *Krishnarao* ('59) A.M.P. 100.

(*u*) *Parappa* v. *Mallappa* ('56) A.B. 332 (F.B.).

(*v*) (1907) 31 Bom. 54 [Mayukha], *supra*; *Hosbanna* v. *Devanna* (1924) 48 Bom. 468, 80 I.C. 468, ('24) A.B. 444 [Mitakshara].

(*w*) (1907) 31 Bom. 54, *supra*.

(*x*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 8.

*Putrabhaga.*—When the division is by number of *sons* it is called *putrabhaga;* when the division is according to wives, it is known as *patnibhaga. Putrabhaga* is now the recognized mode of division. But the custom of *patnibhaga* prevails in some places and in some families especially among *Sudras* (*y*).

*Whether a share allotted to a wife on partition is her stridhana?* The share allotted to a wife (which expression includes step-mother) on partition is not her stridhana unless it be shown that it was given to her absolutely [§ 128].

The present section deals with the rights of a female who occupies the position of a *wife*. The next two paragraphs deal with the rights of the same female after her husband's death, that is, a female who has become a *widow*.

**315A. Widow.**—See Hindu Women's Rights to Property Act, 1937, § 35 *supra* for the rights of a widow, a predeceased son's widow and the widow of a predeceased son of a predeceased son of a coparcener.

**316. Widow-mother.**—(1) A mother cannot compel a partition so long as the sons remain united. But if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property (*z*). She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them (*a*). Where a son sued for partition but died during the pendency of the suit and the mother was brought in as the legal representative she was held entitled only to his share and not to a mother's share (*b*).

(2) If the mother has received stridhana from her husband or father-in-law, its value should be deducted from her share (*c*).

(3) The term "mother" in this section includes step-mother (*d*).

(4) On a partition between sons by different mothers when more than one mother is alive, the rule is first to divide the property into as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them (*e*).

(5) See Hindu Women's Rights to Property Act, 1937, § 35 *supra.*

*Illustrations*

(a) *A* dies leaving a widow *B*, three sons by *B*, and a son *X* by a predeceased wife. *X* sues his step-mother *B* and his three half-brothers for a partition. The property will be divided into 5 parts, each of the 5 persons above-named including *B* taking one-fifth: *Damodardas* v. *Uttamram* (1893) 17 Bom. 271.

(b) *A* dies leaving two widows, *B* and *C*, two sons by *B*, and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the pro-

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(*y*) *Palaniappa* v. *Alayyan* (1921) 48 I.A. 539, 44 Mad. 740, 64 I.C. 439, ('22) A.P.C. 228. Also see *Umaraparvathy* v. *Bhagwathy Amma* ('72) A.M. 151.

(*z*) *Damoodur* v. *Senabutty* (1882) 8 Cal. 537; *Damodardas* v. *Uttamram* (1893) 17 Bom. 271; *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 271, 31 I.A. 10, 15; *Isree Pershad* v. *Nasib Koer* (1884) 10 Cal. 1017 [alleged waiver of right to partition]; *Gopal Narain* v. *Goenka* ('71) A. Delhi 61; *Saraswathi Ammal* v. *Anantha* ('66) A. Kerala 66.

(*a*) *Blivso* v. *Dina Nath* (1881) 3 All. 88; *Amrita Lall* v. *Manick Lal* (1900) 27 Cal. 551; *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77 [judgment rested on the Dayabhaga].

(*b*) *Parbatidevi* v. *Bansidhar* (1943) All. 810, ('43) A.A. 350.

(*c*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165; *Jadoo Nath* v. *Brojonath* (1874) 12 Beng. L.R. 385; *Piara Lal* v. *Hirdey Nath* ('53) A.J. & K. 9; *Purna Chandra* v. *Chandramani Debya* ('66) A. Orissa 98.

(*d*) *Damoodur* v. *Senabutty* (1882) 8 Cal. 537; *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 286-287; *Har Narain* v. *Bishambhar* (1916) 38 All. 83, 31 I.C. 907, ('15) A.A. 340; *Tegh Indar* v. *Harnam* (1925) 6 Lah. 457, 90 I.C. 1035, ('25) A.L. 568; *Saheb Rai* v. *Shafiq Ahmad* (1927) 31 C.W.N. 972, 101 I.C. 426, ('27) A.P.C. 101.

(*e*) *Kristo Bhabiney* v. *Ashutosh* (1886) 13 Cal. 39.

perty into 5 shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each taking 1/3 of 2/5, *i.e.* 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, *i.e.*, 3/20. Thus *B* will take 2/15, and *C* will take 3/20.

(c) *A* dies leaving two widows *B* and *C*, and two sons *D* and *E* by *B*. *C* has no son. *D* sues *E*, *B* and *C* for partition. The property will be divided into 4 parts, there being 2 widows and 2 sons, and each widow will take one-fourth and each son also will take one-fourth. The fact that *C* has no son does not affect her right to a share: See *Damoodar* v. *Senabutty* (1882) 8 Cal. 537.

*Partition between paternal uncle and nephew.*—The mother of the uncle who is the grandmother of the nephew as well as the mother of the nephew are entitled to a share each. The word 'mother' in Yajnavalkya's text includes grandmother and stepmother (*f*).

*Partition between legitimate and illegitimate sons of a Sudra.*—Among Sudras, a mother is entitled to a share on a partition between her sons and the illegitimate sons of her husband (*g*).

*Madras State.*—In Madras a mother is not entitled to a share. She is entitled only to a provision for her maintenance which must not in any case exceed the share of a son (*h*): *Smriti Chandrika*, chap. iv, paras. 12-17. See also notes to § 315.

*Whether the share allotted to a mother on partition is her stridhana.*—See § 128 above.

*Omission to reserve a share for the mother.*—The omission to reserve a share for the mother does not render the partition invalid (*i*).

*Sale of one of the properties before decree in a partition suit.*—See § 353(7).

**317. Grandmother.**—(1) A paternal grandmother (father's mother) cannot herself demand a partition, but when a partition takes place *between her son's sons, her own sons being dead*, she is entitled to a share equal to that of a son's son (*j*). She is similarly entitled to a share when a partition takes place between her son and the sons of a *deceased son* (*k*). But when partition takes place between her son and his sons, it has been held by the High Courts of Allahabad (*l*) and Bombay (*m*) that she is not so entitled; and by the High Courts of Calcutta (*n*) and Patna (*o*) that she is; the last decision proceeds on a text of Vyasa which allows her a share on such a partition. But now see § 35 and notes to §§ 43 and 316.

(2) The expression "grandmother" in this section includes step-grandmother (*p*).

(3) See Hindu Women's Rights to Property Act, 1937, § 35 *supra*.

*Illustration*

*A* has a son *B*, a mother *M*, and two wives *W* and *W1*. *B* sues *A* for partition. Under the Dayabhaga law, each of these five persons would be entitled to 1/5. Under the Mitakshara law, *M* would not be entitled to a share and each of the other persons would take 1/4.

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(*f*) *Rambhau* v. *Balu* (1946) Nag. 732, ('46) A.N. 206.

(*g*) *Manchharam* v. *Dattu* (1920) 44 Bom. 166, 54 I.C. 110, ('20) A.B. 241.

(*h*) *Venkatammal* v. *Andyappa* (1883) 6 Mad. 130; *Ramlu* v. *Vithal* (1947) Nag. 267.

(*i*) *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 271, 31 I.A. 10, 15.

(*j*) *Kanhaiya Lal* v. *Gaura* (1925) 47 All. 127, 83 I.C. 47, ('25) A.A. 19; *Vithal* v. *Prahlad* (1915) 39 Bom. 373, 28 I.C. 967, ('15) A.B. 35.

(*k*) *Babuna* v. *Jagat Narain* (1928) 50 All. 532, 109 I.C. 61, ('28) A.A. 330.

(*l*) *Sheo Narain* v. *Janki Prasad* (1912) 34 All. 505, 16 I.C. 88.

(*m*) *Jamnabai* v. *Vasudeo* (1930) 54 Bom. 417, 124 I.C. 793, ('30) A.B. 302; *Jotiram Ekoba* v. *Ramchandra Trimbak* (1941) Bom. 638, 197 I.C. 788, ('41) A.B. 382.

(*n*) *Badri Roy* v. *Bhugwat* (1882) 8 Cal. 649.

(*o*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 42-44, 44 I.C. 146, ('18) A.P. 91.

(*p*) *Vithal* v. *Prahlad* (1915) 39 Bom. 373, 28 I.C. 967, ('15) A.B. 35; *Sriram* v. *Haricharan* (1930) 9 Pat. 338, 125 I.C. 518, ('30) A.P. 315,

*Whether the share allotted to a grandmother on partition is her stridhana?*—See § 128 above.

No female except those mentioned in §§ 315 to 317 is entitled to a share on partition. Thus daughter, sisters, etc., are not entitled to a share on partition. But on a partition provision must be made for their maintenance and marriage expenses: See § 304.

**318. Disqualified coparceners.**—Persons who by Hindu law are disqualified by physical infirmity from inheriting are also disentitled to a share on partition. This subject is dealt with in §§ 106 to 109.

## III. RESTRAINT AGAINST PARTITIONS

**319. Agreement not to partition.**—It has been held by the High Courts of Calcutta (*q*), Allahabad (*r*) and Madras (*s*), that an agreement between coparceners not to partition coparcenary property binds the actual parties thereto, but it does not bind their assigns, unless there be a stipulation not to assign. A compromise followed by a decree providing that certain properties should be divided and certain other items should be kept joint for ever, was held to be enforceable in law (*t*). On the other hand, it has been held by the High Court of Bombay that such an agreement does not bind even the parties thereto, so that any party may, notwithstanding the agreement, sue the other parties for a partition (*u*).

*Illustration*

*Calcutta decisions.*—*A* and *B*, two Hindu brothers, agree not to partition the coparcenary property. After the date of the agreement, *A* sells his interest in the joint property to *P*. The agreement is not binding upon *P*, there being no stipulation not to assign. *P* may, therefore, sue *B* for partition.

See the Transfer of Property Act, 1882, secs. 10-11.

It is open to Hindu brothers to divide the family property and to agree that upon the death of any one of them *without male issue* his share shall pass to the surviving brothers. Such an agreement is not in contravention of the provisions of Hindu Law (*v*). But it is not open to the contracting parties to lay down a rule of inheritance for the property in the hands of the last survivor in derogation from the ordinary rules of Hindu law (*w*).

An agreement by a coparcener, that he would forego his right to claim partition on receipt of certain properties for his maintenance is a good and binding agreement, and a claim for partition in contravention of such agreement would not be entertained (*x*).

**320. Direction in a will prohibiting partition.**—A direction in a will prohibiting a partition, or postponing a partition for an indefinite period, is invalid (*y*).

See the Indian Succession Act, 1925, ss. 77 and 163.

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(*q*) *Anand Chandra* v. *Pran Kisto* (1869) 3 Beng. L.R.O.C. 14; *Anath Nath* v. *Mackintosh* (1871) 8 Beng. L.R. 60; *Rajender* v. *Sham Chund* (1881) 6 Cal. 106; *Srimohan* v. *Macgregor* (1901) 28 Cal. 769, 786; *Krishendra* v. *Debendra* (1908) 12 C.W.N. 793.

(*r*) *Rup Singh* v. *Bhubhuti* (1920) 42 All. 30, 58 I.C. 632, ('20) A.A. 341.

(*s*) *Arumugha Chetty* v. *Ranganathan Chetty* (1934) 57 Mad. 405, 146 I.C. 1057, ('33) A.M. 847.

(*t*) *Jyotish Chandra Narayan* v. *Rathika Chandra Narayan* (1933) 60 Cal. 1078, 149 I.C. 150, ('33) A.C. 892.

(*u*) *Ramlinga* v. *Virupakshi* (1883) 7 Bom. 538.

(*v*) *Kanti* v. *Al-i-Nabi* (1911) 33 All. 414, 9 I.C. 935; *Ram Nirunjun* v. *Prayag Singh* (1882) 8 Cal. 138.

(*w*) *Bageshar Rai* v. *Mahadevi* (1924) 46 All. 525, 79 I.C. 514, ('24) A.A. 461.

(*x*) *Sobhag Singh* v. *Pirthe Singh* ('51) A.N. 259.

(*y*) *Mokoondo* v. *Gonesh Chunder* (1876) 1 Cal. 104; *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Poorendra Nath* v. *Hemangini* (1909) 36 Cal. 75, at p. 77, 1 I.C. 523.

## IV. ALLOTMENT OF SHARES

**321. Shares on partition.**—On a partition between the members of a joint family, shares are allotted according to the following rules:—

(1) On a partition between a father and his sons each son takes a share equal to that of the father. Thus if a joint family consists of a father and three sons, the property will be divided into four parts, each of the four members taking one-fourth.

(2) Where a joint family consists of brothers, they take equal shares on a partition.

*Jyeshtabhagam* as understood in ancient Hindu law has become obsolete and the Court will not enforce any claim by the eldest member or manager to a larger share of the joint family property than that allotted to the other coparceners (*yy*) nor, according to the High Court of Mysore, will the Court confirm any such unequal allotment in every such case simply on the ground that the arrangement had been acted upon (*y*1).

(3) Each branch takes *per stirpes* (that is, according to the stock) as regards every other branch, but the members of each branch take *per capita* as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives [ills. (a) and (b)].

It has been laid down by the High Court of Madras following the authority of the Smriti Chandrika, that rule 3 applies to cases in which *all* the coparceners desire partition at the same time. In cases in which only some of the members of a joint family separate from it at one time and others on a subsequent occasion, regard should be had to the shares allotted at the first partition in computing the shares to be allotted at the second partition (*z*). On the other hand, it has been laid down by the High Court of Bombay, following the authority of the Vyavahara Mayukha, that in allotting shares at the second partition, regard is to be had to the state of the family at the time of the second partition, and not to the state of the family at the first partition (*a*). The ordinary rule is that partition should be made *rebus sic stantibus* as on the date of the suit, *i.e.* according to the condition of the family as on the date of the suit. According to the Madras High Court, this rule is to be applied at the first partition only and not at the second partition. According to the Bombay High Court, the rule is to be applied at both partitions [see ills (c) and (d)].

*Variation in shares after preliminary decree.*—Though a suit is generally to be tried in all its stages on the cause of action as it existed at the date of commencement, notice may be taken of events which have happened since the institution of the suit and relief afforded to the parties on the basis of the altered conditions. This may in a proper case be done even after a preliminary decree for partition has been passed. Thus for instance where after the preliminary decree defendant No. 1, the father died and in the course of the darkhast, the plaintiff applied to have the decree amended and to have awarded to him his augmented share it was held that the original decree should be suitably amended (*b*).

(4) On the death of a coparcener leaving male issue, his right to a share on partition is represented by his male issue, that is it passes to his male issue, provided such issue be within the limits of the coparcenary. This rule was modified by the Hindu Women's Rights to Property Act, 1937. It must now be read in the context of section 6 of the Hindu Succession Act, 1956, and particularly the proviso to that section. Reference may be made to the Notes

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(*yy*) *Siromani* v. *Hemkumar* ('68) A.SC. 1299.

(*y*1) *Veerabhadrappa* v. *Lingappa* ('63) A. Mysore 5. Also see *Panchanana* v. *Balursingh* ('72) A. Orissa 85.

(*z*) *Manjanatha* v. *Narayana* (1882) 5 Mad. 362; *Narayana* v. *Shankar* (1930) 53 Mad. 1, 121 I.C. 1, ('29) A.M. 865 [F.B.].

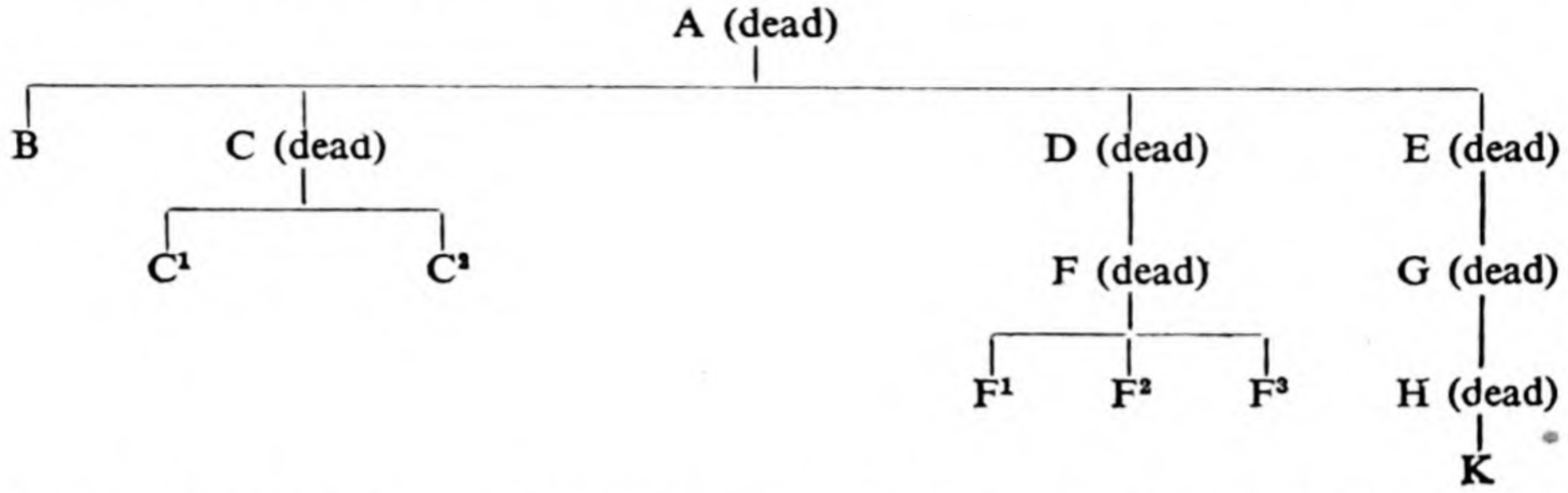
(*a*) *Pranjivandas* v. *Ichharam* (1915) 39 Bom. 734, 30 I.C. 918, ('15) A.B. 255.

(*b*) *Parashuram* v. *Hirabai* ('57) A.B. 59; *Sham Singh* v. *Lal Singh* ('56) A. Pepsu 97,

under that section *post*. The illustrations below must be read in the light of what is stated above.

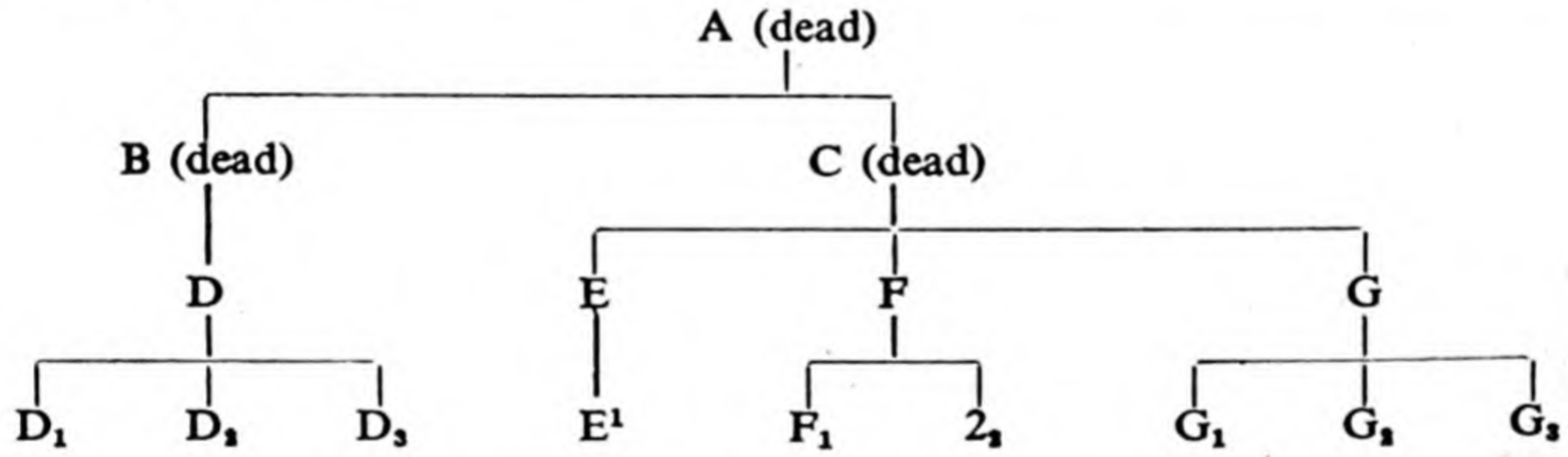
*Illustrations*

(a) *A* dies leaving a son *B*, two grandsons $C^1$ and $C^2$, three great-grandsons $F^1$, $F^2$ and $F^3$ and one great-great-grandson *K*.



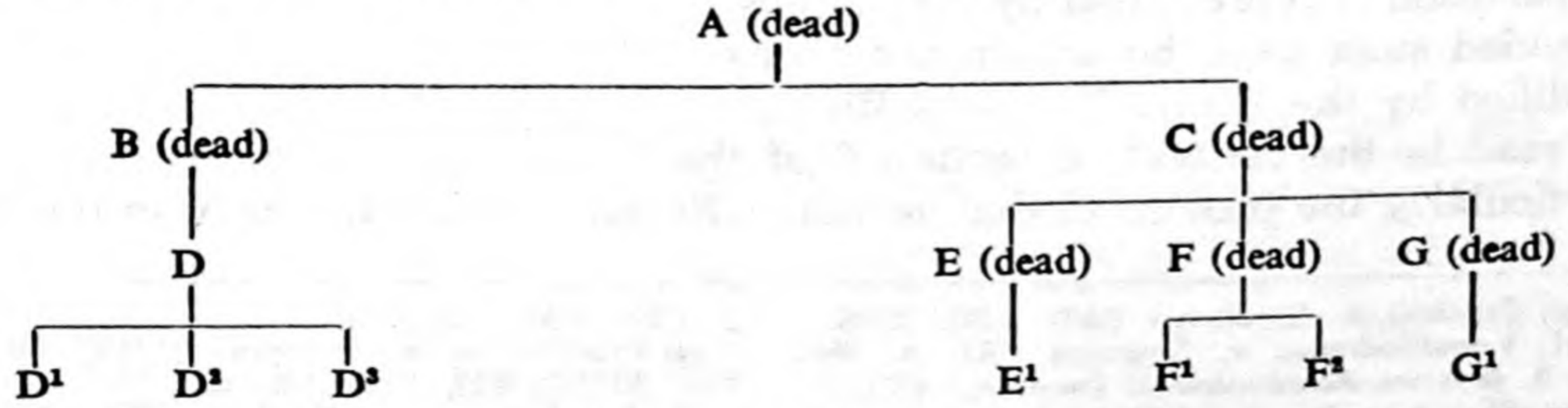

Here there are four branches of the joint family represented respectively by the four sons of *A* and their descendants. *E*'s branch takes nothing as *K*, the only surviving member of that branch, is outside the limits of the coparcenary, being beyond the fourth degree of descent from *A*, the common ancestor [§ 215]. The joint property will therefore be divided *per stirpes* into three parts corresponding to the remaining three branches, each branch taking 1/3. The result is that *B* will take 1/3, $C^1$ and $C^2$ will take the one-third share of *C* equally between them, each taking 1/2 of 1/3, *i.e.*, 1/6 and $F^1$, $F^2$ and $F^3$ will take the one-third share of *D* equally between them each taking 1/3 of 1/3, *i.e.* 1/9.

(b) *A* dies leaving four grandsons, *D*, *E*, *F* and *G*, and nine great-grandsons as shown in the following diagram:—




All the coparceners are desirous of separating from one another. Here there are two branches of the joint family represented respectively by the two sons of *A*. The property will, therefore, be divided into two parts, *B*'s branch taking 1/2, and *C*'s branch taking 1/2. As to *B*'s branch, *D* and his sons $D_1$, $D_2$ and $D_3$ will each take 1/4 of 1/2, *i.e.*, 1/8, each son taking a share equal to that of the father. As to *C*'s branch, each of the three sub-branches represented by *E*, *F* and *G*, will take 1/3 of 1/2, *i.e.*, 1/6, *E* and $E_1$ will each take 1/2 of 1/6 *i.e.*, 1/12; *F*, $F_1$ and $F_2$ will each take 1/3 of 1/6, *i.e.*, 1/18 and *G*, $G_1$, $G_2$ and $G_3$ will each take 1/4 of 1/6, *i.e.* 1/24.

(c) A Hindu, *A*, governed by the Mitakshara school of Hindu law, dies leaving a grandson *D*, and seven great-grandsons as shown in the following diagram:—



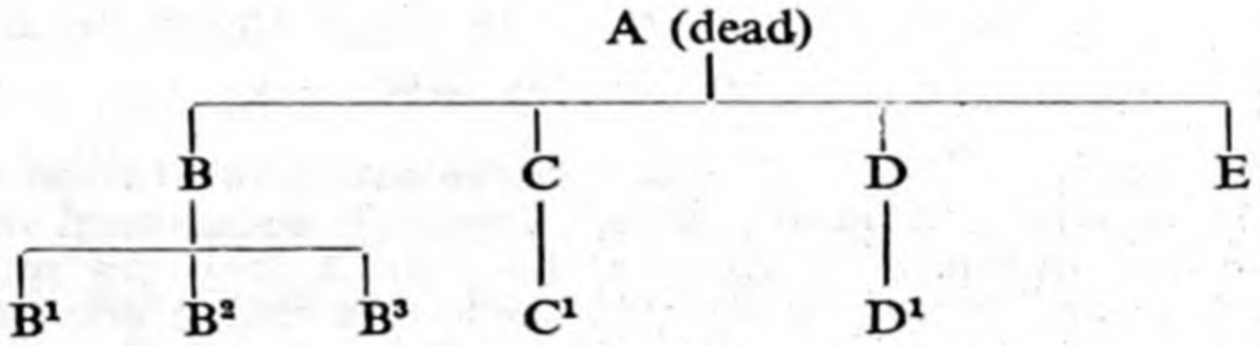

$D^1$, $D^2$, $F^1$, $F^2$, and $G^1$ institute a suit against *D*, $D^3$, and $E^1$ for partition. What are the respective shares of the parties in the property? Here there are two branches of the

joint family; the property will therefore be divided into two parts, *B*'s branch taking 1/2 and *C*'s branch taking 1/2. As to *B*'s branch, *D* and his sons $D^1$, $D^2$ and $D^3$ will each get 1/4 of 1/2, *i.e.* 1/8. As to *C*'s branch each of the three sub-branches represented by *E*, *F* *G*, will get 1/3 of 1/2 *i.e.*, 1/6, $E^1$ will get 1/6, $F^1$ and $F^2$ will each get 1/2 of 1/6, *i.e.* 1/12, and $G^1$ will get 1/6. The five plaintiffs take their respective shares, and leave the family. *D*, $D^3$ and $E^1$ continue joint as before. Their shares, it has been seen, are as follows:—

| | |
|---|---|
| D | 1/8 |
| $D^1$ | 1/8 |
| $E^1$ | 1/6 |
| | 5/12 |

*D* then dies. After *D*'s death, his son $D^3$ sues $E^1$ to recover his share of the family property. What is the share of $D^3$ in the property? According to the Bombay High Court, $D^3$ as representing *B*'s *branch* is entitled to 1/2 × 5/12=5/24, and $E^1$ as representing *C*'s *branch* is entitled to the remaining 5/24. According to the Madras High Court, on the death of *D*, the right to represent his share passes to his son $D^2$ so that $D^3$ is entitled to get 1/8 + 1/8, *i.e.*, 1/4 and $E^1$ retains his original share 1/6. See rule 3 above.

(d) A Hindu, *A*, governed by the Mitakshara school of Hindu law, dies leaving four sons, *B*, *C*, *D* and *E*, five grandsons, $B^1$, $B^2$ $B^3$, $C^1$. and $D^1$, as shown in the following diagram:—




Thereafter *B* dies. In 1892, $B^2$ receives his share 1/3 × 1/4 = 1/12, and leaves the family. The rest of the family continues joint. Then *C* dies, then *D*, then *E*, and then $B^2$.

In 1911 $B^1$ sues $C^1$ and $D^1$ for a partition. According to the Bombay High Court the property is to be divided into three parts, as there are three branches subsisting at the date of the suit, namely *B*'s branch, *C*'s branch and *D*'s branch, so that $B^1$, $C^1$ and $D^1$ will each take 1/3. According to the Madras High Court $B^1$ is entitled to 1/3 — 1/12 [1/12 being the share allotted to $B^2$ when he left the family] = 1/4, and not 1/3. See rule 3 above.

(5) See Hindu Women's Rights to Property Act, 1937, § 35 *supra* for the rights of a widow, predeceased son's widow and the widow of a predeceased son of a predeceased son of a coparcener.

(6) See sec. 6 of the Hindu Succession Act, 1956, and Notes thereunder.

## V.—PARTITION HOW EFFECTED

**322. What is Partition.**—According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he—that particular member —has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a *numerical* division of the property; in other words, it consists in *defining the shares* of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary (*c*). Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether

(*c*) *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A, 75, 89-90; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 255, 30 I.A. 1; *Sheodan* v. *Balkaran* (1921) 43 All. 193, 59 I.C. 116, ('21) A.A. 337.

they do the one or the other, it affects only the *mode of enjoyment*, but not the *tenure* of the *property*. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common (*d*).

Where at a partition between a Hindu, his two sons, and his two wives one-fifth was allotted to each of the sons and three-fifths to the father and his wives, it was held that the father and his wives became tenants-in-common, but though they had not divided their shares by metes and bounds *inter se* there could be no reunion between them, and the father therefore had no right to sell the properties of the wives and any such alienation by him was not binding on them (*e*).

**323. Partition by father during his lifetime.**—The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons *inter se*. The consent of the sons is not necessary for the exercise of that power (*f*). But a grandfather has no power to bring about a separation among his grandsons. Even if he allots shares, they remain joint (*g*). The right of a father to sever the sons *inter se* is a part of the *patria potestas* still recognized by the Hindu law.

When under a partition by a father *unequal* shares are given to the sons, the transaction will be binding on the sons as *a family arrangement*, if acquiesced in by them (*h*). If the partition is unequal and unfair it is open to the sons if they are majors to repudiate the partition; but if they are minors, it is open to them to avoid it after they attain majority. The partition will be good until it is set aside. The right of the minors is a personal right and cannot be exercised by others (*i*). In any such case it is not necessary for the minor to formally set aside the earlier partition before filing a suit for partition (*j*).

**324. Whether father can effect partition by a will.**—No coparcener, not even the father, has a right to make a partition by will of joint family property among the various members of the family except with their consent (*k*).

**325. How partition may be effected.**—Partition is a severance of joint status, and as such it is a matter of individual volition (*l*). All that is necessary, therefore, to constitute a partition is a *definite and unequivocal indication of his intention* by a member of a joint family to separate himself from the family and enjoy his share in severalty. The Supreme Court pointed out in the undermentioned case (*l*1) that there should be an intimation, indication or representation of such intention and that what form that manifestation should take would depend upon the circumstances of each case. It is implicit

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(*d*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 751, 752, 30 I.A. 139; *Darshan Singh* v. *Prabhu Singh* (1946) All. 130; *Narasamma* v. *Venkata Narasi* ('54) A.M. 282, (1953) 2 M.L.J. 695.

(*e*) *Nanuram* v. *Radhabai* (1942) Nag. 24, ('40) A.N. 241.

(*f*) *Kandasami* v. *Doraisami* (1880) 2 Mad. 317, 321; *Meyyappa* v. *I.T. Commissioner* ('51) A.M. 506, (1950) 2 M.L.J. 353; *Nirman* v. *Fateh* (1930) 52 All. 178, 126 I.C. 337, ('29) A.A. 963; *Mulam Chand* v. *Kanchhendillal* ('58) A.M.P. 304; *Venkatasubramania* v. *Easwara Iyer* ('66) A.M. 266.

(*g*) *Subbarami Reddi* v. *Chenchuraghava Reddi* (1945) Mad. 1714; *Meyyappa* v. *I.T. Commissioner, supra.*

(*h*) *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All. 763, 102 I.C. 66, ('27) A.A. 454.

(*i*) *Meyyappa* v. *I.T. Commissioner, supra.* Reference may also be made to *Deveerachar* v. *Viswesvariah* ('68) A. Mys. 211; *Gadadhar* v. *Gangadhar* ('72) A. Orissa 24.

(*j*) *Hiralal* v. *Fulchand* ('56) A. Sau. 89.

(*k*) (1913) 35 All. 337, 346, 40 I.A. 161, 19 I.C. 826, *supra*; *Harkash Singh* v. *Hardevi* (1927) 49 All. 763, 102 I.C. 66, ('27) A.A. 454.

(*l*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 161, 43 Cal. 1031, 1049, 37 I.C. 321, ('16) A.P.C. 104.

(*l*1) *Raghavamma* v. *Chenchamma* (1964) S.C. 136; *Puttrangamma* v. *Rangamma* ('68) A.S.C. 1018 [Relevant texts examined]. Also see *Fatechand* v. *State of W. Bengal* ('72) A.C. 177.

in this principle that this manifestation or declaration of intention should be to the knowledge of the persons affected for a mere uncommunicated declaration may amount to no more than merely harbouring an intent to separate. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation, and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct (*m*). It may be expressed by serving a notice on the other coparceners (*n*), and the severance of status takes place from the date when the communication was sent and not when it was received (*o*). Once a communication of the intention is made by a member which has resulted in the severance of the joint family status it would not thereafter be open to him to nullify its effect by revoking or withdrawing the notice. He cannot get back to the old position by mere revocation of the intention (*o*1). The notice, however, may be withdrawn with the consent of the other coparceners (*p*). It may also be expressed by the institution of a suit for partition. An oral request made by an elder brother, at the time of his death, to his younger brother to give half the property to the widow of the former, does not amount to a separation (*q*). A statement by a member in his will that he is entitled to a particular share does not by itself amount to an expression of intention to separate (*q*1). But a will may contain a clear and unambigous declaration of intention to separate from the family and if the intention is communicated, that may be sufficient (*q*2). Communication of intention to all the members of the family is, however, not essential. It may suffice if it is to the managing member of the family or in the case of *tarwad* to the *karnarvan* (*r*).

*Prima facie* a document expressing the intention to divide brings about a division in status, but it is open to a party to prove that the document was a sham or a nominal one not intended to be acted upon and executed for some ulterior purpose. It sometimes happens that persons make statements which serve their purpose, or proceed upon ignorance of the true position; and it is not their statements but their relations with the estate which is the determining factor (*r*1).

As to minor coparceners see § 308 *ante*. Reference may also be made to § 330 *post*.

Where a simple money decree was obtained against the father and in a suit on behalf of his minor sons for a declaration that the debt for which the decree was passed was immoral, the District Munsiff found that the debt was not immoral but on the ground that the decree was a money decree, declared that the sons' share was not liable

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(*m*) *Dnyaneshwar Krishna* v. *Anant Vasudeo* (1936) 60 Bom. 736, 38 Bom. L.R. 579, 164 I.C. 632, ('36) A.B. 290; *Girdharilal* v. *Fatechand* ('54) A.M.B. 148; *Bal Mukandji* v. *Gokaran Singh* ('56) A.A. 124.

(*n*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.P.C. 104, *supra*.

(*o*) *Narayana Rao* v. *Purushothama Rao* (1938) Mad. 315, ('38) A.M. 390.

(*o*1) *Puttrangamma* v. *Ranganma* ('68) A.SC. 1018.

(*p*) *Banke Bihari* v. *Brij Bihari* (1929) 51 All. 519, 116 I.C. 285, ('29) A.A. 170.

(*q*) *Shivappa Rudrappa* v. *Rudrava Chanbasappa* (1933) 57 Bom. 1, 142 I.C. 164, ('32) A.B. 410.

(*q*1) *Mulan* v. *Kanchhendillal* ('58) A.M.P. 304.

(*q*2) *Raghavamma* v. *Chenchamma* ('64) A.S.C. 136; *Lakshmi Perumallu* v. *Krishnavenamma* ('65) A.S.C. 825.

(*r*) *Katheesumma* v. *Beechu* (1950) Mad. 502, ('51) A.M. 561; *Appalanarasimhan* v. *Udalama* ('59) A.A.P. 407.

(*r*1) *Rukhmabai* v. *Laxminarayan* ('60) S.C. 335; *Mudigowda* v. *Ramchandra* ('69) A.S.C. 1076.

to be sold in execution, it was held that these facts did not constitute separation of the sons from the father (*s*).

*Exercise of volition on behalf of minor.*—It has been held by the High Court of Madras (*s*1), disagreeing with the High Court of Andhra Pradesh (*s*2) that a guardian of a minor acting on his behalf can exercise volition on behalf of the minor to effect partition, subject to the condition that such exercise of volition should be approved of by the court and that it is not necessary for the exercise of that volition that any suit or partition suit should be pending before the court.

*Date of severance in status.*—Question arises as to the date from which severance in status is deemed to have taken place. Is it the date of expression of intention by a coparcener to sever himself from the joint family or the date when such intention is brought to the knowledge of the other coparceners? Obviously the answer would affect rights also of other parties. In *Raghavamma* v. *Chenchamma* the Supreme Court held that the date of severance would be that of manifestation of intention to separate by virtue of the doctrine of relation back. Even so the rights accrued to others in the joint family property between such manifestation of intention and the knowledge of it by the other coparceners would be saved (*s*3).

(1) *Partition by institution of suit.*—(i) *Suit by adults.*—The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate, and there consequently is a severance of his joint status from the date when it is instituted. A decree may be necessary for *working out the results of the severance and for allotting definite shares,* but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not (*t*). And if the plaintiff dies the suit can be continued by the heir (*u*). But if the suit is withdrawn before trial, the plaintiff not desiring separation, there is no severance of the joint status (*v*). Nor is there any severance if the suit is proved to be a sham transaction resorted to for the purpose of creating evidence of separation (*w*). Or if the defendant dies and the suit is withdrawn on that ground there is no separation (*x*). The filing of a suit is strong evidence but not conclusive evidence of an intention to separate (*y*). Even a decree passed by consent does not effect a severance if

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(*s*) *Patru Lal* v. *Parbhawati Kuar* (1943) All. 205, 207 I.C. 228, ('43) A.A. 214.

(*s*1) *Ramaswamy* v. *Kuppa Chetti* ('62) A.M. 31.

(*s*2) *Ayyanna* v. *Kotayya* ('60) A.A.P. 70.

(*s*3) (1964) S.C. 136.

(*t*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.P.C. 104; *Kawal Nain* v. *Prabhulal* (1917) 44 I.A. 159, 39 All. 496, 40 I.C. 286, ('17) A.P.C. 39; *Suraj Narain* v. *Iqbal Narain* (1913) 40 I.A. 40, 45, 35 All 80, 87, 18 I.C. 30; *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.P.C. 201; *Soundararajan* v. *Arunachalam* (1916) 39 Mad. 136, 33 I.C. 858, ('16) A.M. 1170 [F.B.]; *Hazari Lal* v. *Ram Lal* (1925) 47 All. 746, 88 I.C. 422, ('25) A.A. 813. The same rule applies where the estate is impartible; *Jagadamba* v. *Narain Singh* (1923) 2 Pat. 319, 50 I.A. 1, 77 I.C. 1041, ('23) A.P.C. 59; *Dhanabathi Bibi* v. *Pratapmull Agarwalla* (1934) 61 Cal. 1056, 154 I.C. 655, ('35) A.C. 131; *Ramamurthy* v. *Venkatasubbarayudu* ('54) A. Andh. Pra. 34.

(*u*) *Rajrup Rai* v. *Sheo Shanker Rai* (1945) All. 287.

(*v*) *Kedar Nath* v. *Ratan Singh* (1910) 37 I.A. 161, 32 All. 415, 7 I.C. 648; *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.P.C. 49; *Shagun Chand* v. *Data Ram* (1927) 49 All. 664, 101 I.C. 868, ('27) A.A. 465.

(*w*) *Bhagwant Kishore* v. *Bishambhar Nath* ('50) A.A. 54.

(*x*) *Shankersingh* v. *Gulapchand* (1945) Nag. 444.

(*y*) *Joala Prasad Singh* v. *Chanderjet Kuer* (1938) 17 Pat. 430, 175 I.C. 783, ('38) A.P. 278.

its terms are not carried out and the members continue to live together having abandoned their decision to separate (*z*).

When a suit for partition is instituted by a member of a joint family the Court has power not only to divide the properties by metes and bounds, but also to effect a separation of status without actual division of the property. Such direction may be useful when a minor is a party to the partition suit and the declaration is considered beneficial in the interests of the minor (*a*).

*Withdrawal of Suit.*—The Madras High Court has held that when in a suit for partition the plaint contains a clear and unambiguous expression of an intention to separate from the date of filing the suit, and summons have been duly served on the other coparceners, division in status is effected from the date of filing the suit, even if the suit is subsequently withdrawn. The reason is that except in case of an agreement to reunite, it is not open to a coparcener to revoke or withdraw an unambiguous expression of and intention to separate which is communicated to the other members (*b*).

In *Palani Ammal's* case (c), the Judicial Committee observed that a plaint claiming a partition, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained.

*Attachment of undivided share.*—In a decision of the Calcutta High Court (*d*) it has been held that attachment of the undivided share of a coparcener in a Mitakshara family during his lifetime operates as division of interest and causes a severance of status. The correctness of this view, it is submitted, must be doubted. The Patna High Court has expressed disagreement with the Calcutta view (*d*1).

(ii) *Minor's suit for partition.*—In a suit for partition brought by the father and his minor son as plaintiffs against the other members of the joint family, in which it was contended by the minor's mother as the guardian, and found by the Court that the separation was not in the interests of the minor, it was held, that the institution of the suit does not effect a separation of the minor from the rest of the family, though it may operate as a separation of the father from the rest of the family (*f*). Where the Court dismisses the suit on the ground that a partition was not beneficiai to the minor plaintiff, no severance is effected (*g*). If the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, the divided status of the minor dates from the date of the institution of the suit and not from the date of the preliminary decree (*h*).

In a suit for partition filed on behalf of the minor son against the father the plaint was returned to be presented to the proper Court and, after an interval, was re-presented and the Court found that the partition was beneficial to the interests of the minor. In the interval the father executed a mortgage. It was held that the son became divided from the father only from the date of re-presentation of the plaint and that it could not be contended that the mortgage was not binding on the son on the ground that they were divided when it was executed. It was also held that the document was not affected by the principle of *lis pendens* (*i*). In a minor's suit for partition, where another son was born to the plaintiff's father even before the preliminary decree, it was held by the High Court of Patna that the institution of the suit itself effected a severance of the joint status

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(*z*) *Chokalingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 849.

(*a*) *Bhagirathibai* v. *Manohar* (1950) Nag. 698, ('51) A.N. 164.

(*b*) *Radhakrishna* v. *Satya Narayan* (1949) Mad. 229.

(*c*) (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.P.C. 49, *supra*.

(*d*) *Muneswari* v. *Jugal Mohini* ('52) A.C. 368.

(*d*1) *Sheonandan* v. *Ugrah Sao* ('60) A.P. 66.

(*f*) *Ganapathy* v. *Subramanyam* (1929) 52 Mad. 845, 122 I.C. 167, ('29) A.M. 738.

(*g*) *C Sriramamurthi* v. *Official Receiver* ('57) A. Andh. Pra. 692.

(*h*) *Krishnaswami* v. *Pulukaruppa* (1925) 48 Mad. 465, 88 I.C. 424, ('25) A.M. 717; *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 866, 104 I.C. 72, ('27) A.M. 80; *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A.P. 275; *Ram Singh* v. *Fakira* (1939) Bom. 256; *Mandliprasad* v. *Ramcharanlal* (1947) Nag. 848. Reference may be made to *Varadammal* v. *Ambalal Vyas* ('27) A.M. 371.

(*i*) *Nathusingh* v. *Anandrao* (1941) Nag. 652, 186 I.C. 688, ('40) A.N. 185.

and that the minor's share did not suffer a diminution by reason of the birth of another son (*j*).

There was divergence of judicial opinion (*j*1) about the effect of the death of a minor plaintiff pending any such suit. It has now been held by the Supreme Court (*j*2) that any such suit instituted on behalf of a minor coparcener brings about a division in status. What brings about the severance in status is the action of the next friend in instituting the suit, the decree of the court merely rendering it effective by deciding that what the next friend has done is for the benefit of the minor. Such a suit does not abate on death of the minor but can be continued by his legal representative.

Reference may also be made to §§ 308 and 330.

According to a Patna decision, his interest will pass to his heirs unconditionally (*p*). As to the effect on the minor plaintiff's shares by subsequent births and deaths; see also § 330 below.

(2) *Partition by agreement.*—A partition may also be effected by an agreement between the parties [§ 326]. In some cases it is stated that a severance of joint status can take place only by agreement between the parties or by a decree of the Court [§ 329]. But this is a mistaken view (*q*). As stated above, a definite and unambiguous indication by one member of his intention to separate and to enjoy his share in severalty may amount to a partition.

(3) *Partition by arbitration.*—An agreement between the members of a joint family whereby they appoint arbitrators for dividing the joint family properties among them amounts to a severance of the joint status of the family from the date thereof (*r*). The mere fact that no award has been made is not evidence of a renunciation of the intention to separate (*s*). Where a father refers the family dispute between himself and his minor son (represented by his mother) to an arbitrator, the award of the arbitrator directing a partition effects a severance between the father and the son from its date (*t*). A reference to arbitration for effecting partition made on his behalf by his natural guardian must be for the benefit of the minor. If not so, it will not in any event bind him (*u*).

(4) It is a mistake to suppose that there can be no partition until there is a division of the joint family property by metes and bounds. It is very important to keep the two considerations quite distinct from each other, namely, partition, that is, the severance of the joint status, which is a matter of individual decision, and the *de facto* division of the property, that is, the allotment of shares which may be effected by different methods, *e.g.*, by

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(*i*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

(*j*1) *Rangarsayi* v. *Nagaratnamma* (1934) 57 Mad. 95 [F.B.], 146 I.C. 769, ('33) A.M. 890; *Ramsingh* v. *Fakira* (1939) Bom. 256, ('39) A.B. 169; *Mandliprasad* v. *Ramcharanlal* (1947) Nag. 848. *Contra* see *Chelimy Chetty* v. *Subamma* (1918) 41 Mad. 442, 42 I.C. 860, ('18) A.M. 379; *Lalta Prasad* v. *Sri Mahadeoji* (1920) 42 All, 461, 58 I.C. 667, ('20) A.A. 116; *Hari Singh* v. *Pritam Singh* (1936) Lah. 504.

(*p*) *Krishna Lal* v. *Nondeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

(*q*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 162, 43 Cal. 1031, 1050, 37 I.C. 321, ('16) A.P.C. 104.

(*r*) *Syed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('23) A.P.C. 353; *Kashinathsa* v. *Narsingsa* ('61) A.S.C. 1077; *Krishna* v. *Balaram* (1896) 19 Mad. 290; *Subbaraya* v. *Sadashiva* (1897) 20 Mad. 490; *Balmukund Lal* v. *Musammat Sohano* (1929) 8 Pat. 153, 119 I.C. 817, ('29) A.P. 164; *Ramadin* v. *Gokulprasad* ('59) A.M.P. 25.

(*s*) *Ram Kali* v. *Khamman Lal* (1929) 51 All. 1, 111 I.C. 33, ('28) A.A. 422; *Panchpagesa* v. *Kalyanasundaram* ('57) A.M. 472 (Revocation of arbitration after severance).

(*t*) *Shantilal Meucaram* v. *Munshilal Kewalram* (1932) 56 Bom. 595, 139 I.C. 820, ('32) A.B. 498.

(*u*) *Kamal Singh* v. *Sekhar Chand* ('52) A.C. 447.

private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court (*v*).

(5) A coparcener does not on insolvency cease to be a member of a joint family, nor does the fact that a coparcener has alienated the whole or part of his undivided share, effect a partition between him and his family (*w*).

*Illustrations*

(a) *A* and his brothers *B* and *C* are members of a joint Hindu family. *A* sues *B* and *C* for partition. After the suit, but before the decree, *A* dies leaving a widow. *A*'s share does not pass by survivorship to *B* and *C*, but it descends to his widow as his heir, and she as such is entitled to continue the suit: *Girija Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.P.C. 104. The result would be the same if *A*, *B* and *C* appointed an arbitrator to partition the property and *A* died pending arbitration: *Syed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('23) A.P.C. 353.

(b) *A* and his father *B* are members of a joint Hindu family. *A* sues *B* for partition. *B* admits that he and *A* are joint, but alleges that the fact stated in the plaint, namely, that *B* had failed to maintain *A* is *untrue*, and asks that *A*'s suit should be dismissed on the ground that the facts alleged by *A* in his plaint are not proved. Such a dismissal is quite wrong. The institution of the suit operates as a partition between *A* and *B*, though the suit is dismissed: *Kawal Nain* v. *Prabhu Lal* (1917) 44 I.A. 159, 39 All. 496, 40 I.C. 286, ('17) A.P.C. 39. See sub-§ (1) above.

**326. Partition by agreement.**—(1) As regards partition, no act done by any member of a joint family, can operate as a partition, unless it has been done with the *intention* to put an end to his *status* as a coparcener and acquire a new *status*, that is, the *status* of a separate owner (*x*) [§ 325]. As stated by their Lordships of the Privy Council in the leading case of *Appovier* v. *Rama Subba Aiyan* (*y*), the true test of partition of property according to Hindu law [is] the *intention* of the members of the family to become separate owners. *Intention* being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property *in defined shares as separate owners* operates as a partition, although there may have been *no actual division of the property by metes and bounds.* As observed by the Judicial Committee in the case above referred to (*z*), "when the members of an undivided family agree among themselves with regard to a particular property, that it shall thenceforth be the *subject of ownership, in certain defined shares,* then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, *although the property itself has not been actually severed and divided.*" In such a case the *interest* of each member is divided though the *property* remains physically undivided. That interest, therefore, will descend, and may be dealt with, as separate property, except where the separating member remains joint with his own male issue (*a*) [§ 223, sub-§ (4)]. A partition, if otherwise genuine,

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(*v*) (1919) 43 I.A. 151, 161, 43 Cal. 1031, 1049, 37 I.C. 321, ('16) A.P.C. 104, *supra*; *Mukund* v. *Balkrishna* (1927) 54 I.A. 413, 419, 52 Bom. 8, 15, 105 I.C. 703, ('27) A.P.C. 224; *Sumi Devi* v. *Pranakrushna* ('56) A. Orissa 68.

(*w*) *Lakshmanan Chettiar* v. *Srinivasa Iyengar* (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131; *Sheonandan* v. *Ugrah Sao* ('55) A.P. 189.

(*x*) *Appovier* v. *Rama Subba Alyan* (1866) 11 M.I.A. 75, 92-93; *Baboo Doorga Pershad* v. *Kundun* (1874) 13 Beng. L.R. 235, 239, 1 I.A. 55.

(*y*) (1866) 11 M.I.A. 75, 90.

(*z*) *Ibid.*

(*a*) *Rajah Suraneni* v. *Venkama Row* (1869) 13 M.I.A. 113; *Doorga Persad* v. *Kundun* (1873) 13 Beng. L.R. 235, 1 I.A. 55; *Balkishen Das* v. *Ram*

will sever the joint status even if the motive is to defeat the claims of creditors (*b*).

Where a member of the joint family executed a sham sale deed in favour of his brother it was held that he did not become divided from the family and on his death his nephews got the property by survivorship and his creditor could not execute a money-decree against the property which so devolved on his nephews (c).

The mere fact, however, that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family has separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. To constitute a partition the shares should be defined with the intention of an immediate separation (*d*). For an instance where there was no such intention, see *Poornandachi* v. *Gopalasami* (1936) 63 I.A. 436, 38 Bom. L.R. 1247, 164 I.C. 26, ('36) A.P.C. 281, and § 327 (3).

(2) An agreement to separate is not required by law to be in writing (*e*). If it is in writing, and *clearly indicates on the face of it* an intention to separate and hold the property in defined shares as separate owners, no evidence is admissible of the *subsequent* acts of the parties to alter or control its legal effect (*f*). But where the agreement is not in writing, or, where it is in writing, but does not declare on the face of it what the intention of the parties was, evidence of subsequent conduct of the parties becomes very material in order to determine whether there was a partition or not (*g*). This subject is further explained in the next section in another form.

*Illustration*

A joint Hindu family consisting of six members is entitled to a moiety of certain villages and to three other properties, namely, *x*, *y* and *z*. All the six members execute a deed whereby they divide the three properties, *x*, *y* and *z*, by metes and bounds into six parts, each taking one-sixth. As to the moiety belonging to the family in the said villages, the deed says: "But inasmuch as it is not convenient to divide now [that is, to divide by metes and bounds] our moiety of the villages, we shall divide every year *in six shares the produce of them* and enjoy it, after deducting the Sirkar's *kist* and charges on the villages." The deed concludes with the words "we have henceforward *no interest*

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*Narain* (1903) 30 Cal. 738, 30 I.A. 139; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 253, 30 I.A. 1, 10; *Parbati* v. *Naunihal Singh* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195; *Mahdo* v. *Mehrban* (1891) 18 Cal. 157, 17 I.A. 194; *Sri Raja Viravara* v. *Sri Raja Viravara* (1897) 20 Mad. 256, 24 I.A. 118; *Raja Setrucherla* v. *Raja Setrucherla* (1899) 22 Mad. 470, 26 I.A. 167; *Gajapathi* v. *Gajapathi* (1870) 13 M.I.A. 497, 517; *Babaji* v. *Kashibai* (1880) 4 Bom. 157; *Ananta* v. *Damodhar* (1889) 13 Bom. 25; *Tej Protap* v. *Champa* (1889) 12 Cal. 96; *Sarada* v. *Umakanta* (1923) 50 Cal. 370, 392, 77 I.C. 450, ('23) A.C. 485; *Adi Deo* v. *Dukharan* (1883) 5 All. 533; *Raghubir* v. *Moti Kunwar* (1913) 35 All. 41, 17 I.C. 766 [P.C.].

(*b*) *Kuppan Chetiar* v. *Masa Goundan* (1937) Mad. 1004, 169 I.C. 400, ('37) A.M. 424; *K.S.R.M. Firm* v. *Subbiah* (1945) Mad. 138; *Hirday Narain* v. *Ram Das* ('51) A.A. 606.

(*c*) *Merla Ramanna* v. *Chelikani Jagannadha Rao* (1941) Mad. 886, 193 I.C. 1, 68 I.A. 75, ('42) A.P.C. 48.

(*d*) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 86, 48 Mad. 254, 267, 268, 87 I.C. 333, ('25) A.P.C. 49; *Ramabadra* v. *Gopalaswami* (1931) 54 Mad. 269, 129 I.C. 801, ('31) A.M. 404; *Kochukutti* v. *Bhavani Amma* ('54) A. Tr. Co. 169; *Chandrakanto* v. *Ram Mohini* ('56) A.C. 577 (specification of shares in settlement records); *Gangabai* v. *Punau Rajwa* ('56) A.N. 261.

(*e*) *Rewun Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168; *Budha Mal* v. *Bhagwan Das* (1891) 18 Cal. 302 (P.C.); (1909) 31 All. 412, 422-423, 36 I.A. 71, 3 I.C. 195, *supra*; *Alamelu* v. *Balu* (1920) 43 Mad. 849, 26 I.C. 455, ('15) A.M. 103; *Bhimraj* v. *I.T. Commissioner* ('55) A.P. 172.

(*f*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 752, 30 I.A. 139 [case of an unambiguous *ikrarnamah*]; *Jai Narain* v. *Baij Nath* (1928) 50 All. 615, 108 I.C. 449, ('28) A.A. 419; *Hira Singh* v. *Mst. Manglan* (1928) 9 Lah. 324, 106 I.C. 877, ('28) A.L. 122.

(*g*) *Doorga Pershad* v. *Kundan* (1874) 13 Beng. L.R. 235, 239-240, 1 I.A. 55 [case of an ambiguous *ukarnamah*]; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 253, 30 I.A. 1, 10 [case of an ambiguous decree], *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 270, 31 I.A. 10 [case where there was no writing].

*in each other's effects and debts* except friendship between us." The question is whether the deed operates as a partition of the family's interests in the villages, regard being had to the fact that there was no division of the villages by metes and bounds. The answer is that it does, as the effect of the deed is—using the language of the English Law merely by way of illustration—that the joint tenancy is severed and converted into a tenancy in common. In delivering the judgment of the Judicial Committee, Lord Westbury said: "Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement and that is a *separation in interest and in right*, although not immediately followed by a *de facto actual division* of the subject-matter. This may at any time be claimed by virtue of the separate right. . . . We find, therefore, a clear intention to subject the whole of the property to a *division of interest*, although it was not immediately to be perfected by an actual partition. It [the deed] operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make, a divided family, and to make a divided possession of what was previously undivided without the necessity of its being carried out into an actual partition of the subject-matter": *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75. [It is enough to constitute a partition that there should be a division of *title*: It is not necessary that there should be an actual division of the *property*].

*Registration.*—A mere agreement to divide does not require registration. But if the writing itself effects a division it must be registered (*h*). It is well settled that the document though unregistered can, however, be looked into for the limited purpose of establishing a severance in status, though that severance may ultimately alter the nature of possession held by members of the separated family as co-tenants (*h*1). Where the plaintiff alleged that all the family properties were divided except one item and the defendant denied the partition, it was held that an unregistered document evidencing the partition may be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted to the defendant's branch was in pursuance of the original intention to divide (*i*).

An unregistered deed of partition and other deeds of transfer between the parties to the partition though not admissible to prove partition can be referred to under sec. 49 of the Registration Act to show that the parties dealt with the property on the footing that there was a previous partition (*j*).

**327. Evidence of partition and burden of proof.**—This branch of the subject may be divided into four parts:—

1. The clearest case is where the members of a joint family divide the joint property by metes and bounds, and each member is in separate possession and enjoyment of the share allotted to him on partition. Permanency is an essential feature, though not the sole test, of an arrangement of outright partition (*k*).

2. The next case is of the kind dealt with by the Privy Council in *Appovier* v. *Rama Subba Aiyan* (*l*), that is, the case where the coparceners, with a view to partition execute a writing whereby they agree to hold the joint property *in defined shares as separate owners.* Such a writing operates in law as a partition though the property is not physically divided. This is a case where the agreement *declares on the face of it* the intention of the parties

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(*h*) *Rajangam* v. *Rajangam* (1923) 46 Mad. 373, 50 I.A. 134, 69 I.C. 123, ('22) A.P.C. 266; *Nani Bai* v. *Gita Bai* ('58) A.S.C. 706; (1958) S.C.J. 925; *Chhotalal* v. *Bai Mahakore* (1917) 41 Bom. 466, 40 I.C. 83, ('17) A.B. 206.

(*h*1) *Muthyalareddy* v. *Venkatareddy* ('69) A.A.P. 242 (F.B.).

(*i*) *Ganpat* v. *Namdeo* (1942) Nag. 73, 196 I.C. 278, ('41) A.N. 209; *Tejraj* v. *Mohanlal* ('55) A. Raj. 157.

(*j*) *Girija* v. *Girdhari* (1950) Pat. 628, ('51) A. Pat. 277. See *Subbu Naidu* v. *Varadarajulu* (1947) Mad. 694; *Panchapagesa* v. *Kalyanasundaram* ('57) A.M. 472. Also see *Ramnagina* v. *Harihar* ('66) A.P. 179.

(*k*) *Kochukutti* v. *Bhavani Amma, supra.*

(*l*) (1866) 11 M.I.A. 75.

to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document [§ 326, sub-§ (2)].

3. The third case is of the kind dealt with by the Privy Council in *Doorga Pershad* v. *Kundun* (*m*), that is, the case where the agreement is in writing, but the document *does not declare on the face of it* the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from (1) the document and from (2) their subsequent acts (*n*) [§ 326, sub-§ (2)']. Where an instrument of partition after giving one member his share provided that the rest of the property was to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no partition between the other members (*o*).

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt* v. *Jewach* (*p*), that is, the case where there is no writing at all. In such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances and primarily the burden of showing that there has been a partition is on the person setting it up.

In case of old transactions when no contemporeneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps in the evidence more readily by reasonable inferences from the evidence on record than in a case where the evidence is not obliterated or lost by passage of time (*p*1).

In *Ganesh Dutt's* case, a Hindu widow alleging that her husband *B* has separated from his three brothers in Fasli 1295 brought a suit against them to recover her husband's share in the family as his heir. The defence was that *B* died joint and undivided. The Privy Council held that there was a partition as evidenced by the following five facts: (1) payment of revenue of certain villages belonging to the family, one-fourth in the name of *B* and three-fourths in the names of his three brothers; (2) crediting to *B* in Fasli 1295 one-fourth of a share of Rs. 35,000 recovered by the family under a decree and three-fourths to the three brothers: (3) payment of rent by a lessee of a factory belonging to the family as to one-fourth to *B* and as to three-fourths to the three brothers: (4) purchase in Fasli 1295 by the four brothers of an estate in their names *in equal shares;* and (5) a suit instituted after *B*'s death by one of his brothers as the adopted son and *heir* of *B* to recover a debt due to the family; as to this last fact it is to be observed that if *B* had died undivided, the suit would have been brought by the *surviving brothers* and the adopted son *as coparceners.* In the above case it was also contended on behalf of *B*'s widow that *B* had become separate from his brother *in food and worship* in Fasli 1295, and that fact was of itself conclusive proof of partition. As to this contention their Lordships said: "Cesser of commensality is *an element* which may properly be

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(*m*) (1873) 13 Beng. L.R. 235, 1 I.A. 55.

(*n*) *Doorga Pershad* v. *Kundun* (1873) 13 Beng. L.R. 235, 239, 1 I.A. 55.

(*o*) *Poornanandachi* v. *Gopalasami Odayar* (1936) 63 I.A. 436, 38 Bom. L.R. 1247, 164 I.C. 26, ('36) A.P.C. 281.

(*p*) (1904) 31 Cal. 262, 31 I.A. 10; *Durga* v. *Lal Bahadur* (1929) 4 Luck. 138, 112 I.C. 387, ('28) A.O. 509. See also *Budha Mal* v. *Bhagwan Das* (1891) 18 Cal. 302 [P.C.].

(*p*1) *Bhagwan Dayal* v. *Reoti Devi* ('62) A.S.C. 287, 294; (1962) S.C.J. 348.

considered in determining the question whether there has been a partition of joint family property, but it is *not conclusive*. It is therefore necessary to consider whether the evidence in *other respects* supports or negatives the theory that the cesser in this case was adopted *with a view to partition* in the legal sense of the word." Their Lordships then proceeded to examine the other evidence in the case and came to the conclusion that the five facts mentioned above supported the theory that the cesser was adopted *with a view to partition*.

Cesser of commensality, it is stated above, is not a conclusive proof of partition; the reason is that a member may become separate in food and residence merely for his convenience (*q*). Separate residence of the members of the joint family in different places where they are in service does not show separation (*r*). Similarly, there are other acts which, though *standing by themselves*, are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation of portions of the joint property (*s*), division of the income of the joint property (*t*), definement of shares in the joint property in the Revenue or Land Registration records (*u*), etc. "The mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be" (*v*). When besides entries in Revenue records showing that the two brothers who constituted a joint family, held separate khatas of *sir* and *khudkasht* lands, it was proved that letters were written by the brothers to one of their near relations expressly indicating their intention to effect partition as soon as possible, and separate suits were filed in the name of the individual brothers against the tenants, it was held that from these facts partition could be inferred (*w*). The burden, however, of proving that the family continued to be joint in such a case lies on the person alleging it (*x*).

The statements of a particular person that he is separated ffom a joint family of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant under sec. 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible but all matters that are "involved in it and knit up with the statement."

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(*q*) *Rewun Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168; *Anundee* v. *Khedoo Lal* (1872) 14 M.I.A. 412, 422; *Suraj Narain* v. *Iqbal Narain* (1913) 35 All. 80, 40 I.A. 40, 18 I.C. 30 [difference in religious opinions]; *Kesavan* v. *Narayanan* ('53) A. Tr. Co. 118.

(*r*) *Mohan Lal* v. *Ram Dayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*s*) *Runjeet Singh* v. *Gujrat Singh* (1873) 1 I.A. 9; *Murari* v. *Mukund* (1891) 15 Bom. 201.

(*t*) *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66, 86; *Appavu* v. *Manikkam* (1946) Mad. 557. An agreement merely to enjoy or share income in a particular manner does not by itself amount to partial partition. *Charandas* v. *Commissioner of Income-tax* (1955) 57 Bom. L.R. 430, ('55) A.B. 343. Also see *Udayanath* v. *Ratnakar* ('67) A. Orissa 139 [division of a property for convenience].

(*u*) *Gajendar* v. *Sardar Singh* (1896) 18 All. 176; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 30 I.A. 1; *Parbati* v. *Naunihal Singh* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195; *Nageshar* v. *Ganesha* (1920) 47 I.A. 57, 42 All. 368, 56 I.C. 306, ('20) A.P. 46; *Mst. Bhagwani* v. *Mohan Singh* (1925) 29 C.W.N. 1037, 88 I.C. 385, ('25) A.P.C. 132; *Dattatraya* v. *Shakuntalabai* ('56) A.N. 95; *Bal Mukundji* v. *Gokaran Singh* ('56) A.A. 124; *Chanderjit Das* v. *Debi Das* (1951) A. All. 522; *Ramchandra* v. *Keshav* ('53) A.M.B. 184; *Arjun Mahto* v. *Monda Mahtain* ('71) A.P. 215.

(*v*) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 85, 48 Mad. 254, 257, 87 I.C. 333, ('25) A.P.C. 49. Also see *Girijanandini Devi* v. *Bijendra Narain* ('67) A.S.C. 1124. *Lingraj* v. *Ananta* ('57) A. Orissa 63 [subsequent conduct].

(*w*) *Shyam Lal* v. *Ranbir Singh* ('51) A.A. 386.

(*x*) *Beti* v. *Sikhdar Singh* (1928) 50 All. 180, 108 I.C. 721, ('28) A.A. 39.

**328. Partial partition.**—(1) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it (*y*).

(2) *Partial as to property.*—It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family (*z*). But where there is evidence to show that *the parties intended* to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved (*a*). When a partition is admitted or proved, the presumption is that all the property was divided and a person alleging that family property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case (*b*).

(3) *Partial as to the persons separating.*—Just as a partition may be partial as regards the property, so it may be partial as regards the persons separating. This case arises when there is no general partition amongst all the members of the family.

*Separation of one coparcener.*—When one coparcener separates from the others, the question arises whether the latter are to be deemed to be *joint* or *reunited or separate.* This distinction is important, for the devolution of the estate of a Hindu is governed by different rules according as he was joint, reunited, or separate. The view taken in the earlier Calcutta cases was that the separation of one member was a separation of all, but as regards the non-separating members the presumption was that they had *reunited* immediately after the separation (*c*). On the other hand the view taken in some of the later Calcutta cases (*d*), and also in some Madras cases (*e*), was that when one coparcener separated from the others, the presumption was that the latter remained *joint* as before. Since then there have been several important pronouncements by the Judicial Committee and by the Supreme Court. The result of the decisions may be stated as follows:—

(1) The general principle is that every Hindu family is presumed to be joint unless the contrary is proved. This presumption, however, does not continue after one member has separated from the others. As observed by

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(*y*) *Rewun Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168; *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75, 90; *Muthusami* v. *Nallakulantha* (1895) 18 Mad. 418; *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 197.

(*z*) *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.P.C. 201; *Jagmohan* v. *Ranchhoddas* (1945) Nag. 892.

(*a*) *Dagadu* v. *Sakhubai* (1922) 47 Bom. 773, 73 I.C. 369, ('24) A.B. 31, dissenting from *Govrishankar* v. *Atmaram* (1894) 18 Bom. 611; *Martand* v. *Radhabai* (1930) 54 Bom. 616, 127 I.C. 510, ('31) A.B. 97; *Beni Parshad* v. *Must. Gurdevi* (1923) 4 Lah. 252, 73 I.C. 894, ('23) A.L. 497; *P. C. Pai* v. *Agricultural I.T.O.* ('70) A. Mys. 168.

(*b*) *Kumarappa Chettiar* v. *Adaikkalam Chetty* (1932) 55 Mad. 483, 137 I.C. 616, ('32) A.M. 207; *Nadiammai Achi* v. *Mariappa* ('51) A.M. 625, (1949) 2 M.L.J. 806; *Kaulesari* v. *Ambika Dutt* ('50) A. Patna 365; *Ramjugeshwar* v. *Gajadhar* (1950) Pat. 980; *Tejraj* v. *Mohanlal* ('55) A. Raj. 157; *Dwarka Nath* v. *Kedar Nath* ('51) A.P. 445; *Chhatradhari* v. *Akleshwar* ('52) A.P. 382.

(*c*) *Jaudubchunder* v. *Benodbeharry* (1863) 1 Hyde. 214; *Keshub Ram* v. *Nand Kishore* (1869) 11 W.R. 308; *Petambur* v. *Hurish Chunder* (1871) 15 W.R. 200.

(*d*) *Upendra* v. *Gopee Nath* (1883) 9 Cal. 817; *Bata* v. *Chintamani* (1886) 12 Cal. 262.

(*e*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 157; *Ranganatha* v. *Narayanasami* (1908) 31 Mad. 482; *Rangasami* v. *Sundarajulu* (1916) 31 Mad. L.J. 472, 35 I.C. 52, ('17) A.M. 722.

the Judicial Committee, "There is no presumption when one coparcener separates from the others, that the latter remain united. . . . An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact" (*f*). It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them (*g*), or it may be inferred from other conduct indicating such an intention (*h*). These principles were stated with approval by the Supreme Court in *Bhagwati Prasad* v. *Dulhin Rameshwari* [1951] S.C.R. 603 (*h*1). It was also observed in this case that it would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation among the other coparceners or they remained united and the burden would lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief. The principles were also stated in the undermentioned case by the Supreme Court (*h*2).

(2) When there has been a separation between the members of a joint family, there is no presumption that there was a separation between one of the members and his descendants. Thus if two brothers *A* and *B* separate, there is no presumption that there was a separation between *A* and his sons, or a separation between B and his sons (*i*).

(3) A Hindu father may separate from his sons, and the sons may remain joint or he may separate from his sons by one wife, and remain joint with his sons by another wife. Here again, it is conceived, it is a question of their intention to remain joint which must be proved like any other fact (*j*).

(4) Where in a suit a *decree* is passed for partition, and the question arises whether the separation effected by the decree was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other, the decree alone should be looked at to determine that question. It is the decree alone which can be evidence of what was decreed (*k*).

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(*f*) *Balabux* v. *Rukhmabai* (1903) 30 I.A. 130-137, 30 Cal. 725 [brothers]; *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 4 Lah. 350, 74 I.C. 462, ('23) A.P.C. 136 [brothers]; *Bal Krishna* v. *Ram Krishna* (1931) 58 I.A. 220, 53 All. 300, 132 I.C. 613, ('31) A.P.C. 154 [brothers]; *Babanna* v. *Parawa* (1926) 50 Bom. 815, 100 I.C. 147, ('27) A.B. 68 [brothers]; *Bhimabai* v. *Gurunathgouda* (1928) 30 Bom. L.R. 859, 114 I.C. 392, ('28) A.B. 367; *Martand* v. *Radhabai* (1930) 54 Bom. 616, 127 I.C. 510, ('31) A.B. 97 [brothers]. The decision to the contrary in the following cases do not seem to be correct:—*Sarju Prasad* v. *Nand Gopal* (1927) 2 Luck. 691, 104 I.C. 315, ('27) A.O. 815; *Musammat Menda Kuar* v. *Mirtunjai Bakhsh* (1928) 3 Luck. 220, 105 I.C. 337, ('27) A.O. 580; *Ramchandra* v. *Tukaram* (1921) 45 Bom. 914, 61 I.C. 761, ('21) A.B. 276; *Bhagwati Prasad* v. *Dulhin Rameshwari* (1951) S.C.R. 603; *Pramod Kumar* v. *Damodar* ('53) A. Orissa 179; *Sahu Ram Kishen* v. *State of U.P.* ('58) A.A. 35.

(*g*) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.P.C. 49; *J. Seethamma* v. *J. Veeranna* (1950) 2 M.L.J. 21, ('50) A.M. 785.

(*h*) *Ram Pershad Singh* v. *Lakhpati Koer* (1903) 30 I.A. 1, 30 Cal. 231.

(*h*1) Also see *Bhagwan Dayal* v. *Reoti Devi* ('62) A.S.C. 287; (1962) I S.C.J. 348; *Jaigobind Singh* v. *Brij Behari Singh* ('66) A.P. 168.

(*h*2) *Girijanandini* v. *Bijendra Narain* ('67) A.S.C. 1124.

(*i*) *Hari Bakhsh* v. *Babu Lal* (1924) 51 I.A. 163, 5 Lah. 92, 83 I.C. 418, ('24) A.P.C. 126; *Deputy Commissioner* v. *Sheo Nath* (1927) 2 Luck. 459, 100 I.C. 689, ('27) A.O. 149.

(*j*) But see *Sengoda* v. *Muthu* (1924) 47 Mad. 567, 78 I.C. 927, ('24) A.M. 625.

(*k*) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 87, 48 Mad. 254, 259, 87 I.C. 333, ('25) A.P.C. 49; *Ram Pershad* v. *Lakhpati* (1903) 30 I.A. 1, 10, 30 Cal. 231, 253.

Reference may also be made to the undermentioned decision of the Supreme Court (*kk*).

The following are the leading Privy Council cases on the subject:

(a) *Balabux* v. *Rukhmabai* (1903) 30 I.A. 130, 137, 30 Cal. 725.—In this case *three brothers, G, K* and *L*, owned a shop which had been founded by their father. In 1870 *K* separated from his brothers, took out his share amounting to about Rs. 11,000 and started a shop of his own. In 1894 *L*'s son sued *G*'s widow for possession of property held by her as belonging to her husband, alleging that *G* and *L* had continued joint after *K*'s separation, and that on *G*'s death he became entitled to the property by survivorship. The widow denied that her husband continued joint with *L*. It was held that *K* having admittedly separated himself in 1870, the burden lay on the plaintiff to prove that there had been an agreement after *K*'s separation between *G* and *L* to remain united or to reunite, and that no such agreement having been proved, the plaintiff was not entitled to succeed.

(b) *Balkishen Das* v. *Ram Narain Sahu* (1903) 30 I.A. 139, 30 Cal. 738.—In this case a joint family consisted *of four cousins*. The cousins entered into an agreement which stated that *defined share* in the whole joint family property had been allotted to the several coparceners. The agreement also gave them liberty either to live together or to separate their own business. It was held that the agreement defining the share effected *a partition in estate*, and that evidence of some of the coparceners having continued to enjoy their shares in common would not affect the tenure of the property or their interest in it. It was also held that the clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate.

(c) *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 4 Lah. 350, 74 I.C. 462, ('23) A.P.C. 136.—In this case a joint family consisted of *four brothers*. The brothers executed a deed by which the joint family property was described *as divided between them*, and one of them was finally paid out. Thereafter the family business was carried on by the three remaining brothers, and the profits of the business were carried *in equal shares to their separate accounts*. In subsequent proceedings the question arose whether the remaining three brothers were joint or separate. It was held that the deed coupled with the mode in which the accounts were kept showed that the remaining three brothers had ceased to be coparceners.

(d) *Hari Bakhsh* v. *Babu Lal* (1924) 51 I.A. 163, 5 Lah. 92, 83 I.C. 418, ('24) A.P.C. 126.—In this case the Judicial Committee held that the fact of a separation having been effected between brothers raises no presumption that there was a separation of the joint family constituted by one of the brothers *and his descendants*. Thus if a joint family consists of two brothers *A* and *B*, and each brother has a son, and *A* and *B* separate, there is no presumption that the separation between *A* and *B* involves necessarily a separation between *A* and his son or between *B* and his son. To hold otherwise "would be introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara."

(e) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.P.C. 49.—In this case their Lordships of the Privy Council observed as follows:—"It is also now beyond doubt that a member of such a joint family [that is Mitakshara family] can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off, for him, and that the remaining coparceners, *without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family* what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it *may agree to reunite* as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is strictly proved. The leading authority for that last proposition is *Balabux Ladhuram* v. *Rukhmabai* (*l*)."

(5) In a suit for partition which proceeds to a decree, the decree for partition is the evidence to show whether the separation was only a separa-

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(*kk*) *Girijanandini* v. *Bijendra Narain supra.*

(*l*) (1903) 30 I.A. 130, 30 Cal. 725.

tion of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other (*m*).

(6) A *renunciation* by a member of his interest in the family property stands on a different footing altogether from the case where one member *receives his share* in the property and separates from the other members (*n*) [§ 264]. In the former case, the other members continue joint as before. The effect of renunciation is to reduce the number of persons to whom shares would be allotted if and when a division of the estate takes place.

(7) It has been laid down in some cases that where a partial partition is proved, the presumption is that there has been a complete partition both as to parties and property (*o*). Pronouncements of the Judicial Committee show that there is no such general presumption (*p*).

(8) Though a partition may be partial *by mutual agreement* of parties, no coparcener can *by suit* enforce a partial partition against the other coparceners. The suit must be one for a *complete* partition [§ 333].

**329. Partition by decree of Court.**—There are some decisions which lend colour to the view that where a suit is brought for partition, there is no partition or severance of the joint status until a decree is passed in the suit declaring the rights of the parties interested in the joint family property (*q*). But this view is no longer tenable; for, as held by the Judicial Committee, the very *institution* of a suit for partition operates as a partition [except in the case of a minor's suit—[§ 325 (1) (ii)], though a decree may be necessary for working out the results of the severance and for allotting definite shares [§ 325]. Where a decree for partition is passed, the decree is evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. "It is the decree alone which can be evidence of what was decreed" (*r*). See § 325(1).

Although a suit does not in terms seek a partition, yet if it indicates a distinct intention to obtain a separation in estate, and the decree gives effect to that intention such decree [it is submitted, the very institution of the suit] effects a partition as regards the joint title (*s*).

As to decrees in suits for partition, see Code of Civil Procedure, 1908, sec. 54, and O. 20, r. 18.

### *Births and deaths pending suit*

**330. Births and deaths pending suit for partition.**—(1) The institution of a suit for partition by a member of the joint family effects a severance of the

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(*m*) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.P.C. 49.

(*n*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 156; *Parsotam Das* v. *Jagan Nath* (1919) 41 All. 361, 50 I.C. 357, ('19) A.A. 381; *Alluri Venkatapathi Raju* v. *D. Venkatanarasimha Raju* (1936) 63 I.A. 397, (1937) Mad. 1, 38 Bom. L.R. 1238, 164 I.C. 1, ('36) A.P.C. 264.

(*o*) *Vaidyanatha* v. *Aiyasamy* (1909) 32 Mad. 119, 1 I.C. 408; *Ananadibai* v. *Hari* (1911) 35 Bom. 293, 10 I.C. 911; *Ramchandra* v. *Tukaram* (1921) 45 Bom. 914, 61 I.C. 761, ('21) A.B. 276.

(*p*) *Babanna* v. *Parawa* (1926) 50 Bom. 815, 829, 100 I.C. 147, ('27) A.B. 68.

(*q*) See *Chidambaram* v. *Gauri Nachiar* (1879) 2 Mad. 86, 6 I.A. 177; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 30 I.A. 1; *Subbaraya* v. *Manika* (1896) 19 Mad. 345; *Lakshman* v. *Narayan* (1900) 24 Bom. 182; *Mahadev* v. *Govind* (1912) 36 Bom. 550, 16 I.C. 991; *Thandayuthapani* v. *Raghunatha* (1912) 35 Mad. 239, 10 I.C. 660.

(*r*) *Palani Ammal* v. *Muthuvenkatachala* (1925) 52 I.A. 83, 87, 48 Mad. 254, 259, 87 I.C. 333, ('25) A.P.C. 49; (1903) 30 Cal. 231, 253, 30 I.A. 1, 10, *supra*.

(*s*) *Joy Narain* v. *Girish Chunder* (1878) 4 Cal. 434, 5 I.A. 228.

joint status of the family. His share, therefore, is not liable to be diminished by the birth of another member of the family subsequent to the date of the suit, as the latter is not to be counted for a share; nor is it augmented by the death of any of the members subsequent to that date as his share will pass to his heirs (t). Consequently the heirs of the deceased party are entitled to prosecute the suit for partition (*u*).

There has been a divergence of judicial opinion as to the legal position where the suit is brought by a minor whether as a sole plaintiff or as a co-plaintiff with an adult coparcener. The question will now require to be determined in accordance with the principle laid down by the Supreme Court in *Pedasubhayya* v. *Akkamma* (*u*1) to which reference has been made under § 325. According to the Madras and Bombay High Courts, the mere institution of such a suit does not effect a severance of the joint status, but if a decree is passed in the suit, the partition dates from the date of the suit [§ 325 (1) (ii)]. The result is that if a decree *is passed,* the minor's share will not decrease by the birth of a member subsequent to the date of the suit; nor will it increase by the subsequent death of a member. But if the Court *refuses to decree separation* as regards the minor, the minor's share will increase by subsequent deaths (*v*). According to the Patna High Court, the mere institution of a suit by a minor effects a severance of the joint status as much as a suit by an adult [§ 325 (1) (ii)]. His share, therefore, is not diminished by subsequent births nor is it increased by subsequent deaths (*w*).

In the undermentioned case (*x*) the question was left open. Reference may be made to §§ 308 and 325 *ante*.

(2) See the Hindu Women's Rights to Property Act 1937: § 35 *supra*.

**331. Death of a coparcener pending suit for partition.**—This section is *now amalgamated with* § 330.

**332. Death of a female entitled to a share pending suit for partition.**—The share allotted to a female on partition is not her *stridhana* [§ 128]. Therefore, if such a female dies before the final decree though after the preliminary decree, her share remains an integral part of the estate available for division among the male members of the family (*y*), including those born after the suit but before her death (*z*) and the Court is bound to take notice of such deaths and make the necessary changes in the preliminary decree (*a*). Also see the Hindu Women's Rights to Property Act, 1937: § 35 *supra*. The rule stated above must now be read in the context of sec. 6 of the Hindu Succession Act, 1956, and particularly the proviso to that section.

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(*t*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.P.C. 104; *Sayed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('22) A.P.C. 353.

(*u*) *Rajrup Rai* v. *Sheo Shankar* (1945) All. 287.

(*u*1) (1958) S.C. 1042; *Natisha Begum* v. *Alumuga Thaver* ('66) A.M. 111.

(*v*) *Ganapathy* v. *Subramanyam* (1929) 52 Mad. 845, 122 I.C. 167, ('29) A.M. 738; *Ramsing* v. *Fakira* (1939) Bom. 256. Also see *Suryanarayanu* v. *Ganesulu* (1953) 2 M.L.J. 439, ('54) A.M. 203 [property sold in attachment before preliminary decree].

(*w*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

(*x*) *Palaniappa* v. *Alayan* (1921) 48 I.A. 539, 542, 543, 44 Mad. 740, 743, 64 I.C. 439, ('22) A.P.C. 228.

(*y*) *Sheo Dyal* v. *Judoonath* (1868) 9 W.R. 61; *Raoji* v. *Anant* (1918) 42 Bom. 535, 46 I.C. 750, ('18) A.B. 175. Also see *Shamrao* v. *Kashibai* ('56) A.N. 110.

(*z*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 48-49, 44 I.C. 146, ('18) A.P. 91.

(*a*) *Bhiwra* v. *Renuka* (1949) Nag. 400.

*Suit for partition*

**333. Suit for partition: parties to the suit: what property it should comprise.**—Any one of several members of a joint family is entitled to require partition of joint family property, and his demand to that effect, if not complied with, can be enforced by suit (*b*). The following are the leading points to be noted in connection with a suit for partition:—

(1) *Who may sue for partition.*—Subject to the provisions of §§ 307 and 308 every coparcener and every purchaser of the interest of a coparcener is entitled to institute a suit for partition.

A suit by a coparcener excluded from coparcenary property to enforce his right to share therein must be brought within 12 years from the date when the exclusion becomes known to him: The Limitation Act, 1963, Schedule Art. 110. See § 235 (3a).

(2) *Parties to suit.*—(a) The plaintiff in a partition suit should implead as defendants:—

(i) the heads of all branches (*c*);

(ii) females who are entitled to a share on partition;

(iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;

(iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly (*d*). Reference may be made to sec. 6 of the Hindu Succession Act, 1956, and particularly to the proviso to that section. Also see Notes under that section *post*.

(b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit:

(i) a mortgagee with possession of the family property or of the undivided interest of a coparcener (*e*);

(ii) simple mortgagees of specific items of the family property (*e*);

(iii) purchaser of the undivided interest of a coparcener (*e*);

(iv) persons entitled to provision for their maintenance and marriage, that is, widows, daughters, sisters, and such like, and disqualified heirs;

(v) any person entitled to maintenance from the family (*f*).

The plaintiff may also implead any other coparcener or any person interested in the family property such as a mortgagee or a lessee. Such a person may himself apply and be made a party.

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(*b*) *Madho Parshad* v. *Mehrban Singh* (1890) 17 I.A. 194, 18 Cal. 157, 161.

(*c*) *Pahaladh* v. *Luchmunbutty* (1869) 12 W.R. 256; *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A.P. 96. Also see *Bhikulal* v. *Kisanlal* ('59) A.B. 260.

(*d*) *Ramanathan* v. *Veerappa* ('56) A.M. 89.

(*e*) *Sadu* v. *Ram* (1892) 16 Bom. 608; *Duri* v. *Tadepatri* (1910) 33 Mad. 246, 4 I.C. 392. See Code of Civil Procedure, O. 1, r. 10. Also see *Krishanamachari* v. *Dhanalakshmi* ('68) A.M. 142 [purchaser from a coparcener who claimed a property to be his self acquired property].

(*f*) *Sadu* v. *Ram* (1892) 16 Bom. 608; *Jotiram Ekoba* v. *Ramchandra Trimbak* (1941) Bom. 638, 197 I.C. 788, ('41) A.B. 382. See Code of Civil Procedure, O. 1, r. 10.

*Illustrations*

(1) If *A* has two sons $S^1$ and $S^2$ and grandsons by $S^1$ and $S^2$, in a suit for partition by $S^1$ against *A* and $S^2$, the grandsons are not *necessary* parties though they may be proper parties (*g*)..

(2) Where the suit is not for partition between all the coparceners *inter se* but only between the two branches of the families, the heads of each branch are the only necessary parties (*h*).

(3) *Persons entitled to sue and property to be comprised in a suit for partition.*—A suit for partition may be instituted—

(i) by a coparcener against the other coparceners;

(ii) by the purchaser of the interest of a coparcener against his vendor and the other coparceners;

(iii) against the purchaser of the interest of a coparcener by the other coparceners;

(iv) by the purchaser of the interest of a coparcener in one of the several joint family properties against the purchaser of the interest of the other coparceners in the same property.

Whether a suit for partition should comprise all the joint family property, in other words, whether the suit should be one for *general partition*, or whether it can be one for a *partial partition* only depends upon who the parties to the suit are—

(i) The general rule is that where a suit for partition is brought by a *coparcener* against the other *coparceners*, it should embrace the *whole* family property (*i*). This rule is subject to certain qualifications. Thus where a portion of the property is not available for actual partition (*j*) as being in the possession of a mortgagee (*k*), or where it is held jointly by the family with a stranger (*l*), a separate suit for partition may be brought in respect of that portion. Similarly, where part of the joint property consists of land situated outside the jurisdiction of the Court in which the suit for partition is brought, a separate suit may be brought in respect of that portion in the Court of the place where that portion is situated (*m*).

*Hotchpot.*—A member of a joint family suing his coparceners for partition of family property is bound to bring into hotchpot, in order that there may be a complete and final partition, all family property that may be in his possession (*n*), even though it be land situated

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(*g*) *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A.P. 96.

(*h*) *Bishambar Das* v. *Kanshi Prashad* (1932) 13 Lah. 483, 141 I.C. 45, ('32) A.L. 641.

(*i*) *Nanabhai* v. *Nathabhai* (1870) 7 Bom. H.C.A.C. 46; *Trimbak* v. *Narayan* (1874) 11 Bom. H.C. 69; *Ganpat* v. *Annaji* (1899) 23 Bom. 144; *Haridas* v. *Pran Nath* (1886) 12 Cal. 566. See Code of Civil Procedure, O. 2, rr. 1 and 2. The rule, however, is not absolute: *Harihar* v. *Nabakishore* ('63) A. Orissa 45.

(*j*) *Pattaravy* v. *Audimula* (1870) 5 Mad. H.C. 419; *Balunki* v. *Benudhar* ('67) A. Orissa 30.

(*k*) *Narayan* v. *Pandurang* (1875) 12 Bom. H.C. 148; *Kristayya* v. *Narasimhan* (1900) 23 Mad. 608.

(*l*) *Purushottam* v. *Atmaram* (1899) 23 Bom. 597; *Lachmi* v. *Janki* (1901) 23 All. 216 [where the property was the exclusive property of some of the coparceners only]; *Laxman* v. *Bayabai* (1955) Nag. 656, ('55) A.N. 241.

(*m*) *Subba* v. *Rama* (1867) 3 Mad. H.C. 376 [see Code of Civil Procedure, s. 16]; *Punchanun* v. *Shib Chunder* (1887) 14 Cal. 835; *Balaram* v. *Ramchandra* (1898) 22 Bom. 922 [See cl. 12, Letters Patent]. See also *Abdul Karim* v. *Badrudeen* (1905) 28 Mad. 216. See *Jaganath* v. *Diocession Corporation* (1950) 29 Pat. 1065.

(*n*) *Ramlochun* v. *Rughoobur* (1871) 15 W.R. 111; *Lallijeet* v. *Rajcoomar* (1876) 25 W.R. 353.

beyond the local limits of the ordinary original jurisdiction of the Court in which the suit is brought (*o*), provided it is situated within India (*p*).

(ii) The next case is where a coparcener sells his undivided interest in *one* of several properties belonging to the coparcenary, and a suit for partition is brought by the *purchaser* of such interest against *his vendor and the other coparceners.* In this case there is a conflict of decisions as to whether he can sue for partition of that property alone in which he is interested as a purchaser, or whether he should bring a suit for a general partition of all the family properties. This subject is dealt with in § 261(3).

(iii) The third case is where a coparcener sells his undivided interest in one of several properties belonging to the coparcenary, and a suit for partition is brought by the other coparceners *against the purchaser.* As to the rights of the other coparceners in such a case, see § 261(3).

(iv) The last case may be put in the form of an illustration. *A* and *B* are members of a joint family. The family property consists of three houses *X*, *Y* and *Z*. *A* sells his interest in house *X* to *C*. *B* sells his interest in the same house to *D*. In such a case *D* can sue *C* for partition of house *X*, without asking for a partition of houses *Y* and *Z*. *A* and *B*, no doubt, must be joined as defendants; but the real contest in this case is between strangers to the family, namely, *C* and *D*, and there is no reason why such contest should not be determined without reference to the remaining property of the family (*q*).

*Miscellaneous*

**334. Conversion and Partition.**—Conversion of a member of a joint family to Mahomedanism (*r*), or to Christianity (*s*), or to any other religion, operates as a severance of the joint status as between him and the other members of the family, but not as a severance among the other members *inter se.* It extinguishes the right of survivorship as between the convert and his coparceners. He ceases to be a coparcener from the moment of his conversion, and is entitled to receive his share in the joint family property as it stood at the date of his conversion (*t*).

A member of a joint Hindu family does not by his conversion forfeit his interest in the joint family property. See § 97, ill. (a), and the Caste Disabilities Removal Act, 1850.

**334A. Special Marriage Act, 1872: Special Marriage Act, 1954.**—By operation of sec. 22 of the Special Marriage Act, 1872, there results severance of status of a person marrying under the Act. The Act of 1954 repeals the

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(*o*) *Hari* v. *Ganpatrao* (1883) 7 Bom. 272; *Balaram* v. *Ramchandra* (1898) 22 Bom. 922, 928.

(*p*) *Ramacharya* v. *Anantacharya* (1894) 18 Bom. 389.

(*q*) *Subbarazu* v. *Venkataratnam* (1892) 15 Mad. 234; *Iburamsa* v. *Thirumalai* (1911) 34 Mad. 269, 7 I.C. 559.

(*r*) *Gobind* v. *Abdul* (1903) 25 All. 546, 573; *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420.

(*s*) *Khunni Lal* v. *Gobind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477, on app. from 29 All. 487; *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I.C. 257.

(*t*) *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I.C. 257; *Vella Venkatasubbayya* v. *Yella Venkatramayya* (1944) Mad. 33.

earlier enactment. The effect of sec. 19 of the Act of 1954 is the same, viz., the marriage results in severance of the person from the joint family. Reference may be made to the case noted below (*u*).

**335. The Partition Act, 1893.**—(1) Where in a suit for partition, it appears to the Court that a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

(2) Where a share of a *dwelling house* belonging to an undivided family has been transferred to a person who is not a member of the family, it is open to any member of the family who is entitled to a share in the dwelling house to buy the share of the transferee at a valuation made by the Court.

The partition suit need not be by the transferee (*uu*).

This section reproduces the provisions of secs. 2 and 4 of the Partition Act, 1893. As to powers of the Court *de hors* provisions of the Act see the undermentioned case (*u1*).

*Covenant to pre-empt.*—An agreement between two brothers at a partition that if one sharer wishes to sell his share in the house or if his share was sold in any other way the other sharer would be entitled to buy it at a certain amount is not void under section 14 of the Transfer of Property Act and is binding on the representative of the party (*v*).

## VI.—REOPENING PARTITION

*Note.*—Under Hindu law partition is made only once, but there are some exceptions to this rule. The posthumous son can claim a re-partition and so can the heir of a disqualified person and an absent coparcener. The case of the adopted son also must be included amongst the exceptions. A partition may also be reopened on grounds mentioned in §§ 337-339 below.

**336. Rights of sons.**—A partition may be reopened by an after-born in the circumstances mentioned in §§ 309 and 310 or a person validly adopted to a deceased coparcener (who if existing at the time of the partition would have been entitled to a share) by his widow after the partition (*w*).

In reopening a partition, made between the surviving members of a joint Hindu family, at the instance of a son adopted by the widow of a deceased coparcener, the adopted son is entitled to claim that the properties alienated not for justifying necessity by the surviving coparceners should be assigned to their shares and that he should be awarded his share in the property existing at the date of his adoptive father's death. Whenever a partition is reopened, shares must be allocated on a fair and equitable principle. Equity in such a case could be satisfied if, in determining the share of the adopted son, the alienation made by one of the coparceners is allotted to his share and the partition is opened on that basis and the properties are re-allotted on that basis. This in no way can be said to interfere with the right of a divided coparcener to deal with his share as his own or of impairing the principle that an adopted son is bound by all lawful alienations made prior to the adoption does arise (*x*).

Where in a partition between two brothers, one brother transferred a portion of his share to the other in consideration of the fact that the latter had discharged joint family debts out of his separate property, the son of the former cannot question the transfer (*y*).

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(*u*) *Girdharilal* v. *Fatechand* ('55) A.M.B. 148.
(*uu*) *Ramaswami* v. *Subramania* ('67) A.M. 156.
(*u1*) *Ramaprasada Rao* v. *Subbarameiah* ('58) A.A.P. 647, (1957) A.P. 566.
(*v*) *Ratanlal* v. *Ramanujdas* (1945) Nag. 174.
(*w*) *Sankaralingam Pillai* v. *Veluchami Pillai* (1943) Mad. 309, 205 I.C. 1, ('43) A.M. 43. See 'Adoption' *post*.
(*x*) *Krishtappa* v. *Gopal* ('57) A.B. 214 [F.B.].
(*y*) *Ananthachari* v. *Krishnaswami* (1938) Mad. 410, 174 I.C. 599, ('38) A.M. 102.

**337. Fraud.**—A partition may be reopened, if any coparcener has obtained an unfair advantage in the division of the property by fraud upon the other coparceners (*z*).

**338. Mistake.**—Where, after a partition has been made, it is discovered that property allotted to one of the coparceners did not belong to the family, but to a stranger, or that it was subject to a mortgage, the coparcener to whom such property has been allotted is entitled to compensation out of the shares of the other coparceners, and the partition may, if necessary, be reopened for readjustment of the shares (*a*).

**339. Where a portion of joint property was excluded from partition.**—Where a portion of the joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be the joint property of the family, and it must be divided amongst the persons who took under the partition (*b*). It is not necessary in such a case to reopen the original partition (*c*).

*Finality of partition.*—"*Once is the partition of inheritance made,* once is a damsel given in marriage; and once does a man say, 'I give'; these three are by good men done *once for all and irrevocably.*" *Manu,* IX 47. Therefore, a partition once made cannot be reopened except in the cases mentioned in the above sections. Where a partition is prejudicial to the interests of a minor coparcener, it may be set aside as regards himself; see § 308, sub-§ (2).

## VII.—EFFECT OF PARTITION

**340. Devolution of share acquired on partition.**—The effect of a partition is to dissolve the coparcenary, with the result that the separating members thenceforth hold their respective shares as their *separate* property, and the share of the each member will pass on his death to his *heirs.* But if a member while separating from his other coparceners, continues joint with his own male issue, the share allotted to him on partition will in his hands retain the character of a coparcenary property as regards the male issue [§ 223, sub-§ (4)].

**341. Whether separating son can inherit as an heir.**—(1) It has been held by the High Courts of Bombay, Madras, Allahabad and some other High Courts that on the death of a father leaving self-acquired property, an *undivided* son takes such property to the exclusion of a *divided* son. See § 43 "divided and undivided sons," p. 108 *ante.* But now see Sec. 8 of the Hindu Succession Act, 1956, which has abolished distinction between a divided son and an undivided son in the matter of inheritance of self-acquired property.

(2) If, however, there is no undivided son, the divided son is entitled to succeed to such property in preference to his father's widow (*d*).

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(*z*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444, 451; *Lakshman* v. *Gopal* (1899) 23 Bom. 385. Also see § 292 *ante.* Also see *Veerabhadrappa* v. *Lingappa* ('63) A. Mys. 5 [no proof of fraud, unfair dealing or overreaching].

(*a*) *Maruti* v. *Rama* (1897) 21 Bom. 333; *Purushottam* v. *Atmaram* (1899) 23 Bom. 597; *Balaji* v. *Annapurnabai* (1952) Nag. 99, ('52) A.N. 2; *Debabrata Ghose* v. *Jnanendra* ('60) A.C. 381.

(*b*) *Jogendra* v. *Baladeb* (1907) 12 C.W.N. 127; *Bhowani* v. *Juggernath* (1908) 13 C.W.N. 309, 316; *Lachman* v. *Sanwal* (1878) 1 All. 543; *Ganeshi Lal* v. *Babu Lal* (1918) 40 All. 374, 45 I.C. 4, ('18) A.A. 223.

(*c*) Colebrook's Digest, vol. III, p. 400; *Kumaraswami* v. *Rajamanikkam* ('66) A. Kerala 266.

(*d*) *Ramappa* v. *Sithammal* (1879) 2 Mad. 182; *Balkrishna* v. *Savitribai* (1879) 3 Bom. 54.

But see sec. 3(1) of the Hindu Women's Rights to Property Act, 1937 and sec. 8 of the Hindu Succession Act, 1956, under which the father's widow inherits simultaneously with the son, whether divided or undivided.

(3) If the deceased dies leaving a *divided* son and a *divided* grandson by a predeceased son, the divided son does not exclude the divided grandson, but they succeed to the property in equal shares (*e*).

Propositions (2) and (3) proceed on the ground that partition does not destroy the filial relation nor the rights of inheritance incidental to such relation.

The Patna High Court has applied this principle in favour of a separated grandson in the matter of succession to the separate property of the deceased grandfather (*f*). In this case the grandfather *K* partitioned his properties amongst his two sons *B* and *S*. Subsequently the plaintiff who was one of the four sons of *B* separated from his father and his other brothers who continued to remain joint. *K* then died and the question was whether the plaintiff who was separate from his father and brothers could claim along with them his share of the properties left by *K*. The High Court held in favour of the plaintiff being of opinion that the right by birth in the grand-father's property which the grandson had under Mitakshara law could not be annulled by partition.

*Illustration*

*A* and his son *B* are members of an undivided family. *B* receives his share of the joint property, and separates from *A*. *A* then dies leaving a widow and his son *B*. *B*, as *A*'s son, is entitled to inherit to *A* in preference to the widow. The fact that *B* has separated from *A* does not interfere with his right of inheritance. [Also see 341(2) above].

## VIII.—REUNION

**342. Who may reunite.**—"A reunion in estate properly so called can only take place between persons who were parties to the original partition" (*g*). It would appear from this that a reunion can take place between *any* persons who were parties to the original partition. The Commentators, however, are not unanimous on this point. According to the Mitakshara (*h*), the Dayabhaga (Bengal school), and the Smriti Chandrika (Madras school), a member of a joint family once separated can reunite only with his father, brother or paternal uncle, but not with any other relation, as, for instance, paternal grandfather or paternal uncle's son, though such relation was a party to the original partition. According to the Vivada Chintamani (Mithila school) and the Mayukha (which is the paramount authority in Gujarat, the island of Bombay and the northern Konkan), a person may reunite with *any* relation who was a party to the original partition (*i*). Only males can reunite (*j*).

No writing is necessary for a reunion. Even persons who are parties to a registered deed of partition may reunite by an *oral* agreement (*k*).

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(*e*) *Marudayi* v. *Doraisami* (1907) 30 Mad. 348.

(*f*) *Bhairab* v. *Birendra* (1949) 28 Patna 123, ('50) A. Pat. 1; *Jatru Pahan* v. *Ambikajit Prasad* ('57) A.P. 570.

(*g*) *Balabux* v. *Rukhmabai* (1903) 30 Cal. 725, 734, 30 I.A. 130, 136; *Akshav* v. *Hari* (1908) 35 Cal. 721; *Vishvanath* v. *Krishnaji* (1866) 3 Bom. H.C.A.C. 69; *Lakshmibai* v. *Ganpat* (1867) 4 Bom. H.C.O.C. 150, 166.

(*h*) *Hira Singh* v. *Mst. Mangla* (1928) 9 Lah. 324, 106 I.C. 877, ('28) A.L. 122; *Ram Narain Chaudhury* v. *Pan Kuer* (1935) 14 Pat. 268, 62 I.A. 16, ('35) A.P.C. 9.

(*i*) *Basanta* v. *Jogendra* (1906) 33 Cal. 371 [Mitakshara]; *Vishvanath* v. *Krishnaji* (1866) 3 Bom. H.C.A.C. 69 at pp. 73, 74 [Mayukha]; *Bal Kishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 753, 30 I.A. 139 [Dayabhaga]; *Abhai Churn* v. *Mangal* (1892) 19 Cal. 634, 638 [Dayabhaga].

(*j*) *Nanuram* v. *Radhabai* (1942) Nag. 24, ('40) A.N. 241.

(*k*) *Mahalakshmamma* v. *Suryanarayana* (1928) 51 Mad. 977, 117 I.C. 113, ('28) A.M. 113. Such an agreement, however, would be a difficult matter to establish. *Narasamma* v. *Venkata Narasi* ('54) A.M. 282, (1953) 2 M.L.J. 695.

The leading text on the subject is that of *Brihaspati*, which runs as follows:—

"He who being once separated dwells again through affection with his father, brother or paternal uncle, is termed reunited."

The conflict of opinion among the Commentators has arisen from the fact that some Commentators regard the list given in the above text as exhaustive, while others regard it as merely illustrative.

**343. Effect of reunion.**—The effect of a reunion is to remit the reunited members to their former *status* as members of a joint Hindu family (*l*). See § 60 and § 94.

The question whether there has been a reunion or not derives its importance from the fact that the devolution of the interest of a reunited member is governed by the special rules laid down in § 60 [Mitakshara law] and § 94 [Dayabhaga law].

**344. Intention necessary to constitute reunion.**—To constitute a reunion, there must be an *intention* of the parties to *reunite in estate and interest* (*m*). In *Bhagwan Dayal* v. *Reoti Devi* the Supreme Court pointed out that it is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. Such an agreement may be express or may be implied from the conduct of the parties. The conduct must be of an incontrovertible character and the burden lies heavily on a party who asserts reunion (*n*). The mere fact that the parties who have separated live together or trade together after partition, does not amount to reunion (*n*1). Such an intention may be inferred if the parties jointly take a mortgage in which it is recited that they are members of a joint family. provided it is clearly shown that the recital is known to all the parties. If there is no such evidence it cannot be inferred that the parties have reunited (*o*). There can be no reunion unless there is an *agreement* between the parties to reunite in estate *with the intention* to remit them to their former status as members of a joint family (*p*). But possession of family properties by a reuniting member at the time of reunion is not essential (*q*). Since a minor is not competent to contract, it follows, that an agreement to reunite cannot be made by, or on behalf of, a minor (*r*) [§ 328, sub-§ (3)].

Where the parties lived jointly but there was no reunion the ordinary law of inheritance applies (*p*).

## IX.—PARTITION CREATED BY SO-CALLED WILL

**345. Partition or family agreement created by so-called will.**—(1) No member of a joint family, although he may be the head of the family, has a

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(*l*) *Prankishen* v. *Mothooramohun* (1865) 10 M.I.A. 403, 406.

(*m*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 753, 30 I.A. 139, 150; *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 74 I.C. 462, ('23) A.P.C. 136. Very strong evidence would be required when there was a decree for partition, *Parashuram* v. *Hirabai* ('57) A.B. 59.

(*n*) ('62) S.C. 287, 296; (1962) IS.C.J. 348; *Ramadin* v. *Gokulprasad* ('59) A.M.P. 251.

(*n*1) *Ram Huree* v. *Trihee Ram* (1871) 15 W.R. 442; *Gopal* v. *Kenaram* (1867) 7 W.R. 35; *Venkata Chenchayya* v. *Ramalingam* ('57) A. Andh. Pra. 744.

(*o*) *Govindoss* v. *Official Assignee of Madras* (1934) 57 Mad. 931, 61 I.A. 257, 150 I.C. 1.

(*p*) *Gokul Pati Datta* v. *Pashu Pati Nath Datta* (1942) 1 Cal. 85, 201 I.C. 642, ('42) A.C. 331; *Kaliammal* v. *Sundarammal* (1949) Mad. 171; *Manorama Bai* v. *Rama Bai* ('57) A.M. 269.

(*q*) *Godavarthi Venkanna* v. *G. Venkatanarayana* (1947) Mad. 382.

(*r*) *Balabux* v. *Rukmabai* (1903) 30 Cal. 725, 734-735, 30 I.A. 130, 136. See also *Kuta* v. *Kuta* (1864) 2 Mad. H.C.A.C. 235; *Bhagirathibai* v. *Manohar* (1950) Nag. 698, ('51) A.N. 164; *Balasubramania* v. *Narayana* ('65) A.M. 409.

right to make a partition by will of *joint family property* among the members of the family except with their consent. A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution; such a document may be good evidence of a family arrangement contemporaneously made and acted upon by all parties, the effect of which may be to create a partition of the joint family property (*s*).

(2) Similarly, no member of a joint family can dispose of even *his own share* by will. But now sec. 30 of the Hindu Succession Act, 1956 permits a coparcener to dispose of his own share by will. See *post*. A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution; if a member of a joint family purports by such a document to dispose of his interest in the joint family property then if the disposition is assented to by the other members of the family, the document may be good evidence of a family arrangement, and effect will be given to the disposition so made (*t*).

*Illustrations*

(1) By a document called a "will" the father and head of a joint family recorded a division of the joint family property amongst his 3 sons, giving himself no share, but allotting a double share to his eldest son. The document recited *inter alia* that he had divided the property among his sons in the proportions mentioned in it, and that in anticipation of the execution of the document the sons had been put into possession of their shares some 2 months previously. The evidence showed that the division had been assented to, acquiesced in and acted upon by the sons for a period of 10 years. It was held that the document was not a will but was intended to operate from its date, and was evidence of a family arrangement contemporaneously made and acted upon by all the parties: *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All. 337, 40 I.A. 161, 19 I.C. 826.

(2) Two brothers, having no male issue, and constituting a joint Hindu family governed by the Mitakshara, signed a document, described therein as an agreement by way of will. The document provided in effect that if either party died without male issue, his widow should take a life interest in a moiety of the whole estate, and that if both parties died without male issue, the daughters of each, or their male issue, should divide the father's share. The document was registered. A few days after its execution one brother died, and his widow was entered as owner of a moiety of the estate. Subsequently the other brother sued for a declaration that the document was null and void. It was held that the document could not operate as will; but that, as a co-sharer in a Mitakshara joint family with the consent of all his co-sharers, could deal with the share to which he would be entitled on a partition, the document was an agreement entitling the widow of the deceased brother to a life interest in a moiety: *Lakshmi Chand* v. *Anandi* (1926) 53 I.A. 123, 48 All. 313, 95 I.C. 556, ('26) A.P.C. 54.

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(*s*) *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All. 337, 40 I.A. 161, 19 I.C. 826.

(*t*) *Lakshmi Chand* v. *Anandi* (1926) 53 I.A. 123, 48 All. 313, 95 I.C. 556, ('26) A.P.C. 34; *Kuppuswami* v. *Perumal* ('64) A.M. 291.

## CHAPTER XVII

# PARTITION—DAYABHAGA LAW

*Note.*—Attention has been drawn to the Hindu Women's Rights to Property Act, 1937, the Hindu Succession Act, 1956, and sec. 16 of the Hindu Marriage Act, 1955, in the Note at the beginning of Chapter XIII *supra*. Reference may be made to that Note.

**346. Scope of the Chapter.**—The object of the present chapter is to indicate the points of distinction between the Mitakshara and the Dayabhaga law of partition. Except as to those points, the rules of the Mitakshara law of partition apply *mutatis mutandis* to cases governed by the Dayabhaga law.

See § 272 and the case there cited.

**347. What is partition.**—According to the true notion of a Mitakshara family no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he—that particular member—has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in *ascertaining and defining the shares* of the coparceners; in other words, it consists in a numerical division of the property by which the proportion of each coparcener in the property is fixed [§ 322].

According to the Dayabhaga law, on the other hand, each coparcener has, even whilst the family remains undivided, a *certain definite share* in the joint property of which he is the absolute owner. The property is held in defined shares, though the possession is the joint possession of the whole family. Partition, according to that law, consists in *separating* the *shares* of the coparceners, and assigning to the coparceners *specific portions of the property* (*u*).

As under the Mitakshara law, so under the Dayabhaga law, the true test of a partition lies in the *intention* of the parties to separate [§ 326]. In the case of a joint Mitakshara family, that intention may be manifested by a mere agreement between the coparceners to hold and enjoy the property *in defined shares as separate owners* without an actual division of the property by metes and bounds (*v*) [§ 326]. In the case, however, of a joint Dayabhaga family, such an agreement as aforesaid is not a sufficient manifestation of the intention to separate; for according to the Dayabhaga law the joint property is held, even while the family remains joint, in defined and specific shares. To constitute a partition according to the Dayabhaga law, there must be something more than such an agreement (*w*). There must be a *separation* of the shares, and the assignment to each coparcener of *specific portions* of the joint property [see § 279].

**348. Persons entitled to partition.**—Under the Dayabhaga law, every adult coparcener, male or *female* (*x*), is entitled to enforce a partition of the

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(*u*) Dayabhaga, Chap. I, *paras* 8-9.

(*v*) *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75; *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 30 I.A. 139; *Parbati* v. *Naunihal* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195.

(*w*) *Bata* v. *Gopal* (1907) 5 Cal. L.J. 417.

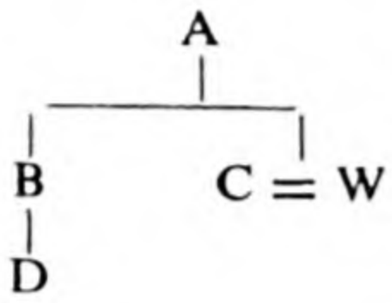
(*x*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

coparcenary property. Also see Hindu Women's Rights to Property Act, 1937.

As regards minor coparceners, a suit may be brought on their behalf for a partition in the circumstances mentioned in § 308 above.

The rules stated in §§ 349-354 below and the illustrations thereunder should now be read in the context of the changes brought about in the law of succession by the Hindu Succession Act, 1956.

*Illustrations*




*A*, a Hindu, governed by the Dayabhaga school, dies leaving two sons, *B* and *C*. On *A*'s death *B* and *C* inherit the property left by *A as coparceners*. *B* dies leaving a son *D*. On *B*'s death *D* inherits *B*'s share in the coparcenary property as *B*'s heir and he becomes a coparcener with *C*. *C* dies next leaving a widow *W*. On *C*'s death, *W* inherits *C*'s share in the coparcenary as his heir, and she becomes a coparcener with *D*. The position at this stage is that we have a coparcenary consisting of two members, namely, *D* and *W*, the one a male, and the other a female (§ 277). *W* sues *D* for partition. Is she entitled to do so? Yes, and the Court will allot to her a moiety of the joint property both movable and immovable. *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

**349. Sons, grandsons and great-grandsons.**—Under the Dayabhaga law a son is not entitled to a partition of the coparcenary property against his father. The reason is that a son, according to that law, does not acquire by birth an interest in ancestral property. The same rule applies to grandsons and great-grandsons [§§ 273-274].

According to the Dayabhaga law, there can be no coparcenary in the strict sense of the term between a father and sons, or between a grandfather and grandsons, or between a great-grandfather and great-grandsons. See note to § 277 above. Under that law, the father has absolute power of disposal of the property, whether ancestral or self-acquired.

**350. Illegitimate sons.**—According to all the schools, the illegitimate sons of the three regenerate classes [§ 1] are not entitled to any share of the inheritance nor to any share on partition. They are entitled to maintenance only. Reference may also be made to sections 20-22 of the Hindu Adoptions and Maintenance Act, 1956.

As to the illegitimate sons of a Sudra see § 43, nos. 1-2-3, on pp. 108-111 above [as to inheritance] and § 312 [as to partition].

**351. Purchaser.**—Where a fractional share in a property which forms part of a joint estate has been sold, the purchaser may sue for partition of that property only and for possession of the share brought by him, without asking for partition of the whole joint estate (*y*).

*Illustration*

*A* dies leaving two sons *B* and *C*. The family owns two immovable properties *X* and *Y* *B* sells his one-half share in *X* to *D*. *D* may sue for partition of *X* and for possession of a moiety thereof, without including property *Y* in the suit.

**352. Wife.**—According to the Mitakshara law, though a wife cannot herself demand a partition, she is entitled to a share on a partition between her

(*y*) *Barahi* v. *Debkamini* (1893) 20 Cal. 682.

husband and his sons [§ 315]. No such question can arise under the Dayabhaga law, for according to that law, a father is the absolute owner of his property whether ancestral or self-acquired, and the sons not being entitled to any interest in his property in his lifetime, cannot demand a partition against him [§ 273-275].

Since a father, according to the Dayabhaga law, has absolute power of disposal over his property, whether ancestral or self-acquired, he may in his lifetime divide his property among his sons in such proportions as he likes. He is not bound to divide it equally between them, not even the ancestral property (*z*).

See the observations of Wilson J., in *Sarolah* v. *Bhoobun* (*a*).

**353. Mother.**—(1) As under the Mitakshara law, so under the Dayabhaga law, a mother cannot herself demand a partition; but if a partition takes place between *her* sons she is entitled to a share equal to that of a son after deducting the value of the *stridhana,* if any, which she may have received from her husband or father-in-law (*b*) [§ 316]. Reference may also be made to the Hindu Women's Rights to Property Act, 1937.

(2) If a son dies before partition leaving the mother as his heir, the mother is entitled, upon a partition between her surviving sons, to receive a share as heiress of her deceased son, as well as a share in her own right. The share which she is entitled to receive as the heiress of her deceased son is not *stridhana* for property inherited by a mother is not *stridhana* at all, and it is not therefore to be taken into account in determining the value of her share on partition (*c*) [ill. (a)].

The Calcutta High Court has held that as a share was given to the mother only in lieu of maintenance no further share should be allotted to her if what she had obtained by inheritance from her deceased son was sufficient for her maintenance (*d*).

(3) A Hindu governed by the Dayabhaga law may dispose of the whole of his property, ancestral as well as self-acquired, by a will so as to deprive his widow of a share on a partition between her sons. The reason is that, according to that law, a widow has no indefeasible vested right in the property left by her husband. But if the whole property be willed away, she has, by virtue of her marriage, a right to maintenance out of her husband's property (*e*) [ill. (b)].

(4) Under the Dayabhaga law, a sonless step-mother is not entitled to a share on a partition between her stepsons (*f*) [ill. (*c*)].

(5) On a partition between sons by different mothers, where there is more than one son of each mother, the rule is first to divide the property into as many shares as there are sons, and then to allot to each mother a share equal to that of each of her sons in the aggregate portion allotted to them (*g*) [ill. (*d*)]. A mother who has only one son is not entitled to a separate share.

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(*z*) See Bhattacharya's Hindu Law, 2nd edn., p. 361; Mitra's Law of Joint Property and Partition, p. 320.

(*a*) (1888) 15 Cal. 292, 306-307.

(*b*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165; *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77.

(*c*) *Jugomohan* v. *Sarodamoyee* (1878) 3 Cal. 149; *Poorendra Nath* v. *Hemangini* (1909) 36 Cal. 75, 1 I.C. 523.

(*d*) *Indu Bhusan* v. *Mrityunjoy* (1946) 1 Cal. 128.

(*e*) *Debendra* v. *Brojendra* (1890) 17 Cal. 886; (1909) 39 Cal. 75, 1 I.C. 523, *supra.*

(*f*) *Srimati Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 765, 16 I.A. 115.

(*g*) *Kristo Bhabiney* v. *Ashutosh* (1886) 13 Cal. 39.

Her only right is to maintenance out of the portion allotted to him (*h*) [ill. (*e*)].

(6) According to the Dayabhaga law, the share allotted to a mother on a partition between her sons is given to her in lieu of, or by way of provision for, her maintenance [§ 128(1)]. Such being the case, she is not entitled to a share if a portion only of the joint property is divided and the bulk of the property remains undivided; provided that she can be adequately maintained from the undivided property (*i*).

(7) The mere institution of a suit for partition by a son does not entitle the mother to a share in her husband's estate. If the suit is dismissed or withdrawn, she can claim no share. It is only if a decree is passed in the suit that she is entitled to a share. It follows that if one of the properties is mortgaged by the sons, and it is sold at the instance of the mortgagee before a decree for partition is passed, she is not entitled to any share in that property. Nor is she entitled by reason of the sale of the property to a larger share in the other properties. Whether she would be entitled to any charge for her maintenance on the property sold is an open question (*j*).

*Illustrations*

(a) *H* dies leaving a widow *A*, and three sons *B*, *C* and *D*. *B*, *C* and *D* remain joint, after some time *D* dies intestate and unmarried. On *D*'s death, *A* is entitled to his share as his heir [sec. 88]. A year after *D*'s death, *B* sues *C* and *A* for partition. The property will be divided into four shares of which one will be allotted to *B*, one to *C* and two to *A*, one as *D*'s heir and the other in her own right: *Jugomohan* v. *Sarodamoyee* (1878) 3 Cal. 149. [According to the Mitakshara law, *D*'s share would pass to *B* and *C* by survivorship.]

(b) *A* dies leaving a widow *B*, and two sons, *C* and *D*. *A* by his will bequeaths the whole of his property, ancestral as well as self-acquired, absolutely to *C* and *D*. *C* sues *D* for partition. Is *B* entitled to a share at such partition? No; because the whole property has been willed away to the sons. She is entitled to maintenance only: *Debendra* v. *Brojendra* (1890) 17 Cal. 886.

(c) *A* dies leaving a widow *B who has no son*, and two sons, *C* and *D* by a predeceased wife. *C* sues *D* for partition. Is *B* entitled to share on partition? No, for *B* is not the mother, but the step-mother of *C* and *D*. [According to the Mitakshara law, *B* would take one-third: See § 316].

(d) *A* dies leaving two widows, *B* and *C*, and two sons by *B*, and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the property into 5 shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each taking 1/3 of 2/5, *i.e.* 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, *i.e.*, 3/20. Thus *B*, will take 2/15 and *C* will take 3/20.

(e) *A* dies leaving a widow *B*, a son *C* by *B*, and two sons, *D* and *E*, by a predeceased wife. *C* sues *D* and *E* for partition. Each of the three sons takes one-third. *B* is not entitled to share the one-third allotted to her son *C* with him as she has only one son. But she is entitled to maintenance out of the one-third allotted to her son *C*: *Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 16 I.A. 115.

**354. Grandmother.**—A grandmother (father's mother) cannot herself demand a partition but—

(i) if a partition takes place between her sons and grandsons, or between her sons and a predeceased son's daughter, who acquired a share as the heir of her father (*k*), she takes the share of a son;

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(*h*) (1889) 16 Cal. 758, 16 I.A. 115, *supra*; *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292, 307.
(*i*) *Barahi* v. *Debkamini* (1893) 20 Cal. 682.
(*j*) *Baldeodas* v. *Sarojini* (1930) 57 Cal. 597, 126 I.C. 408, ('29) A.C. 697.
(*k*) *Sibbosoondery* v. *Bussoomutty* (1881) 7 Cal. 191

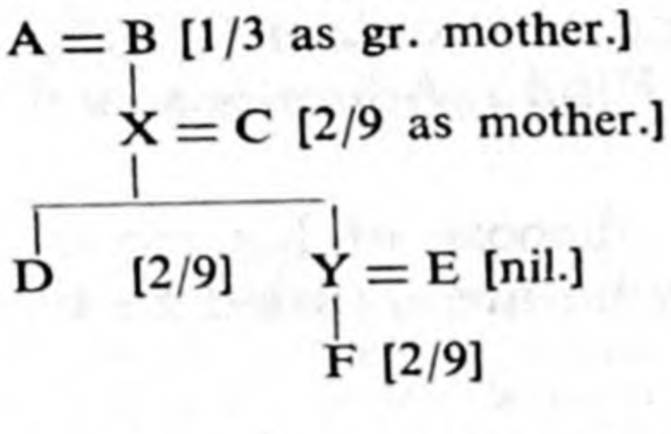
(ii) if a partition takes place between her grandsons, she takes the share of a grandson; and

(iii) if a partition takes place between her grandsons and great-grandsons, she takes the share of a grandson (*l*).

In each case, if she has received any *stridhana* from her husband or her father-in-law, she is entitled to so much only as together with what she has already received would make her share equal to that of a son or grandson as the case may be (*m*).

The grandmother gets a share only if the subject matter of partition is the proper y of her husband (*n*).

*Illustration*




*A* dies leaving a widow *B*, and a son *X*. *X* dies leaving a widow *C*, and two sons *D* and *Y*. *Y* dies leaving a widow *E* and a son *F*. *D*, who is *A*'s *grandson*, sues *F*, who is *A*'s *great-grandson*, *B*, his *grandmother*, *C*, his *mother*, and *E* his brother's widow, for a partition of *A*'s property. Here the partition is really between *D*, *B*'s grandson and *F*, *B*'s great-grandson. Therefore *B*, as grandmother of *D* is entitled to a share, equal to that of her grandson *D*. Similarly *C*, as *D*'s mother is entitled to a share equal to that of her son *D*. What are the shares of *B* and *C*? As *B* is entitled to a share equal to that of a grandson, the property will first be divided into three parts of which *B* will take 1/3, *D* will take 1/3 and the heirs of *Y*, that is, *E* and *F* will take 1/3. Similarly as *C* is entitled to a share equal to that of a son and the portion allotted to the sons *D* and *Y* is 2/3, *C* will take 1/3 of 2/3, *i.e.* 2/9, *D* will take 2/9, and *F* will take 2/9. *E* is not entitled to share her son *F*'s 2/9, with him, as, according to the Dayabhaga law, a mother who has only one son is not entitled to a share on partition (*o*).

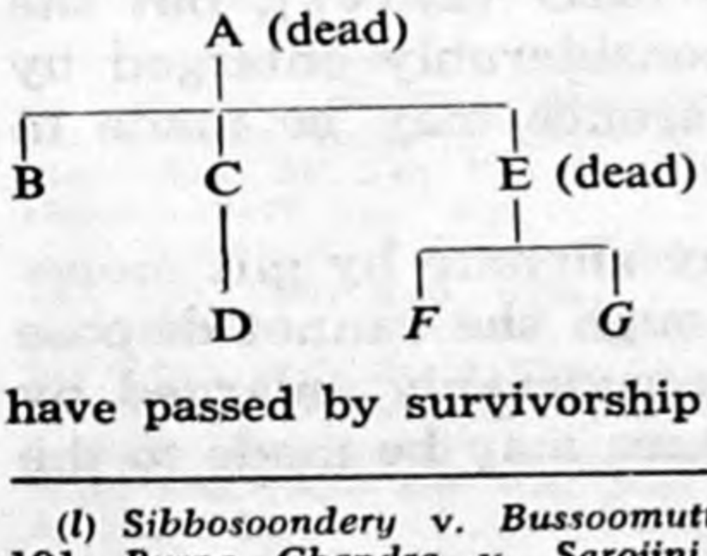
**355. Allotment of shares.**—On a partition shares are allotted according to the following rules:—

(1) on a partition between brothers, they all take equally (*p*);

(2) the share of a brother who is dead is taken by his heir, devisee, or assignee;

(3) each branch takes per *stirpes* (that is, according to the stock) as regards every other branch, but the members of a branch take *per capita* as regards one another.

*Illustration*




*A* dies leaving two sons *B* and *C*, a grandson *D* by *C*, and two grandsons *F* and *G* by a predeceased son *E*. The property will be divided into three portions *per stirpes*, *B* taking one-third, *C*, taking one-third, and *F* and *G* together taking the one-third. *F* and *G* take *per capita*, that is, each taking one-sixth. *D takes nothing, for under the Bengal school sons do not take any interest in ancestral property during their father's lifetime.* [If *B* had died leaving a widow, his third would have gone to her (rule 2); according to the Mitakshara law, it would have passed by survivorship to *C* and *E*].

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(*l*) *Sibbosoondery* v. *Bussoomutty* (1881) 7 Cal. 191; *Purna Chandra* v. *Sarojini* (1904) 31 Cal. 1065.

(*m*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165.

(*n*) *Kiranbala* v. *Sushil*, 53 C.W.N. 709.

(*o*) *Ibid.*

(*p*) *Dayabhaga*, chap. iii, sec. 2, para 27.

## CHAPTER XVIII

# GIFTS

**356. "Gift" defined.**—"Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise."

Mitakshara, chap. 3, secs. 5 and 6. See § 358, and notes "Acceptance of gift".

**357. What property may be disposed of by gift.**—(1) A Hindu, whether governed by the Mitakshara or the Dayabhaga school, may dispose of by gift his *separate or self-acquired property*, subject in certain cases to the claims for maintenance of those whom he is legally bound to maintain [§ 222]. Reference may be made to sections 18 to 22 of the Hindu Adoptions and Maintenance Act, 1956.

(2) A coparcener under the Dayabhaga law may dispose of his *coparcenary interest* by gift subject to the claims of those who are entitled to be maintained by him [§ 282].

A coparcener under the Mitakshara law, however, has no such power [§ 258], unless he is the sole surviving coparcener [§ 257].

(3) A *father* under the Dayabhaga law may by gift dispose of the whole of his property, whether *ancestral or self-acquired*, subject to the claims of those who are entitled to be maintained by him (*q*).

The reason is that according to the Bengal school, "where property is held by the father [as the head of the family], his issue have no legal claim upon him or the property *except for their maintenance*. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect Upon his death the property in the sons arises, and with it the right to a partition" (*r*) [§§ 273, 275]. A father under the Mitakshara law has no such power over joint family property. He cannot dispose of it, not even his own interest therein, by gift. In certain cases, however, he has a special power, by virtue of his position as father, to dispose of, by gift, a *small portion* of joint family property [§§ 225 and 226].

(4) A female may dispose of her *stridhana* by gift or will, subject in certain cases to the consent of her husband [§ 143]. The rights of a female have been considerably enlarged by section 14 of the Hindu Succession Act, 1956. Reference may be made to the Notes under that *post*.

(5) A widow may in certain cases by gift dispose of a *small portion* of the property inherited by her from her husband [§ 181B (2) (v)], but she cannot do so by will. Her rights have now been considerably enlarged by section 14 of the Hindu Succession Act, 1956. Reference may be made to the Notes under that section *post*.

(6) A widow governed by the Mayukha law may alienate by gift *moveable* property inherited by her from her husband, though she cannot dispose of it by will [§ 179]. Her rights have now been considerably enlarged by section 14 of the Hindu Succession Act, 1956. Reference may be made to the Notes under that section *post*.

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(*q*) *Nagalutchmee* v. *Gopoo* (1856) 6 M.I.A. 309, 344 [case of a will].

(*r*) *Sartaj* v. *Deoraj* (1888) 10 All. 272, 288, 15 I.A. 51.

(7) The owner of an impartible estate may dispose of it by gift or will, unless there be a special custom prohibiting alienation or the tenure is of such a nature that the estate cannot be alienated (*s*).

*Marumakkatayyam law.*—As to the effect of a gift by a husband to his wife and her children by him, her children by her former husband being alive at the date of the gift, see the undermentioned case (*t*).

**358. Delivery of possession.**—(1) A gift under pure Hindu law need not be in writing. But a gift under that law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee (*u*). Mere registration of a deed of gift is not equivalent to delivery of possession; it is not therefore sufficient to pass the title of the property from the donor to the donee (*v*). But where from the nature of the case physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could to complete the gift, so as to *entitle* the donee to *obtain* possession (*w*).

*Illustrations*

(a) *A* executes a deed of gift of certain immovable property to *B*. At the date of the gift the property is in the possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a defendant. *A* by his written statement *admits B's claim*. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and possession was not given to *B*. The gift is valid, though possession was not delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor or a person claiming under him. The person who disputes it claims adversely to both. . . . *The donor has done all that she can to complete the gift, and is a party to the suit, and admits the gift to be completed*": *Kalidas* v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I.A. 218, followed in *Mahomed Buksh* v. *Hooseini Bibi* (*x*). See also *Man Bhari* v. *Naunidh* (*y*); *Muhammad Mumtaz* v. *Zubaida Jain* (*z*). *Mahomed Buksh's* case and *Muhammad Mumtaz's* case were both cases under Mahomedan law which, in this respect, is similar to pure Hindu law.

(b) A gift of property in the occupation of tenants may be completed by the tenants attorning to the donee at the donor's request: *Bank of Hindustan* v. *Premchand* (*a*).

(c) If the donee is already in possession, the gift may be completed by a declaration of gift on the part of the donor, and by acceptance on the part of the donee: *Bai Kushal* v. *Lakhma* (*b*).

(c1) A gift among the Hindus of Berar before the application of the Transfer of Property Act to that State is invalid unless accompanied by delivery of possession (*c*).

(d) It has been held by the High Court of Allahabad that mere delivery of a registered deed of gift is sufficient to complete a gift (*d*). This view cannot be supported unless the case was one governed by the Transfer of Property Act [see sub-§ (2) below].

(e) For the purpose of making a gift of an incorporeal right, the transfer may be effected in the same manner as the transfer of a chose in action (*e*).

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(*s*) *Surtaj* v. *Deoraj* (1888) 10 All. 272, 15 I.A. 51, *Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83; *Rao Bhimsingh* v. *Fakirchand* (1947) Nag. 649.

(*t*) *Moithiyan* v. *Ayissa* (1928) 51 Mad. 574, 110 I.C. 480, ('28) A.M. 870.

(*u*) *Harjivan* v. *Naran* (1867) 4 Bom. H.C.A.C. 31; *Abaji* v. *Mukta* (1894) 18 Bom. 688; *Venkatachella* v. *Thathammal* (1869) 4 Mad. H.C. 460. See also *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449. Also see *Mst. Nozi* v. *Mohanlal* ('57) A. Raj. 128.

(*v*) *Vasudev* v. *Narayan* (1883) 7 Bom. 131; *Dagai* v. *Mothura* (1883) 9 Cal. 854; *Lakshimoni* v. *Nittyananda* (1893) 20 Cal. 464.

(*w*) *Kalidas* v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I.A. 218 [where the gift was effected by an *ikrarnama*, *Joitaram* v. *Ramkrishna* (1903) 27 Bom. 31; *Rajaram* v. *Ganesh* (1889) 23 Bom. 131; *Bhaskar* v. *Sarasvatibai* (1893) 17 Bom. 486.

(*x*) (1888) 15 Cal. 684, 701-702, 15 I.A. 81.

(*y*) (1882) 4 All. 40, 45.

(*z*) (1889) 11 All. 460, 475-476, 16 I.A. 205.

(*a*) (1868) 5 Bom. H.C.O.C. 83.

(*b*) (1883) 7 Bom. 452.

(*c*) *Chandrabhaga* v. *Anandarao* (1939) Nag. 293.

(*d*) *Balmakund* v. *Bhagwan Das* (1894) 16 All. 185.

(*e*) *Chalamanna* v. *Subbamma* (1884) 7 Mad. 23 [gift of a nibandha or corrody]; *Khursedji* v.

(2) As regards Hindu gifts to which the Transfer of Property Act, 1882, applies, the rule of pure Hindu law that delivery of possession is essential to the validity of a gift is abrogated by sec. 123 of that Act (*f*). Under that Act delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of movable property. A gift under that Act can only be effected in the manner provided by sec. 123. That section is as follows:—

(i) "For the purpose of making a gift of *immovable* property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

(ii) "For the purpose of making a gift of *movable* property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery."

*Gifts by Hindus to which the Transfer of Property Act, 1882, applies.*—Section 123 of the Transfer of Property Act, 1882, has been applied to gifts by Hindus by sec. 129 of that Act. The Act came into force on the first day of July 1882. It extended, in the first instance, to the whole of British India *except* the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of Punjab, and the Chief Commissioner of Burma. It was subsequently extended to the Bombay Presidency on the first day of January 1893, and, on the same date, to the area included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon. The result is that the provisions of sec. 123 of the Transfer of Property Act apply to all gifts made by Hindus in the territories to which the Act applies since the date on which the Act came into force in those territories.

*Writing.*—Writing is not necessary under Hindu law for the validity of any transaction (*g*). Therefore, in cases of gifts by Hindus to which the Transfer of Property Act does not apply, a gift may be made orally or in writing.

*Acceptance of gift.*—"A gift," according to the Mitakshara, "consists in the relinquishment of one's own right and the creation of the rights of another. The creation of another man's right is *completed* on that other's *acceptance* of the gift, but not otherwise. Acceptance is made by three means, mental, verbal, or corporeal. In the case of land, as there can be no corporeal acceptance without enjoyment of the produce it must be accompanied by *some little possession, otherwise the gift, sale, or other transfer* is not complete" (*h*).

The effect of sec. 123 of the Transfer of Property Act is to dispense with delivery of possession (*i*). But the Act does not dispense with the necessity of *acceptance* as is clear from sec. 122. The mere execution of a registered deed by the donor is no proof of acceptance by the donee. Acceptance must be proved as an independent fact.

*Gifts and bequests to unborn persons.*—See §§ 360 and 373.

**359. Gift to unborn person: Rule apart from statute.**—Under pure Hindu law, a gift cannot be made in favour of a person who was not in existence at the date of the gift (*j*). This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (§ 360) do not apply (*j1*).

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*Pestonji* (1888) 12 Bom. 573 [gift of Government Promissory Notes].

(*f*) *Kalyanasundaram* v. *Karuppa* (1927) 54 I.A. 89, 50 Mad. 193, 100 I.C. 105, ('27) A.P.C. 42; *Atmaram* v. *Vaman* (1925) 49 Bom. 388 [F.B.], 87 I.C. 490, ('25) A.B. 210; *Dharmodas* v. *Nistarini* (1887) 14 Cal. 446; *Balbhadra* v. *Bhowani* (1907) 34 Cal. 853; *Bai Rambai* v. *Bai Mani* (1899) 23 Bom. 234; *Ramamirtha* v. *Gopala* (1896) 19 Mad. 433; *Alabi* v. *Mussa* (1901) 24 Mad. 513, 522; *Phulchand* v. *Lakkhu* (1903) 25 All. 358; *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 [F.B.]; *Ranganadha* v. *Baghirathi* (1906) 29 Mad. 412, 415. But see *Moosabhai* v. *Yacoobhai* (1905) 29 Bom. 267. See also *Sadik Husain Khan* v. *Hashim Ali Khan* (1916) 43 I.A. 212, 222, 223, 38 All. 627, 647, 36 I.C. 104, ('16) A.P.C. 27.

(*g*) *Balaram* v. *Appa* (1872) 9 Bom. H.C. 121, *Hurpurshad* v. *Sheo Dyal* (1876) 26 W.R. 55, 3 I.A. 259.

(*h*) Mitakshara chap. iii. secs. 5 and 6; W. MacN. 212, 217.

(*i*) *Dharmodas* v. *Nistarini* (1887) 14 Cal. 446, 448.

(*j*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 397, 400, I.A. Sup. Vol. 47, 67, 70; *Bai Mamubai* v. *Dossa* (1891) 15 Bom. 443; *Sri Raja Venkata* v. *Sri Rajah Suraneni* (1908) 31 Mad. 310.

(*j1*) *Raman Nadar* v. *Rasalamma* ('70) A.S.C. 1759.

For exception to this rule, see notes to § 372. As to bequests, see § 372. As to trusts, see § 366. As to gift to an idol, see § 410.

**360. Gift to unborn person: Rules as altered by statute.**—(1) The rule of Hindu law stated in § 359 that a gift cannot be made in favour of an unborn person has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921. The rule as altered by these Acts may be stated as follows:—

*Subject to the limitations and dispositions contained in Chapter II of the Transfer of Property Act, 1882, no gift is invalid by reason only that any person for whose benefit it may have been made was not born at the date of the gift.*

This rule, however, is not of universal application, but is confined to the following transfers, by way of gift:—

(i) to transfers executed *on or after the 14th February* 1914, by Hindus domiciled *in the State of Madras except the City of Madras, and, in the case of transfers executed before that date,* to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that Act: *Hindu Transfers and Bequests Act,* 1914. The Hindu Transfers and Bequests Act, which applied to the State of Madras except the city of Madras, now stands repealed with effect from 1st February, 1960 and the Hindu Disposition of Property Act, 1916 has now been made applicable to the State of Madras also.*

(ii) to transfers executed *on or after the 20th September* 1916, by Hindus *in any part of India except the state of Madras*: *Hindu Disposition of Property Act,* 1916: The Hindu Disposition of Property Act, 1916, which originally applied to the rest of India except the State of Madras, has now been made applicable to the State of Madras also.*

(iii) to transfers executed *on or after the 27th March,* 1921, by Hindus domiciled *within the limits of the ordinary original civil jurisdiction of the High Court of Madras,* and, in the case of transfers executed *before that date,* to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the *14th February,* 1914: *Hindu Transfers and Bequests* [*City of Madras*] *Act,* 1921. The Hindu Transfers and Bequests [*City* of Madras] Act, 1921, which applied to the City of Madras stands repealed with effect from 1st February, 1960 and the Hindu Disposition of Property Act, 1916 has now been made applicable to the City of Madras also.*

(2) The limitations and provisions contained in Chapter II of the Transfer of Property Act, 1882, are discussed in §§ 383 to 387 below. For the present they may be summarised as follows: (a) if the gift to an unborn person is preceded by a prior disposition, the gift shall be of the whole

* See Miscellaneous Personal Laws (Extension) Act XLVIII of 1959.

residue; (b) the gift shall not offend the rule against perpetuities; (c) if a gift is made to a class of persons with regard to some of whom it is void under (a) or (b), the gift fails in regard to those persons only and not in regard to the whole class; (d) if a gift to an unborn person is void under (a) or (b) any gift intended to take effect after such gift is also void.

*History of the legislation on the subject.*—It was held by the Privy Council in the *Tagore* case in 1872 that a Hindu cannot dispose of his property by gift in favour of a person who was not in existence at the date of the gift [§ 35], nor could he dispose of his property by will in favour of a person who was not in existence at the date of the death of the testator [§ 372]. The first enactment which validated gifts and bequests in favour of unborn person was the Hindu Transfers and Bequests Act, 1914. This was an Act of the Madras Legislature. It applied in terms to the whole of the State of Madras and was intended so to apply. It was followed by Hindu Disposition of Property Act, 1916, which was an Act of the Imperial Legislature. It applied to the whole of British India except the province of Madras for which legislation had already been made by the local Act, of 1914. After the Act of 1916 was passed, the High Court of Madras held as to the Madras Act of 1914 that the local Legislature had no power to take away the right of a Hindu domiciled within the local limits of the ordinary original civil jurisdiction of High Court of Madras to be governed by the Hindu law as it stood when the High Courts Act, 1861, was passed. The fact, however, was that the Hindu law as it then stood did allow gifts and bequests in favour of unborn persons, and the *Tagore* case had misinterpreted that law (*j*2). This led to the enactment by the Imperial Legislature of the Hindu Transfers and Bequests [City of Madras] Act, 1921. This Act extends in effect the local Act of 1914 to Hindus domiciled in the City of Madras. It also validates gifts and bequests made by Hindus domiciled in the City of Madras subsequent to the 14th February 1914, being the date on which the local Act of 1914 came into force. The result is that as between them the Acts of 1914 and 1921 apply to the whole State of Madras, and the Act of 1916 applies to the rest of India.

It may be noted, however, that, as stated earlier, with effect from 1st February, 1960, The Hindu Transfers and Bequests Act, 1914, and The Hindu Transfers and Bequests [City of Madras] Act, 1921 stand repealed, and The Hindu Disposition of Property Act, 1916, has now been made applicable to the whole of India including the State and City of Madras, excepting the State of Jammu and Kashmir. See Miscellaneous Personal Laws (Extension) Act XLVIII of 1959.

Gifts and bequests, however, in favour of unborn person, could only be made subject to certain limitations and provisions. These limitations and provisions were not the same under the three Acts. To attain uniformity the three Acts were amended by the Transfer of Property (Amendment) Supplementary Act, being Act 21 of 1929, which came into force on the 1st April 1930. These limitations and provisions are more or iess the same both in the case of gifts and of wills and they are dealt with together in §§ 383 and 384. Except as to these, we have dealt separately with gifts and bequests in favour of unborn persons, not because there is any material difference between them, but because a separate treatment must conduce to a clear understanding of the subject. As to bequests to unborn persons, see § 373.

**361. Reservation of life interest.**—A gift of property is not invalid because the donor reserves the usufruct of the property to himself for life (*k*).

*Illustration*

*A* executes a registered deed of gift of seven villages to her daughter, and delivers immediate possession of four villages to her. As to the remaining three villages the condition is that she will retain possession and enjoy the profits thereof during her life-time, but will not have power to make any transfer in respect thereof. The gift is valid not only as regards the four villages, but as to the other three also. There being an intention to effect a transfer in *praesenti* of the proprietary interest in all the seven villages and to vest the same in the donee, the reservation of the right to enjoy the usufruct on the three villages during her own life-time does not make the gift invalid as to the three villages: *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467[F.B.].

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(*j*2) *Raman Naddar* v. *Rasalamma* ('70) A.S.C. 1759.

(*k*) *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 [F.B.].

**362. Conditions restraining alienation or partition.**—Where property is given subject to a condition absolutely restraining the donee from alienating it (*l*), or it is given to two or more persons subject to a condition restraining them from partitioning it (*m*), the condition is void, but the gift itself remains good [§ 393].

**363. Revocation of gift.**—A gift once completed is binding upon the donor, and it cannot be revoked by him (*n*), unless it was obtained by fraud or undue influence (*o*).

Where a gift is made by a Hindu widow, the burden lies upon the donee to show that she made the gift with a full understanding of what she was doing and was aware of her rights (*p*).

**364. Gift in fraud of creditors.**—A gift made with intent to defeat or defraud creditors is voidable at the option of the creditors (*q*).

**365. Donatio mortis causa.**—A *donatio mortis causa*, that is, a gift made in contemplation of death, is recognized by the Hindu law (*r*).

**366. Trusts.**—(1) Trusts are no more strange to the Hindu than to the English system of law (*s*). Before the enactment of the Indian Trusts Act, 1882, a trust could only be created by delivery of possession, or its equivalent (*t*), to trustees as in the case of a gift. But a Hindu trust governed by the Act can only be created in the manner provided by sec. 5 of that Act. That section is as follows:—

(i) "No trust in relation to *immovable* property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

(ii) "No trust in relation to movable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee" (*u*).

(2) A trust cannot be created except in favour of a person to whom a gift or bequest can be validly made. Nor can a trust be made a means of effecting a course of devolution opposed to the Hindu law of property and succession. In other words, trusts are to be regarded as *gifts* alike as to the property which can be transferred as to the persons to whom it can be transferred (*v*).

There is some authority for the proposition that under the Hindu law, in cases not governed by the Indian Trusts Act, 1882, a mere declaration of trust, not amounting to a legal transfer, can be enforced in favour of the object of the trust (*w*).

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(*l*) *Anantha* v. *Nagamuthu* (1882) 4 Mad. 200; *Ali Hasan* v. *Dhirja* (1882) 4 All. 518; *Bhairo* v. *Parmeshri* (1885) 7 All. 516 [case of a deed of compromise]; *Muthukumara* v. *Anthony* (1915) 38 Mad. 867, 24 I.C. 120; *Rukminibai* v. *Laxmibai* (1920) 44 Bom. 304, 56 I.C. 361, ('20) A.B. 73 [Agrahar gift]. See Transfer of Property Act s. 10.

(*m*) *Narayanan* v. *Kannan* (1884) 7 Mad. 315. Transfer of Property Act, s. 11.

(*n*) *Ganga Baksh* v. *Jagat Bahadur* (1896) 23 Cal. 15, 22 I.A. 153; *Rajaram* v. *Ganesh* (1899) 23 Bom. 131; *Ammaponammal* v. *Shanmugam* ('71) A.M. 370.

(*o*) *Manigavri* v. *Narondas* (1891) 15 Bom. 549.

(*p*) *Deo Kuar* v. *Man Kuar* (1894) 17 All. 1, 21 I.A. 148 [gift set aside—suit brought eight years after date of gift—document not explained to donor].

(*q*) *Nasir* v. *Mata* (1880) 2 All. 891; *Rai Bishen Chand* v. *Mussamat Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164.

(*r*) *Visalatchmi* v. *Subbu* (1871) 6 Mad. H.C. 270; *Bhaskar* v. *Sarasvatibai* (1893) 17 Bom. 486, 495.

(*s*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 401-402, I.A Sup. Vol. 47-71-72; *Sri Sri Sridhar Jiu* v. *Manindra Kumar Mitra* (1940) 2 Cal. 285, 195 I.C. 475, ('41) A.C. 272.

(*t*) *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 470-471.

(*u*) *Ranganadha* v. *Baghirathi* (1906) 29 Mad. 412, 415.

(*v*) *Kahandas Narrandas, in re* (1881) 5 Bom. 154, 173-174; *Tagore* v. *Tagore* (1869) 9 Beng. L.R. 377, 401-402, I.A. Sup. Vol. 47, 71-72; *Rajender* v. *Sham Chund* (1881) 6 Cal. 106.

(*w*) *Chatti* v. *Pandrangi* (1884) 7 Mad. 23; *Hirbai* v. *Jan Mahomed* (1883) 7 Bom. 229; *Bhaskar* v. *Sarasvatibai* (1893) 17 Bom. 486, 498-501; *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 472.

# CHAPTER XIX

# WILLS

*Note.*—Under Hindu law a Hindu cannot by will bequeath property which he could not have alienated by gift *inter vivos*. That rule is now considerably modified in case of persons governed by the Mitakshara law. Section 30 of the Hindu Succession Act, 1956, now permits a member of a Mitakshara coparcenary to dispose of by will his undivided interest in the coparcenary property. A coparcener under the Mitakshara law has no power to dispose of his coparcenary interest by gift. That rule is not affected by the new legislation but he is now entitled to dispose of such interest by will. The position of a coparcener under the Dayabhaga law has not been altered in any manner. He could always dispose of his coparcenary interest by gift or will subject to the claims of those who were entitled to be maintained by him.

**367. Persons capable of making wills.**—Subject to the provisions hereinafter contained every Hindu who is of sound mind, and not a minor, may dispose of his property [§ 371] by will (*x*).

*Burden of proof.*—As regards the onus of proof in cases of wills the rules of law are quite clear. The first rule is, that "the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." The second rule is, that "if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will (*y*)." Reference may be made to the undermentioned decisions where the Supreme Court has considered the general principles relating to proof (*y*1).

*Wills unknown to pure Hindu law.*—The idea of a will is wholly unknown to the pure Hindu law. But the testamentary power of Hindus has now long been recognized, and must be considered as completely established (*z*).

*Joint will.*—See note below "*A document described as a will may not be a will.*"

*Minor's will.*—A Hindu who has not attained majority within the meaning of the Indian Majority Act, 1875, sec. 3, is not competent to make a will. See also the Indian Succession Act, 1925, sec. 2(c), where the expression "minor" is defined.

*A document described as a will may not be a will.*—The expression "will" is defined in the Indian Succession Act, 1925, as the *legal* declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. A document by which no property is disposed of, but which merely gives an authority to adopt, though described by the testator as a will, is not a will (*c*). Similarly, since a minor is not competent to make a will, any declaration by him with respect to his property cannot be said to be "legal" declaration, and the document comprising the declaration, though described as a will, is not a will at all (*d*).

*Registration in Book not appropriate for will.*—Where it appears from the terms of a document and the circumstances in which it was executed that it is a will, the fact that it is registered in Book IV (Miscellaneous Register) kept under the Registration Act, 1908, instead of in Book III, is insufficient to outweigh those terms and those circumstances (*e*).

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(*x*) *Hardwari* v. *Gomi* (1911) 33 All. 525, 9 I.C. 1017; *Bal Gulab* v. *Thakorelal* (1912) 36 Bom. 622, 17 I.C. 86; *Krishnamachariar* v. *Krishnamachariar* (1915) 38 Mad. 166, 19 I.C. 452, ('15) A.M. 815.

(*y*) *Lachho Bibi* v. *Gopi Narain* (1901) 23 All. 472; *Shama Charn* v. *Khettromoni Dasi* (1900) 27 Cal. 521, 27 I.A. 10; *Sukh Dei* v. *Kedar Nath* (1901) 23 All. 405, 28 I.A. 186; *Rash Mohini* v. *Umesh Chunder* (1898) 25 Cal. 824, 25 I.A. 109.

(*y*1) *Rani Purnima* v. *Kumar Khagendra* (1962) 3 S.C.R. 195; *Venkatachala* v. *Thimmajamma* (1959) Suppl. I S.C.R. 426.

(*z*) *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, 136; *Beer Pertab* v. *Rajender Pertab* (1867) 12 M.I.A. 1, 37-38.

(*c*) *Jagannatha* v. *Kunja* (1921) 48 I.A. 482, 44 Mad. 733, 64 I.C. 458. ('22) A.P.C. 162.

(*d*) *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Rao* (1925) 52 I.A. 305, 48 Mad. 614, 89 I.C. 733, ('25) A.P.C. 196.

(*e*) *Krishna Rao* v. *Sundara Siva Rao* (1931) 58 I.A. 148, 54 Mad. 440, 131 I.C. 318, ('31) A.P.C. 109.

**368. What property may be bequeathed by will.**—(1) Prior to the coming into operation of the Hindu Succession Act, 1956, it was a rule firmly established that a Hindu cannot by will bequeath property which he could not have alienated by gift *inter vivos* [§ 357]. In the undermentioned case the Supreme Court pointed out that a father in a Mitakshara family has a very limited right to make a will and the mere fact that the father after making some dispositions gave the residue to his son and the son took out probate and carried out the wishes of the father would not change the nature of the joint family property (*e*1). Even after the Succession Act, 1956, a Hindu cannot by will so dispose of his property as to defeat the legal right of his wife or any other person to maintenance. Reference may be made to sections 18 to 22 of the Hindu Adoptions and Maintenance Act, 1956 (*f*).

(2) The rule stated above that a Hindu cannot by will bequeath property which he could not have alienated by gift *inter vivos* is now altered by section 30 of the Hindu Succession Act, 1956, which permits a member of a Mitakshara coparcenary to dispose of by will his undivided interest in the coparcenary property. Reference may be made to Notes under that section, *post*.

See Indian Succession Act, 1925, Schedule III, paras. 1 and 2.

(3) As regards *property* which a Hindu could dispose of by will, the following propositions are to be noted:—

(i) According to all the schools a Hindu could dispose of by will his separate or self-acquired property (*g*) [§ 222].

(ii) According to the Dayabhaga law, a father could dispose of by will all his property, whether ancestral or self-acquired [§ 274]. Similarly, a coparcener could dispose of by will the whole of his interest in the joint family property (*h*) [§ 282].

According to the Mitakshara law, no coparcener, not even a father, could dispose of by will his undivided coparcenary interest (*i*) even if the other coparceners consented to the disposition, the reason being that "at the moment of death the right of survivorship [of the other coparceners] is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise" (*j*). A sole surviving coparcener could, however, bequeath the joint family property as if it was his separate property (*k*).

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(*e*1) *Valliammai Achi* v. *Nagappa Chettiar* ('67) A.S.C. 1153.

(*f*) For decisions prior to the Act see *Sonatun* v. *Juggutsoondree*, (1859) 8 M.I.A. 66-68; *Beer Pertab* v. *Rajender Pertab* (1867) 12 M.I.A. 1, 38; *Promotha Nath* v. *Nagendrabala* (1908) 12 C.W.N. 808.

(*g*) (1867) 12 M.I.A. 1, 38, *supra*.

(*h*) *Nagalutchmee* v. *Gopoo* (1856) 6 M.I.A. 309, 344; *Sartaj* v. *Deoraj* (1888) 10 All. 272, 288, 15 I.A. 51.

(*i*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Lakshman* v. *Ramchandra* (1881) 5 Bom. 48, 7 I.A. 181; *Harilal* v. *Bai Mani* (1905) 29 Bom. 351; *Lalta Prasad* v. *Sri Mahadeoji* (1920) 42 All. 461, 58 I.C. 667, ('20) A.A. 116; *Venkatarao* v. *Venkateswararao* ('56) A. Andh. Pra. 1. Reference may be made to *M. N. Aryamurthi* v. *M. L. Subbaraya* ('72) A.S.C. 1279.

(*j*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Lakhmi Chand* v. *Anandi* (1926) 53 I.A. 123, 48 All. 313, 95 I.C. 566, ('26) A.P.C. 54; *Bhikhabhai* v. *Purshottam* (1926) 50 Bom. 558, 96 I.C. 421, ('26) A.B. 378 [will though made with consent of son held void]; *Anandrao* v. *Administrator General of Bombay* (1896) 20 Bom. 450 explained; *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637.

(*k*) *Nagalutchmee* v. *Gopoo Nadaraja* (1856) 6 M.I.A. 309; *Narottam* v. *Narsandas* (1866) 3 Bom. H.C.A.C. 6.

Since a will operated from the date of the testator's death, it was held that if a coparcener subsequently came into existence such as a son adopted by him (*l*), a son subsequently born to him (*m*), including a posthumous son (*n*) or the posthumous son of a deceased coparcener, the will, so far as it dealt with the coparcenary property, was inoperative and the property passed to him by survivorship. But if the son whether natural born or adopted died in the lifetime of the testator, the will stood, and the devisee was entitled to the property given to him by the will (*o*). See sub-paragraph (2) above.

Though a father could dispose of a small portion of ancestral *movables* by way of *gift*, he could not do so by *will* (*p*) [§§ 225, 226]. See sub-paragraph (2) above.

(iii) A Hindu female could dispose of her *stridhana* by will, subject in certain cases to the consent of her husband [§ 143]. After the coming into force of the Hindu Succession Act, 1956, her rights are considerably enlarged. See section 14 of that Act and Notes thereunder.

(iv) The owner of an impartible estate could dispose of it by will, in the absence of a special custom prohibiting alienation, or where the tenure was of such a nature that it could not be alienated (*q*). See Chapter XXVII *post*.

*Disinheritance*.—There is nothing to prevent a Hindu from so disposing of his property by will as to defeat the rights of his sons, wife, or other heirs even to the extent of completely disinheriting them (*r*). No express words are necessary to disinherit the heirs; it is sufficient if the property is bequeathed to some other person (*s*). But if the bequest to that person is not valid, there will be an intestacy to that extent, and the property will go to the heir, notwithstanding express directions in the will that he shall not take. The estate must go to somebody, and if there is no valid disposition, it must go to the heir (*t*). Similarly, where under the terms of a will the *corpus* of the estate is not to vest until the happening of a certain event, it will *in the meantime* vest in the heir (*u*).

*Will by father making gifts to charity*.—A will by father making gifts to charity was valid if it was consented to by the sole surviving son (*v*).

**369. Section 57 of the Indian Succession Act, 1925.**—The Indian Succession Act, 1925, consists of eleven parts. Part VI relates to testamentary succession and comprises secs. 57 to 191. Of these only some apply to Hindu wills, being those, mentioned in Schedule III to the Act. But these, again, do not apply to all Hindu wills, but only to such classes of wills as are specified in sec. 57 of the Act.

S. 57 "The provisions of this Part (that is, Part VI of the Act) which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

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(*l*) *Venkatanarayana* v. *Subbammal* (1915) 43 I.A. 20, 39 Mad. 107, 32 I.C. 373, ('15) A.P.C. 37; *Parma Nand* v. *Shiv Charan Das* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147; *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Rani Raghubans* v. *Raghuraj Singh* (1947) All. 556.

(*m*) *Lalita Devi* v. *Ishar Das* (1933) 14 Lah. 178, 138 I.C. 58, ('33) A.L. 544.

(*n*) *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105; *Minakshi* v. *Virappa* (1885) 8 Mad. 89.

(*o*) *Bodi* v. *Venkataswami* (1915) 38 Mad. 369, 21 I.C. 73, ('15) A.M. 1077.

(*p*) *Parvatibai* v. *Bhagwant* (1915) 39 Bom. 593, 31 I.C. 280, ('15) A.B. 265; *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637; *Patra Chariar* v. *Srinivasa* (1917) 40 Mad. 1122, 40 I.C. 118, ('18) A.M. 531 [where the other coparceners had consented to the bequest].

(*q*) *Sri Raja Rao Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83 [will]; *Sartaj* v. *Deoraj* (1888) 10 All. 272, 15 I.A. 51 [gift]. *Thyagasundaradoss* v. *Pandia* ('65) A.S.C. 1730.

(*r*) *Mulraz* v. *Chalekany* (1838) 2 M.I.A. 54; *Subbayya* v. *Surayya* (1887) 10 Mad. 251; *Narottam* v. *Narsandas* (1886) 3 Bom. H.C.A.C. 6.

(*s*) *Prosunno* v. *Tarrucknath* (1873) 10 Beng. L.R. 267.

(*t*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 402.

(*u*) *Amulya* v. *Kali Das* (1905) 32 Cal. 861.

(*v*) *Srinivasagam* v. *Chinmammal* (1946) Mad. 676.

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the 1st day of September, 1870,* within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the 1st day of January, 1927,* to which those provisions are not applied by clauses (a) and (b)."

**369A. Form of will.**—The following Hindu wills and codicils are required to be in writing signed by the testator and attested by at least two witnesses (*w*), as provided by sec. 63 of the Indian Succession Act, 1925.

(a) all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the 1st day of September, 1870,* within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;

(b) all *such* wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) all other wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the 1st day of January, 1927.*

This section is but a limb of sec. 57 of the Indian Succession Act, 1925. See § 369 above.

Before the Hindu Wills Act, 1870, no Hindu will was required to be in writing, the will could be oral or in writing (*x*). If the will was in writing, it did not require to be signed or attested (*y*). Probate was granted of oral wills as well as of written wills (*z*). The Hindu Wills Act was the first enactment which required Hindu wills to be in writing. That Act, however, applied to certain wills only, being those specified in cls. (a) and (b) of this section. Other wills were not required to be in writing. They could be made orally. By the Indian Succession (Amendment) Act, 1926, those wills also were required to be in writing. This Act is reproduced in cl. (c) of this section. The result is that every Hindu will made after the 1st January, 1927, must be in writing signed by the testator and attested by at least two witnesses as provided by sec. 63 of the Indian Succession Act, 1925.

*No particular form necessary for a will.*—A will need not be in any particular form. It is sufficient if it contains the testamentary wishes of the deceased. Thus a petition to the Revenue authorities (*a*), a statement made before a Revenue officiai and recorded by him (*b*), entries in a *wajib-ul-arz* (*c*), a matrimonial arrangement deed (*d*), *a mooktiarnamah* or power of attorney (*e*), a deed of settlement made at the time of adoption (*f*), and a *tamlikanama* or deed of assignment (*g*), containing testamentary dispositions of property, have been held to amount to a will.

**370. Revocation of will: alterations in will.**—(1) No will or codicil specified in cls. (a) and (b) of § 369A above can be revoked except in the manner provided by sec. 70 of the Indian Succession Act, 1925. Nor can it be altered except in the manner provided by sec. 71 of the Act.

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(*w*) *Umakanta* v. *Biswambhar* (1929) 8 Pat. 419, 117 I.C. 874, ('29) A.P. 401.

(*x*) *Hari* v. *Moro Lakshman* (1887) 11 Bom. 89, 93; *Bhagwan* v. *Kala* (1877) 1 Bom. 641.

(*y*) *Tara Chand* v. *Nobin Chunder* (1865) 3 W.R. 138; *Radhabai* v. *Ganesh* (1879) 3 Bom. 7; *Bapuji Jagannath In re* (1896) 20 Bom. 674; *Janki* v. *Kallu Mal* (1909) 31 All. 236, 2 I.C. 213 [draft will].

(*z*) *Gokul Chand* v. *Mangal Sen* (1903) 25 All. 313.

(*a*) *Mahomed Shamsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 2 I.A. 7.

(*b*) *Kalian Singh* v. *Sanwal Singh* (1885) 7 All. 163.

(*c*) *Mathura Das* v. *Bhikhan Mal* (1897) 19 All. 16.

(*d*) *Din Tarini* v. *Krishna* (1909) 36 Cal. 149.

(*e*) *Kollany* v. *Luchmee* (1875) 24 W.R. 395.

(*f*) *Lakshmi* v. *Subramanya* (1889) 12 Mad. 490.

(*g*) *Thakur Ishri Singh* v. *Baldeo Singh* (1884) 10 Cal. 792, 11 I.A. 135.

(2) The above rule applies also to wills and codicils specified in cl. (c) of para, 369A, but only to such revocation and alterations as are made on or after the 1st October, 1929.

(3) The will of a Hindu is not revoked by the marriage of the maker thereof (*h*), nor is it revoked, as regards self-acquired property, by the subsequent birth or adoption of a son (§ 498).

*Rule of Hindu law before legislation.*—No writing was necessary under the Hindu law to make a will or to revoke a will. Nor was actual destruction of a will necessary to constitute a revocation, if definite authority was given by the testator to destroy it with the intention of revoking it (*i*).

**371. Wills founded on the law of gifts.**—Bequests stand substantially on the same footing as gifts (*j*). It has been so laid down by their Lordships of the Privy Council in the *Tagore* case. In that case their Lordships said:—"Even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are *generally* so to be regarded as to the *property* which they can transfer, and the *persons* to whom it can be transferred" (*k*).

*"Persons to whom it can be transferred."*—Just as before the Acts referred to in § 360 a gift could not be made in favour of a person who was not in existence at the date of the gift, so a bequest could not before those Acts be made in favour of a person who was not in existence at the testator's death. See §§ 372, 373.

**372. Bequest to unborn person: Rule apart from statute.**—A person capable of taking under a will must, either in fact or in contemplation of law, be in existence at the death of the testator (*l*). This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (§ 373) do not apply. This rule was discussed by the Supreme Court in the undermentioned case (*l*1).

*Child in the womb.*—A bequest to a person not in existence *at the testator's death* is invalid. A child in the womb and a son adopted by a widow after the death of her husband are in *contemplation of law* in existence at the death of the testator.

A bequest to the wife of the testator's son in case he should marry within ten years from the testator's death is valid, provided the son marries a girl who was in existence at the testator's death (*m*), as the rule in this section does not apply.

*Illustration*

A bequest to the eldest child of *L* takes no effect if *L* has no child, at the time of the death of the testator, even though *L* has a son born some time after the testator's death (*n*). The decision is also based on another ground.

*Exceptions to the rule.*—In laying down the above rule in the *Tagore* case the Judicial Committee desired "not to express any opinion as to certain exceptional cases of provisions by means of *contract* or *of conditional gift on marriage* or *other family provision* for which authority may be found in Hindu law or usage." Thus where a suit against a Hindu widow by a person claiming to be the adopted son of her husband was

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(*h*) Indian Succession Act, 1925, s. 57.

(*i*) *Maharajah Pertab Narain* v. *Subhao Kooer* (1877) 3 Cal. 626, 643, 4 I.A. 228, 245; *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156.

(*j*) *Seth Mulchand* v. *Bai Mancha* (1883) 7 Bom. 491, 493.

(*k*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 399, I.A. Sup. Vol. 47, 69; *Motivahu* v. *Mamubai* (1897) 21 Bom. 709, 721, 24 I.A. 93, 105.

(*l*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 397, 400, I.A. Sup. Vol. 47, 67, 70; *Chandi Churn* v. *Sideswari* (1889) 16 Cal. 71, 15 I.A. 149; *Venkata* v. *Suraneni* (1908) 31 Mad. 310; *Bai Mamubai* v. *Dossa* (1891) 15 Bom. 443.

(*l*1) *Raman Nadar* v. *S. Rasalamma* ('70) A.S.C. 1759.

(*m*) *Dinesh Chandra* v. *Biraj Kamini* (1912) 39 Cal. 87, 11 I.C. 67.

(*n*) *Nakshetramali Dei* v. *Brajasunder Das* (1933) 12 Pat. 708, 146 I.C. 865, ('33) A.P. 647.

compromised by an agreement which provided that on the plaintiff relinquishing his claim to a zamindari, the widow and her heirs holding the zamindari should pay a specified annuity to the plaintiff and *his heirs from generation to generation*, it was held by their Lordships of the Privy Council that the annuity was a charge upon the estate, and the agreement was enforceable against the widow's successors. Dealing with the argument that the grant was void as offending against the rule against perpetuity, their Lordships said: "A second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in a *charge*, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Seshagiri Aiyar, J., in the High Court were right in holding that this is a charge" (*o*). It has also been held that an annuity left by a Hindu to his daughter for her life, and then to her son absolutely—the annuity having been made a *charge* on the estate—is valid, though the son might be born after the death of the testator. A grant of this description does not violate the rule against perpetuity (*p*).

The rule in this section applies to the office of a Shebait and a direction in the will that the office should be held by an unborn person was held to be invalid (*q*).

The rule laid down in this section is applicable to all wills, whether they are governed by the Dayabhaga law or the Mitakshara law (*r*), and whether they are or are not subject to the provisions of the Indian Succession Act, 1925, relating to Hindu wills (*s*). It may here be observed that the testator in the *Tagore* case was governed by the Dayabhaga school, and the will was made long before the Hindu Wills Act, 1870, came into force. As to the law as altered by statute, see § 373.

**373. Bequest to unborn persons: Rule as altered by statute.**—(1) The rule of Hindu law stated in § 372 that a bequest cannot be made in favour of a person who was not born at the date of the testator's death has been altered by three Acts, namely, the Hindu Transfer and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921. The rule as altered by these Acts may be stated as follows:—

*Subject to the limitations and provisions contained in sections* 113, 114, 115 *and* 116 *of the Indian Succession Act*, 1925, *no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death.*

This rule, however, is not of universal application, but is confined to the following cases, namely:—

(i) to wills executed *on or after the* 14*th February* 1914, by Hindus domiciled *in the State of Madras except the city of Madras*, and in the case of wills executed *before that date*, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that date: *Hindu Transfers and Bequests Act*, 1914;

(ii) to wills executed *on or after the* 20*th September* 1916, by Hindus in *any part of India except the State of Madras*: *Hindu Disposition of Property Act*, 1916;

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(*o*) *Rajah of Ramnad* v. *Sundara* (1919) 46 I.A. 64, 42 Mad. 581, 49 I.C. 704, ('18) A.P.C. 156. See also *Khajeh Solehman Quadir* v. *Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.P.C. 107.

(*p*) *Jatindra* v. *Ghanesyam* (1923) 50 Cal. 266, 72 I.C. 1019, ('23) A.C. 27.

(*q*) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791 overruling *Mathura Nath* v. *Lakhi Narain* (1923) 50 Cal. 426, 75 I.C. 435, ('24) A.C. 68.

(*r*) *Mangaldas* v. *Krishnabai* (1882) 6 Bom. 38.

(*s*) *Alangamonjori* v. *Sonamoni* (1882) 8 Cal. 637; *Radha Prasad* v. *Ramimoni Dasi* (1911) 38 Cal. 188, 8 I.C. 1061, S.C. on appeal, 41 Cal. 1007, 41 I.A. 176, 23 I.C. 713, ('14) A.P.C. 149.

(iii) to wills executed *on or after the 27th March*, 1921, by Hindus domiciled *within the limits of the ordinary original civil jurisdiction of the High Court of Madras*, and, in the case of wills executed *before that date*, to such of the dispositions thereby made as are to come into operation at a time subsequent to the 14th February, 1914: *Hindu Transfers and Bequests [City of Madras] Act*, 1921.

For the three Acts mentioned in the section and the history of the legislation on the subject, see notes to § 360 above.

The limitation subject to which a bequest can be made in favour of an unborn person are set out in §§ 383-387 below.

It may be noted that with effect from 1st February, 1960, the Hindu Dispositions of Property Act, 1916 has been extended to the whole of India including the State of Madras and the City of Madras, and the Hindu Transfers and Bequests Act, 1914 and the Hindu Transfers and Bequests [City of Madras] Act, 1921 stand repealed.

**374. Election.**—Though a Hindu governed by the Mitakshara law, prior to the enactment of sec. 30 of the Hindu Succession Act, 1956, could not dispose of by will his undivided interest in coparcenary property, he could bequeath his self-acquired property to his coparcener and his undivided interest in the coparcenary property to a third person. Such a disposition was valid, and the coparcener to whom the self-acquired property was bequeathed had to elect, after the testator's death, as to which of the two properties he would take. He could not take both (*t*).

**375. Probate, letters of administration and succession certificate.**—(1) In the case of Hindu wills of the classes specified in clauses (a) and (b) of sec. 57 of the Indian Succession Act, 1925, [§ 369 above], no right as executor or legatee can be established in a Court of Justice, unless, a Court of competent jurisdiction shall have granted probate of the will. But no probate is necessary to establish such right in the case of other Hindu wills (*u*).

(2) Where a Hindu dies intestate, it is not necessary *in any case* to obtain letters of administration to the estate of the deceased to establish a right to any part of the property of the deceased.

(3) But where the suit is one to recover a *debt* due to the estate of a deceased Hindu, no decree can be passed against the debtor except on the production of a probate or letters of administration or a succession certificate.

*Sub*-§ (1).—Sub-section (1) is a reproduction of sec. 213 of the Indian Succession Act, 1925. Where probate is necessary to establish a claim in a Court of law, it is sufficient if the probate is produced when the decree is passed. The suit may be *instituted* without a probate (*v*).

*Sub*-§ (2).—See the Indian Succession Act, 1925, sec. 212.

*Sub*-§ (3).—This sub-section is a reproduction of sec. 4 of the Succession Certificate Act, 1889, now the Indian Succession Act, 1925, sec. 214. A succession certificate

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(*t*) *Kishan Chand* v. *Narinjan* (1929) 10 Lah. 389. 113 I.C. 298, ('28) A.L. 967.

(*u*) *Ahemed* v. *Ghisia* (1945) Nag. 562, ('45) A.N. 237.

(*v*) *Chandra Kishore* v. *Prasanna Kumari* (1911) 38 I.A. 7, 38 Cal. 327, 9 I.C. 22, a case under s. 187 of the I.S. Act, 1865, as applied to Hindu will by the Hindu Wills Act [now a 213 of the I.S. Act, 1925, as applied by s. 57 of that Act].

is necessary in a suit by a son to recover money which was self-acquired property of his deceased father (*w*) or in the execution by a widow of a money decree obtained by her husband (*x*). But no such certificate is necessary to recover money to which the plaintiff becomes entitled by survivorship (*y*).

*Who may oppose grant of probate.*—Where the nearest reversionary heir to a Hindu testator refuses without sufficient cause to oppose grant of probate, the next person in the line of succession may oppose it (*z*). In the last mentioned case the Court applied the principles stated in § 207 above.

*Letters of administration where deceased was joint in estate.*—No probate or letters of administration can be granted in respect of joint family property. But where such property stands in the name of the manager or other members of the family, letters of administration may be granted to the surviving coparcener as his heir to the legal estate in that property, and limited to that property, under sec. 250 of the Indian Succession Act, 1925 (*a*). This constantly happens in the case of shares of a limited company.

**376. Vesting of estate in Hindu executor or administrator.**—The executor or administrator of a deceased Hindu is his legal representative for all purposes, and all the property of the deceased vests in him as such (*b*).

See Indian Succession Act, 1925, sec. 211, corresponding with sec. 4 of the Probate and Administration Act, 1881.

*No vesting of coparcenary property*—Coparcenary property cannot be disposed of by will. Hence it cannot vest in the executor (*c*).

*Character of Hindu executor.*—Before the passing of the Hindu Wills Act, 1870, the estate of a deceased Hindu *did not vest* in his executor, even if probate was granted to him. The executor was not the legal representative of the deceased person, but was practically a manager of the estate with no greater power than the manager of the estate of a minor, unless the will gave him greater powers. The grant of probate and letters of administration took effect only for the purpose of recovering debts and securing debtors paying the same, but neither an executor nor an administrator had any such rights as are conferred upon executors and administrators by the Indian Succession Act, 1925 (*d*).

Such was the state of the law prior to the Hindu Wills Act, 1870. That Act incorporated sec. 179 of the Indian Succession Act, 1865, which provided that "the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such." The Hindu Wills Act, 1870, however, did not apply to all Hindu wills. It applied only to (1) wills made within certain local limits, and (2) to wills relating to immovable property situated within those limits [see § 369]. The Probate and Administration Act, which applied to all Hindu wills, was not passed until 1881. The latter Act repealed the said sec. 179 as part of the Hindu Wills Act, but re-enacted it as part of itself in sec. 4. Both these Acts have been repealed and re-enacted by the Indian Succession Act, 1925. Section 211 of the latter Act corresponds to sec. 4 of the Probate and Administration Act.

*Vesting of property in executor without probate.*—The estate of the deceased vests in the executor whether he has obtained probate or not (*e*).

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(*w*) *Viravan* v. *Srinivasachariar* (1921) 44 Mad. 499, 62 I.C. 944, ('21) A.M. 168 [F.B.]; *Venkataramanna* v. *Venkayya* (1891) 14 Mad. 377.

(*x*) *Jadaobai* v. *Purammal* (1944) Nag. 832.

(*y*) *Raghavendra* v. *Bhima* (1892) 16 Bom. 349; *Jagmohandas* v. *Allu Maria* (1895) 19 Bom. 338; *Sital Proshad* v. *Kaifuc Sheikh* (1922) 26 C.W.N. 488, 65 I.C. 367, ('22) A.C. 149. Reference may be made to *Chhotki* v. *Chandra Prakash* ('64) A. Raj. 32 [case falling under Hindu Women's Rights to Property Act 1937—Succession certificate under S. 214 not necessary].

(*z*) *Shib Charan Das, In the goods of* (1929) 56 Cal. 1070, 121 I.C. 687, ('30) A.C. 150.

(*a*) *Gopalaswamy* v. *Meenakshi* (1929) 7 Rang. 39, 115 I.C. 905, ('29) A.R. 99; *Bank of Bombay* v. *Ambalal Sarabhai* (1900) 24 Bom. 350; *Mussamat Uttam* v. *Dina Nath* (1819) 54 Punj. Rec. no. 139, 46 I.C. 454.

(*b*) *Sir Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Ramiah* v. *Venkatasubbamma* (1926) 49 Mad. 261, 44 I.C. 83, ('26) A.M. 434 [F.B.]; *Ganapathi* v. *Sivamalai* (1913) 36 Mad. 575, 17 I.C. 4.

(*c*) *Ujambai* v. *Harakchand Govindji* (1935) 59 Bom. 644, 37 Bom. L.R. 300, 156 I.C. 621, ('35) A.B. 242.

(*d*) *Maniklal* v. *Manchershi* (1876) 1 Bom. 269, 275; *Jagmohandas* v. *Pallonjee* (1898) 22 Bom. 1; *Kherodemoney* v. *Doorgamoney* (1878) 4 Cal. 455, 468; *Sarat Chandra* v. *Bhupendra Nath* (1898) 25 Cal. 103; *Amulya* v. *Kali Das* (1905) 32 Cal. 861; *Kurrutulain* v. *Nuzbat-ud-Dowla* (1906) 33 Cal. 116, 129, 130, 32 I.A. 244, 257-258.

(*e*) *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Venkatasubamma* v. *Ramayya* (1932) 55 Mad. 443, 59 I.A. 112, 136 I.C. 111, ('32) A.P.C. 92.

The contrary decision of the Calcutta High Court on the Probate and Administration Act, 1881, is now of no importance (*f*).

*A* and *B* are executors of *C*'s will. *A* alone obtains probate. This is no bar to *B*'s acting as a legal representative of *C*'s estate (*g*).

**376A. Power of Hindu executor or administrator to dispose of property.**—(1) A Hindu executor has power to dispose of the property of the deceased vested in him [§ 376 above]. In the case, however, of immovable property this power is subject to any restriction contained in the will, unless he has obtained probate of the will and also leave from the Court which granted the probate to dispose of such property.

(2) A Hindu administrator has power to dispose of the property of the deceased vested in him [§ 376 above]. In the case, however, of immovable property, he cannot mortgage it or charge it or transfer it by sale, gift, exchange or otherwise, or grant a lease of it for a term exceeding five years, unless he has obtained the permission of the Court which granted the letters of administration to do so.

See Indian Succession Act, 1925, sec. 307, corresponding with sec. 90 of the Probate and Administration Act, 1881.

**377. Intention of testator.**—"In determining the construction [of a will] what we must look to. is the *intention* of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor . . . . is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily *the words of the will* are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by *surrounding circumstances*, and where this is the case those circumstances no doubt must be regarded (*h*)."

"In all cases the primary duty of a court is to ascertain from the *language* of the testator what were his *intentions, i.e.*, to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding *circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense*, and many other things which are often summed up in the somewhat picturesque figure: "The Court is entitled to put itself into the testator's armchair.' Among such surrounding circumstances which the Court is bound to consider none would be more important than *race and religious opinions*, and the court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. . . . This fundamental principle does not clash with the principle that the *Court will not necessarily apply English rules of construction* to such a will as we have here to deal with. . . . Nor does this fundamental principle clash in any way with what is sometimes

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(*f*) *Sakina Bibee* v. *Mahomed Ishak* (1910) 37 Cal. 839, 8 I.C. 655.

(*g*) *Chidambara* v. *Krishnasami* (1916) 39 Mad. 365, 368-369, 28 I.C. 221, ('16) A.M. 720.

(*h*) *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1857) 6 M.I.A. 526, 551; *Lakshmana Nadar* v. *R. Ramier* (1953) S.C.R. 848.

called, 'giving a liberal interpretation' to native wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But *those intentions must be ascertained by the proper construction of the words he uses,* and once ascertained they must not be departed from (*i*)." In interpreting a will the Court will be slow in accepting the contention that the testator intended to create joint tenancy which is something unknown to Hindu law (except, in a sense in case of coparcenary) (*ii*).

It is clear from the passage cited above that the intention of the testator is to be gathered primarily from the *language of the will.* Where the language is clear and consistent, it must receive its *literal* construction, unless there is something in the will itself to suggest departure from it (*j*). If the real meaning can be reasonably ascertained from the language used, that meaning is to be enforced to the extent and in the form which the law allows (*k*). It is a well settled rule of construction that the same words used in a document (will) are to be given the same meaning unless there is a clear intention to the contrary (*k*1). Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention (*l*). Technical words or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. Thus the words "become *malik* (owner)" confer an heritable and alienable estate, unless the context indicates a different meaning. Similarly, the words *putra putrade krame* have acquired a technical force, and are used as meaning an estate of inheritance (*m*). At the same time it must be recognized that documents in the vernacular are often expressed in loose and inaccurate language, and thus sometimes a meaning more extended or more restricted than the literal meaning may have to be given to particular words in vernacular documents provided the context justifies doing so (*n*). Particular words in a will should not be construed with reference to similar words in another will. The will must be read as a whole to ascertain the intention of the testator and where the intention is clearly expressed by unambiguous words in certain clauses other words in other clauses repugnant to them may be discarded (*o*).

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(*i*) *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 221-223, 41 I.A. 51, 70-72, 23 I.C. 166; *Sasanka Bhusan* v. *Gopi Ballav* ('35) A.C. 716, (1936) 63 Cal. 385, 159 I.C. 437.

(*ii*) *Venkatakrishna Rao* v. *Satyavathi* ('68) A.S.C. 751.

(*j*) *Gurusami* v. *Sivakami* (1895) 18 Mad. 347, 358, 22 I.A. 119.

(*k*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 395, I.A. Sup. Vol. 47, 65; *Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51.

(*k*1) *Thyagasundaradoss* v. *Pandia* ('65) A.S.C. 1730, 1733.

(*l*) *Vasantkumar Basu* v. *Ramshankar Ray* (1932) 59 Cal. 859, 138 I.C. 882, ('32) A.C. 600.

(*m*) *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76; *Suraimani* v. *Rabi Nath* (1908) 30 All. 84, 35 I.A. 17; *Pratapsingh* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457, ('18) A.P.C. 192; *Soorjeemoney Dosee* v. *Denobundoo Mullick* (1857) 6 M.I.A. 526, 551; *Bissonauth* v. *Bamasoondery* (1867) 12 M.I.A. 41, 59. See also *Ram Narayan Singh* v. *Ram Saran Lal* (1919) 46 I.A. 88, 46 Cal. 683, 50 I.C. 1, ('18) A.P.C. 203.

(*n*) *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 10 Pat. 187, 127 I.C. 743, ('30) A.P.C. 242.

(*o*) *Kanhya Lal Missir* v. *Mst. Hira Bibi* (1936) 15 Pat. 151, 163 I.C. 940, ('36) A.P. 323; *Shib Sakti* v. *Piaraylal* (1947) All. 403.

Where a testator bequeathed his property to his wife absolutely with a condition that if unchastity is established the reversioners should share the property equally, it was held that unchastity does not cover re-marriage in the absence of a clause prohibiting remarriage (*p*).

**378. Ordinary notions and wishes of Hindu to be taken into consideration.**—"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained to his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" (*q*). The predilections of the class to which the testator belongs may be kept in view (*r*). Where a testator gave certain properties to his daughters with a direction that they should enjoy the interest with their sons, grandsons, etc., and that neither the daughters nor their sons or grandsons, etc., should be entitled to give, sell or mortgage the properties, it was held that the daughters and the daughters' sons took only life estates (*s*). In construing a will made after the coming into operation of the recent legislation and particularly the Hindu Succession Act, 1956, the Court may assume that the testator knew of the radical changes that have been brought about in the general law of inheritance and that women now take absolute estates of inheritance.

Reference may be made to the Supreme Court decisions cited under § 401. Also see the undermentioned case (*s*1).

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(*p*) *Har Bux Singh* v. *Musammat Shanti Devi* (1941) 16 Luck. 414, 192 I.C. 53, ('41) A.O. 353.

(*q*) *Mahomed Shumsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 231, 232, 2 I.A. 7, 14-15; *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 902, 35 I.A. 118, 129.

(*r*) *Sasanka Bhusan* v. *Gopi Ballav* (1935) 159 I.C. 437, ('35) A.C. 716.

(*s*) *Bibha Bati Debee* v. *Mahendra Chandra Lahiri* (1937) 1 Cal. 400, 173 I.C. 857, ('38) A.C. 34.

(*s*1) *Harnam Singh* v. *Mohan Lal* ('70) J. & K. 181.

## CHAPTER XX

# RULES COMMON TO GIFTS AND WILLS

**379. Tagore case.**—The leading case on Hindu wills and gifts is the *Tagore* case (*t*) decided by the Judicial Committee in the year 1872. A synopsis of that case is given in illustration (*e*) to § 382 below. The rules laid down in that case and the decisions founded thereon are set out in the following sections. The fundamental principle underlying those rules may be stated as follows:—

Subject to the provisions of § 368, a Hindu may give or bequeath his property to any one he likes. He may not only direct who shall take the estate, but may also direct what quality of estate they shall take. But the person who is to take must be in existence at the date when the gift or bequest is to take effect, and the estate given to such person must be an estate recognized by the Hindu law. The validity of a gift or bequest depends on the fulfilment of the conditions not only as to the *person* who is to take, but also as to the *estate* which is to be taken by him. The mere fact that the donee is a person capable of taking under the deed or will is not sufficient to validate the gift. It is further necessary that the estate given to him must be one recognized by the Hindu law. As to what estates are not recognized by that law, see § 382 below. The rules laid down in the *Tagore* case as applicable to Hindu wills, are applicable to hereditary offices and endowments as well as to immovable property (*u*).

In cases governed by the Hindu Disposition of Property Act, 1916, a grant may be made to an *unborn person* subject, however, to the limitations and provisions contained in that Act [see §§ 383 to 387 below].

**380. Estate of inheritance.**—(1) An important rule applicable to wills and deeds of gift is that benignant construction is to be used; and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. Thus a gift to A simply without the words "and his heirs" would, in the absence of conflicting context, pass by Hindu law an absolute estate. If there were added to such a gift an imperfect description

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(*t*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47.

(*u*) *Ganesh Chunder* v. *Lal Behary* (1936) 63 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, ('36) A.P.C. 318.

of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he has added a qualification which the law does not recognise.

(2) If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, then inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift and to the extent to which the gift is not inconsistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void (*v*).

**381. Limited estate.**—A Hindu may create a life-estate or successive life-estates or any other estate for a limited term, provided the donee is a person capable of taking under the deed or will (*w*).

**382. Estates repugnant or unknown to Hindu law.**—A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or policy. Inheritance does not depend on the will of the individual owner. Inheritance is a rule laid down (or, in the case of custom, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs (*x*). A will in favour of the testator's widow prohibiting all transfer of the property directing that all management of the property should be made after consultation of certain persons and giving her powers of nominating a legatee by her will, such legatee possessing certain qualifications is an attempt to create an estate unknown to Hindu law and is void (*y*).

A will or deed cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the estate of inheritance must be such as is known to the Hindu law. All estates of inheritance

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(*v*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 395, I.A. Sup. Vol. 47, 66; *Manikyamala* v. *Nanda Kumar* (1906) 33 Cal. 1306.

(*w*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 405, I.A. Sup. Vol. 47, 75; *Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51.

(*x*) (1872) 9 Beng. L.R. 377, 394-395, I.A. Sup. Vol. 47, 65-66, *supra*.

(*y*) *Ramu* v. *Kashi* (1944) All. 9.

created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such. An English estate tail is an estate unknown to the Hindu law; no person, therefóre, can succeed under a gift or will as heir to such an estate (*z*). On this ground, wills and gifts which direct an estate to go in an order of succession which excludes female heirs (*a*) [that is, an estate in tail male], or male heirs (*b*), or heirs by adoption (*c*), or daughters and their sons (*d*), or includes only some of the heirs (*e*) have been held invalid to that extent.

*Illustrations*

(a) Property is bequeathed to *B, and after him to the heirs male of his body*, that is, *his heirs* in tail male.

This case gives rise to the following three points:—

*1st point.—The estate tail is void.*—The bequest to *B*'s heirs is void, for the estate attempted to be conferred upon them is an estate in tail male, and such an estate is unknown to the Hindu Law.

*2nd point.—B takes an estate for life.*—Does *B* take any interest under the will? If so, does he take an absolute estate or a life estate only? The answer is, that *B* takes a life estate only. He does not take an absolute estate, for the result of putting that construction on the will would be that *B*, as absolute owner, might mortgage or give away the property, in which case the property might pass away from the family to a mortgagee or a stranger donee. To adopt this construction would be in effect to make a new will for the testator and one which, so far from carrying his intention into effect, would be in direct opposition to his intention, and indeed to his main object, *viz.*, to keep the property in the family. But *B* certainly does take an estate for life, as in respect of him "the giver had at least that intention." The presumption is that the testator intended to benefit *B personally* for it is clear that if the bequest to *B* and his heirs in tail male were valid, it would have carried with it the enjoyment by *B* of the property during his life. "This intention, though it is mixed up with an intention to give an estate tail, may lawfully take effect."

*3rd point.—Heir-at-law entitled to whole estate after B's death.*—(a) The result is that *B* takes an estate for life, and on his death the property will revert to the testator's estate, that is, it will go to the testator's heirs (*f*). The rule of English common law that the undisposed of residue of personal estate vests in the *executor* beneficially does not apply to the will of a Hindu testator in India (*g*).

(b) *A*, after providing for certain legacies, bequeaths the residue of his property to his executor upon trusts to pay the income *to his daughter B during her lifetime and after her death* upon trust to convey the property *to his brothers C and D in equal shares and to the heir or heirs male of their or either of their bodies* and on failure of these *to the sons of his daughter B.*

*C* had three sons living at *A*'s death. *D* had no son living at *A*'s death but two sons are born to him after *A*'s death, and during *B*'s lifetime. *B* had no son at *A*'s death, but six sons are born to her after *A*'s death. What are the rights of the parties under the will?

*B* takes an estate for life. *C* and *D* each takes an estate for his life in one moiety of the residue in remainder expectant on the death of *B*. The bequest to the heirs of *C* and *D* is void as it is a bequest of an estate tail. *B*'s sons are not entitled to any

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(*z*) (1872) 9 Beng. L.R. 377, 396, I.A. Sup. Vol. 47, *supra*; *Kristoromoni* v. *Narendro* (1889) 16 Cal. 383, 392, 16 I.A. 29.

(*a*) *Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51; *Vullubhdas* v. *Gordhandas* (1890) 14 Bom. 360; *Venkata* v. *Chellayammi* (1894) 17 Mad. 150; *Lakshmakka* v. *Boggaramanna* (1896) 19 Mad. 501; *Bai Dhanlaxmi* v. *Hariprasad* (1921) 45 Bom. 1038, 62 I.C. 37, ('21) A.B. 262.

(*b*) *Kunhamina* v. *Kunhambi* (1909) 32 Mad. 315, 1 I.C. 195; *Chandrachoor Deo* v. *Bibhutibhushan Deva* (1944) 23 Pat. 763.

(*c*) *Suriya Rau* v. *Raja of Pittapur* (1886) 9 Mad. 499, 13 I.A. 97.

(*d*) *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 38 I.A. 112, 11 I.C. 412.

(*e*) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791.

(*f*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47, 66; *Manikyamala* v. *Nanda Kumar* (1906) 33 Cal. 1306.

(*g*) *Lallubai* v. *Mankuvarbai* (1878) 2 Bom. 388.

interest under the will, as none of them was in existence at the testator's death, and further, because the estate purporting under the will to be devised to them was already void before it could pass to them. The result is that on the deaths of *C* and *D* respectively, his moiety will pass to the testator's heir. If *C* dies in *B*'s lifetime, and if *B* is the heir-at-law, *C*'s moiety will pass to *B*, so that *B* will be entitled in possession to one moiety of the residue: *Kristoromoni* v. *Narendro* (1889) 16 Cal. 383, 16 I.A. 29.

(c) *A* bequeaths certain property to his three nephews, *B*, *C* and *D*, "for the payment of the expenses of their pious acts." He then directs as follows: "My three nephews shall possess the property in equal shares. They shall have no rights to alienate the same by gift or sale; but they, their sons, grandsons and their descendants in the *male* line shall enjoy the same. If any die without leaving a *male* child, his share shall devolve on the surviving nephews and their *male* descendants, but not on his other heirs.

*A* dies leaving him surviving the three nephews, *B*, *C* and *D*, and a son *F*. *B* dies unmarried. Then *C* dies leaving a widow, but no issue. *F* sues *D* for a declaration of his rights in the property. What are the rights of the parties at this stage in the property?

The bequest to the sons, grandsons and descendants of the nephews in the *male* line is void, for the effect of it is to exclude *females* altogether. Such an estate of inheritance is *inconsistent* with the general law of inheritance which admits males as well females to succession. The attempt to confine the succession to males to the entire exclusion of females, is a distinct departure from Hindu law, 'excluding' in the terms of the judgment in the *Tagore* case, 'the legal course of inheritance.'

On *A*'s death, *B*, *C* and *D* *each* took an *estate for life in one-third of the property*. On *B*'s death, his share went to his two brothers, *C* and *D*. On the death of *C*, *D* as the survivor of the three brothers became entitled to a *life estate in the whole of the property* [§ 389].

In the case on which this illustration is based, it was contended that the intention of the testator was to confer an absolute estate in *B*, *C* and *D*, and that the intention might be effectuated by striking out that portion of the will which excluded females from succession. But this contention was overruled. The Judicial Committee said: "To alter the words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females." The result is that on *D*'s death, the whole property will revert to *A*'s estate and pass to his heirs. If *F* is alive at *D*'s death, it will pass to him as the heir of *A*: *Tarokessur* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51.

(d) Two brothers subject to the Dayabhaga school of Hindu law execute a joint will whereby they purport to provide for the permanent devolution of their respective properties in the *direct male line*, including adopted sons, with the conditions that on failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and that *only in the absence of male descendants in the direct line* in either branch should the properties go to *female heirs or their descendants*. The document is invalid and void. The object of the document is clearly to alter the rule of succession in the family in which the parties belonged by *excluding female heirs and their descendants*. Under it the female heirs and their descendants are not to receive the shares prescribed for them by the Hindu law of inheritance until there is an *indefinite* failure of male issue in both branches of the family. The result is that on the death of either of the two executants, his share will pass to his heirs according to the Dayabhaga law: *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 38 I.A. 112, 11 I.C. 412.

*Note.*—The above case as well as the *Tagore* case [ill. (e)] must be distinguished from a case like the one in ill. (a) to § 389. The latter case does not point to an *indefinite* failure of male issue, but to a failure of male issue of any of the testator's sons *at the time* of the death of that son (*h*).

(e) *Tagore case.*—In the *Tagore* case property was bequeathed—

(1) to *A* for life;
to *A*'s eldest son for life;
in strict settlement upon the first and other sons of such eldest son successively in tail male.
} = to *A* and his heirs *in tail male*,

(*h*) *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, 134.

(2) "after the failure or determination" of the above estate, to *B* and his heirs in tail male,

(3) "after the failure or determination" of the last mentioned estate, to the heirs of *C* in tail male.

The will expressly adopted primogeniture in the male line through males, and *excluded females and their descendants* (*i*).

At the time of the testator's death, *A*, the head of the first series of estates, had no son. *B*, the head of the second series of estates, had a son *D* born in the lifetime of the testator. *C* was dead at the making of the will but left a grandson *F* born in the lifetime of the testator. The testator died leaving an only son, *S*. No provision was made for him in the will, as he had become a Christian. Some time after the testator's death, his son *S* brought a suit to set aside the will. It was held that *A* took an estate for life, that all other bequests were void, and that the plaintiff as the heir of the testator, was entitled to the whole estate after the death of *A*. The estates tail were void, for they were inconsistent with the Hindu law of inheritance. It was also held that *B* and *D* though they were in existence at the testator's death, took nothing under the will, for they were only to take "after the failure or determination" of the previous series of estates, that is to say, *after the actual exhaustion of the line of A in conformity with the will.* This event had not arisen and could not arise. The *incapacity of A's* line to succeed *by reason of the illegality of the will* did not entitle *B* or *D* to any benefit under the will. For the same reason, *F* though he was in existence at the testator's death, took nothing under the will: *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47. The plaintiff's conversion to Christianity was no bar to his succession to his father's estate, having regard to the provisions of the Caste Disabilities Removal Act, 1850.

*Note.*—A Hindu may entirely disinherit his son or other heir by bequeathing the whole of his property to another. By so doing, he does not create an estate inconsistent with the general law of inheritance: he merely exercises the power which the Hindu law allows him. But what the Hindu law does not allow is to confer upon any legatee an estate which would be *inconsistent with the Hindu law of inheritance,* in other words, an estate which would *exclude the legal course of inheritance.* An estate is said to be *inconsistent* with the Hindu law of inheritance if it is given to *A* and the heirs *male* of his body, for the effect is to exclude *female* heirs. If it were given to *A* absolutely, then, on *A*'s death intestate, the estate would pass according to the general law of inheritance to *A*'s heir, whether the heir was a son, or a *widow* or a daughter. But the attempt to give an estate to *A* and the heirs *male* of his body is to exclude *female* heirs; in other words it is an attempt to *alter the line of succession* allowed by law.

(f) *A* Hindu by a deed of settlement conveys property to trustees upon trust to pay the income arising therefrom to himself for life and after his death, as to one-fourth share, to his married daughter *K* "for her sole and separate use and after her death in trust for the male heirs of the said *K* share and share alike." *K* survives the settlor and dies some years after the date of the settlement leaving 6 sons all of whom were in existence at the date of the deed. The gift of the sons is an absolute gift to them of the property and they take the property as tenants-in-common in equal shares. In the course of the judgment their Lordships of the Privy Council said: "In settling the true construction of this deed, therefore, unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. So also must rules like the well known rule in *Shelly's* case, based here upon feudal customs that have had no existence in Bombay. Further, it is to be remembered that a gift to a class of which no member existed at the date of the deed would be bad, and so also a definite attempt to create what in England would be regarded as an estate tail: see *Tagore* v. *Tagore* (*j*). The main part of the respondents' argument depends upon this last consideration. They assert that this was the true meaning of the gift—to the male heirs of Krishnabai after Krishnabai's death—and that it consequently failed. They further argue that the words themselves connote a descendible quality of estate with which it was the intention of the settlor to impress the property either in the gift to Krishnabai or to the male heirs. Their Lordships are unable to accept this view, which is permeated by the suggestion that the words when used in a Bombay settlement are primarily words of inheritance denoting the character of an estate. They do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life interest, and that it

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(*i*) See also *The Administrator General of Bengal* v. *Lalbihari Dhar* (1934) 61 Cal. 393, 152 I.C. 710, ('34) A.C. 629.

(*j*) (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47.

was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arises. . . . Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show that the estate so conferred was anything but an absolute estate upon such persons. For there is nothing to suggest on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate": *Madhavrao* v. *Balabhai* (1928) 55 I.A. 74, 52 Bom. 176, 107 I.C. 119, ('28) A.P.C. 33. The rule in this section applies to wills providing for succession of shebaits of an endowment (*k*).

When the husband gave his wife full powers of transfer over the property but without giving her an absolute estate such a disposition is not repugnant to Hindu Law and alienations by her are binding on the reversioner (*l*).

**383. Limitations subject to which a gift or bequest can be made to an unborn person.**—As has already been stated, a Hindu may under the Acts of 1914, 1916 and 1921 referred to in §§ 360 and 373 above, dispose of his property by *transfer inter vivos* or by will in favour of an unborn person. This, however, can only be done subject to certain limitations and provisions. These limitations and provisions are—

(a) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Chapter II of the Transfer of Property Act, 1882, did not originally apply to Hindus. It has now been extended to Hindus by the Transfer of Property (Amendment) Act 20 of 1929, sec. 3. The sections of that Chapter material for the present purposes are secs. 13, 14, 15 and 16, which correspond to secs. 113, 114, 115 and 116 of the Indian Succession Act, 1925. Both these sets of sections are similar in substance; they are therefore dealt with together in §§ 384, 385, 386 and 387 below.

All the eight sections *assume* that a gift or bequest can be made in favour of an unborn person. They did not apply to Hindus at first. They were gradually made applicable to Hindus. The Hindu Transfers and Bequest Act, 1914, and the Hindu Transfers and Bequests [City of Madras] Act, 1921, incorporated only s. 14 of the Transfer of Property Act and the corresponding s. 114 of the Indian Succession Act, being the sections which relate to the rule against perpetuity. The Hindu Disposition of Property Act, 1916, incorporated two more sections, namely, s. 13 of the Transfer of Property Act and the corresponding s. 113 of the Indian Succession Act. The first time all the eight sections were applied to Hindu gifts and wills was by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, by which all the three Acts mentioned above were amended and they were all made uniform: see ss. 11, 12 and 13 of Act 21 of 1929.

**384. Disposition in favour of unborn person subject to prior disposition.**—Where a gift is made to a person not in existence at the date of the gift or a bequest is made to a person not in existence at the death of the testator, subject to a prior gift or bequest, the later gift or bequest shall not

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(*k*) *Ganesh Chunder* v. *Lal Behary* (1936) 63 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, ('36) A.P.C. 318. Also see *Gokul Chand De* v. *Gopi Nath Dev* ('52) A.C. 705 (deed of trust). Also see *Raikishori Dassi* v. *Official Trustee* ('60) A.C. 235, 64 C.W.N. 646.

(*l*) *Bishun Singh* v. *Shri Takurji Mangla Nain Bhagwan* (1944) 72 I.A. 27, (1945) All. 231.

take effect, unless it extends to the whole of the remaining interest of the donor or testator in the property.

*Illustrations*

(1) *Gift.*—*A* transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage *for life*, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

(2) *Bequest.*—Property is bequeathed by a father to his son for life, after his death, to his son's wife for life and after her death to certain other persons. The son's wife was not in existence at the date of the testator's death. The bequest to her, not being of the whole interest, is void (*m*).

This section is a combination of s. 13 of the Transfer of Property Act, 1882, and s. 113 of the Indian Succession Act, 1925.

**385. Rule against perpetuity.**—(1) *Gift.*—No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(2) *Bequest.*—No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The rule applies to private trusts also (*n*).

*Illustrations*

(a) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of the sons of *B* who shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the survivor of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B*'s death is void.

(b) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death it shall be divided amongst such of *B*'s children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

Sub-section (1) is sec. 14 of the Transfer of Property Act, 1882; sub-sec. (2) is sec. 114 of the Indian Succession Act, 1925. Both these sections are the same in substance, though different in form.

The rule against perpetuity does not apply to charitable or religious endowments. See § 411 below.

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(*m*) *Kuppusami Pillai* v. *Jayalakshmi Ammal* (1935) 58 Mad. 15, 154 I.C. 537, ('34) A.M. 705; *Bibha Bati Debee* v. *Mahendra Chandra Lahiri* (1937) 1 Cal. 400, 173 I.C. 857, ('38) A.C. 34.

(*n*) *Ajitkumar Mitra* v. *Tarubala Dasee* (1936) 63 Cal. 209.

*Rule of Hindu law before legislation.*—The above rules apply only to gifts and bequests which are within the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921, dealt with in § 360 above. As to gifts and bequests which do not come within those Acts the old rule still applies. That rule may be stated as follows:—

Where it appears from the will that the intention of the testator was not to pass the estate at all, but to create a perpetuity, as where the will contains a direction, as regards the *corpus*, that it should be kept intact for ever, and, as regards the income of the property, that portion thereof should be enjoyed by the testator's sons, grandsons and their descendants for ever and that the rest should be accumulated, the direction is invalid, and the estate will pass as an estate intestate. The Hindu law does not allow property to be tied up in perpetuity except in the case of religious and charitable endowments (*o*). The same principle applies to transfers *inter vivos* (gifts). This rule may be explained by the following illustration:

*Illustration*

*A* will contains as to the property purported to be bequeathed thereby the following directions:—

(1) that the property shall not be alienated at all;

(2) that six-sixteenths of the net income of the property shall be applied towards the maintenance of the members of the testator's family and the families of his sons, grandsons and their descendants *in perpetuity;*

(3) that the remaining ten-sixteenths should be accumulated and carried to the credit of the estate.

The will is invalid, and the property will descend to the testator's heirs as on intestacy. The above directions show that it was not the intention of the testator to pass the estate at all. It is not a case where the testator has expressed an *intention to pass the estate*, and has *added* a clause against alienation, in which case the clause against alienation would be void [§ 393], and the gift of the estate would take effect. In the case put above, the will *starts with* a provision against alienation, and this provision is confirmatory of the other parts of the will which clearly show an *intention to create a perpetuity* (*p*).

**386. Gift or bequest to a class.**—If a gift or bequest is made to a class of persons with regard to some of whom it fails by reason of the rules contained in §§ 384 and 385 above, such gift or bequest fails in regard to those persons only and not in regard to the whole class.

*Illustrations*

(a) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. [The gift to *A*'s children is a gift to a class]. *A* survives the testator, and has some children living at the testator's death. Each child of *A* living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest [§ 385 (2)]. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*.

(b) *A* fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D* and all other children of *A* who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in ill. (a) Although the mention of *B*, *C* and *D* by name does not prevent the bequest from being regarded as a bequest to a class, the bequest is not wholly void. It is operative as regards any of the children *B*, *C* or *D*, who attains the age of 25 within 18 years after *A*'s death.

This is a combination of sec. 15 of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act 20 of 1929, sec. 9 and sec. 115 of the

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(*o*) *Shookmoy Chandra* v. *Monoharri Dassi* (1885) 11 Cal. 684, 12 I.A. 103; *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Vullabhdas* v. *Gordhandas* (1890) 14 Bom. 360; *Kumara Asima* v. *Kumara Krishna* (1869) 2 Beng. L.R.O.C. 11.

(*p*) *Ibid.*

Indian Succession Act, 1925, as amended by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 14. Before the amendment, if a gift or bequest to a class failed as to any member thereof, the gift or bequest was *wholly* void. Since the amendment, it is not wholly void. It is void only as to those in regard to whom it fails. The above illustrations are illustrations (i) and (ii) to sec. 115 of the Indian Succession Act as amended by the Supplementary Act.

Section 15 of the Transfer of Property Act and sec. 115 of the Indian Succession Act, before they were amended as aforesaid, were enacted on the principle of the decision in *Leake* v. *Robinson* (*q*). That principle is thus stated in Theobold on Wills: "Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void."

*Rule of Hindu law as to gift to a class and subsequent legislation.*—Before the Acts of 1914, 1916, and 1921, relating to gifts and bequests to unborn persons [§§ 360, 373], a gift to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was *incapacitated* from taking. Thus if a gift was made by a Hindu to his grandsons, and none of them was in existence at the date of the gift, none of them had the *capacity* to take, and the gift was therefore void. But what if a gift was made by a Hindu to his grandson *S* who was in existence at the date of the gift, and to other grandsons (brothers of *S*) who might be born *after the date of the gift*, and some grandsons are born after the date of the gift. It is obvious that the grandsons who were born after the date of the gift could not take, but could *S* take? In some of the earlier cases it was held on the analogy of the rule in *Leake* v. *Robinson*, that the gift having failed as to the other grandsons, it was wholly void, and that *S* too could not take. But it was held in later cases and also by the Judicial Committee that the rule in *Leake* v. *Robinson* was a rule of construction of the English law, and that it did not apply to Hindus, and that the *incapacity* of the other grandsons to take did not incapacitate *S* from taking, with the result that *S* took the whole of the property which was the subject matter of the gift (*r*). Further, the rule in *Leake* v. *Robinson* is confined in terms to cases where the members of the class may have to be ascertained *beyond the limits of perpetuity*. But the sections of the Transfer of Property Act and the Indian Succession Act which contain the rule against perpetuity did not then apply to Hindus and *Leake* v. *Robinson* therefore could not possibly apply to Hindu gifts and bequests.

We shall now observe the course of legislation. First came the Madras Act of 1914. It validated gifts and bequests in favour of unborn persons, and *thus removed the bar of incapacity*. It also applied for the first time the rule against perpetuity to cases governed by that Act. Similar provisions were introduced by the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921; see §§ 360 and 373 above. The result of all that was that in the case put above grandsons other than *S*. though not in existence at the date of the gift, could also take under the deed.

The Indian Succession Act in force when the three Acts were passed was that of 1865. Section 101 related to the rule against perpetuity; it is now sec. 114 of the Indian Succession Act, 1925. Section 102 related to bequests to a class; this corresponds to sec. 115 of the Indian Succession Act, 1925, before it was amended in 1929. Another Act in force when the three Acts were passed was the Hindu Wills Act, 1870. Certain sections of the Indian Succession Act, 1865, were made applicable to cases governed by the Hindu Wills Act, one of them being sec. 102. Section 102 was in the following terms:—

"If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 100 or section 101, such bequest is *wholly void*."

Though sec. 101 was incorporated in all the three Acts, sec. 102 was not, the intention being to keep alive the rule of Hindu law that if a gift or bequest was made to a

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(*q*) (1817) 2 Mer. 363.

(*r*) *Rai Bishenchand* v. *Mussumat Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164; *Ram Lal Sett* v. *Kanai Lal Sett* (1886) 12 Cal. 663; *Bhagabati* v. *Kalicharan* (1911) 38 Cal. 468, 38 I.A. 54, 10 I.C. 641 [affirming s.c. in 32 Cal. 992]; *Rani Moni* v. *Radha Prasad* (1914) 41 Cal. 1007, 41 I.A. 176, 23 I.C. 713, ('14) A.P.C. 149; *Manjamma* v. *Padmanabhayya* (1889) 12 Mad. 393; *Ranganadha* v. *Baghirathi* (1906) 29 Mad. 412; *Mangaldas* v. *Tribhuvandas* (1891) 15 Bom. 652; *Tribhuvan Das* v. *Gangadas* (1894) 18 Bom. 7; *Krishnarao* v. *Benabai* (1896) 20 Bom. 571; *Khimji* v. *Morarji* (1898) 22 Bom. 533; *Advocate-General* v. *Karmali* (1905) 29 Bom. 133, 155-156; *Kanai Lal* v. *Kumar Purnendu* (1944) 51 C.W.N. 227, (1947) 1 Cal. 48; *Rabindra Nath* v. *Sushil Chandra* ('52) A.C. 427.

class of persons with regard to some of whom it was inoperative by reason of the fact that they were not in existence at the material date, the gift or bequest failed in regard to those persons only and not in regard to the whole class. But the legislature seemed to have overlooked the Hindu Wills Act, and particularly the inclusion in that Act of sec. 102. This was not noticed until the decision of the Judicial Committee in *Soundara Rajan* v. *Natarajan* (*s*). The will in that case was governed by the Madras Act of 1914. Amongst the properties disposed of by the will were some immovable properties situated in the city of Madras. This attracted the applicability of the Hindu Wills Act. The testator died in 1904, leaving three daughters, *A*, *B*, and *C*. *A* had four children, *three born before* and one after 1904. *B* had one child *born before* 1904. *C* had six children all born after 1904. By this will the deceased directed his trustees to apportion his residuary trust fund into as many equal shares as there were daughters, to pay the income from each of such shares to the daughters for life respectively, and after the death of each daughter to hold the share appropriated to her "upon trust for the children of such daughters who shall attain the *age of twenty-one years.*" The testator was survived by the three daughters. After their death a suit was brought by the children of the third daughter *C* against the children of *A* and *B* for construction of the will and for administration of the estate of the testator. The Judicial Committee held that the bequest to the unborn children was invalid under sec. 101 of the Indian Succession Act, 1865 [now the Indian Succession Act, 1925, sec. 114], as it offended the rule against perpetuity, and that the bequest being to a class, and being invalid as to some members, it failed also in regard to the children born before the death of the testator under sec. 102 of that Act (corresponding to the Indian Succession Act, 1925, sec. 115, before it was amended in 1929). In the case under consideration the bequest to the children born after the testator's death failed not because of the rule of Hindu law that a bequest to an unborn person is void, for the Madras Act validated such bequest, but because of the rule against perpetuity contained in sec. 101. The bequest being void as to some members of the class under sec. 101 it was *wholly* void under sec. 102. This led to the amendment of sec. 15 of the Transfer of Property Act, 1882, and sec. 115 of the Indian Succession Act, 1925, in the manner stated above.

**387. Failure of prior disposition.**—Where a gift or bequest fails by reason of any of the rules contained in §§ 384 and 385 above, any gift or bequest intended to take effect after on failure of such prior gift or bequest also fails.

This is a combination of sec. 16 of the Transfer of Property Act, 1882, and sec. 116 of the Indian Succession Act, 1925.

A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25 for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under sec. 114 of the Indian Succession Act, 1925 [§ 385 (2) above]. The bequest to *B* is also void (*t*).

**388. Independent and alternative bequests.**—Where there are independent and alternative gifts or bequests, of which one is good at the time the document takes effect, and the other is void, the former will take effect, and the latter will be disregarded (*u*). Where a testator made some bequests of property in favour of his relations and other bequests for charitable purposes and some of the former bequests were invalid, the latter were held to be valid as they were separable from and not dependent on the former (*v*).

**389. Grant subject to defeasance: Executory bequest.**—It is competent to a Hindu to make a grant of an absolute estate *defeasible* on the happen-

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(*s*) (1925) 52 I.A. 310, 48 Mad. 906, 92 I.C. 289, ('25) A.P.C. 244.

(*t*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 410, I.A. Sup. Vol. 47, 80; *Soudaminey Dossee* v. *Jogesh Chunder* (1877) 2 Cal. 262; *Javerbai* v. *Kablibai* (1892) 16 Bom. 492, in app. from 15 Bom. 326.

(*u*) *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37.

(*v*) *Kayastha Pathshala Allahabad* v. *Mt. Bhagwati Devi* (1937) 64 I.A. 5, (1937) All. 3, 39 Bom. L.R. 322, 166 I.C. 4, ('37) A.P.C. 4.

ing of a subsequent event. But the event must happen, if at all, immediately on the close of a life in being, *and* the gift over must be in favour of some person in existence at the date of the gift or at the death of the testator, as the case may be; otherwise, the gift over is void, and the absolute estate granted to the first donee remains unaffected (*w*).

In cases, however, governed by the Hindu Disposition of Property Act, 1916, the gift over may be made in favour even of a person not in existence at the death of the testator.

*Illustrations*

(a) A Hindu bequeaths his property to his five sons in equal shares, and directs that *in the event of* any of his sons dying without sons or sons' sons, his share shall pass over to the sons then living or their sons. All the five sons survive the testator. One of the sons, *A* dies leaving a widow, but *without leaving sons or sons' sons.* The gift over to the surviving sons is valid, and they are entitled to the one-fifth share of the deceased son to the exclusion of his widow. The effect of the will is to give an absolute estate to each son if he dies leaving sons or sons' sons subject to defeasance in the event of his death without leaving sons or sons' sons. If *A* had died *leaving sons or sons' sons,* he would have taken an absolute estate which he could have disposed of by will (*x*), and which on intestacy would have passed to his heirs: *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123 s.c. 6 M.I.A. 526; *Chunilal* v. *Bai Samrath* (1914) 38 Bom. 399, 23 I.C. 645, ('14) A.P.C. 60; *Navalchand* v. *Manekchand* (1921) 23 Bom. L.R. 450, 62 I.C. 98, ('21) A.B. 25. [It may be observed that any son of the testator may alienate his share even before the event happens, but the alienee will in that case take the share *subject to the defeasance clause:* (1921) 23 Bom. L.R. 450, 62 I.C. 98, ('21) A.B. 25.]

*Note.*—The case put above was *not* governed by the Hindu Wills Act, 1870. Had it been governed by that Act, the will would have to be construed with reference to sec. 111 of the Indian Succession Act, 1865, (now sec. 124 of the Act of 1925), it being one of the sections made applicable by the Hindu Wills Act to wills governed by that Act. Section 111 provides that "where a legacy is given if a *specified uncertain event* shall happen and *no time is mentioned in the will for the occurrence of that event,* the legacy cannot take effect, unless such event happens *before* the period when the fund bequeathed is payable or distributable." Ill. (a) to sec. 111 is as follows: "A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect."

In the case put in our illustration, the *uncertain event* on the happening of which the one-fifth share of a son is to go to his brothers is the *death* of the son without leaving sons or sons' sons. Under sec. 111 the rule has been taken from an English case which has been overruled by later English cases. The section, it has been held, should be applied strictly to cases coming within its scope (*y*).

Section 124 of the Indian Succession Act, 1925, (sec. 111 of the Act of 1865), is one of the sections mentioned in Schedule III to that Act. Those sections applied in the first instance to wills of the classes specified in cls. (a) and (b) of sec. 57 of that Act, being wills to which the Hindu Wills Act, 1870, applied. Since the Indian Succession (Amendment) Act, 1929, those sections apply also to *other wills* executed on or after the 1st January, 1927. The Act of 1929 came into force on the 1st October, 1929.

(b) A Hindu testator bequeathed a moiety of his estate to his son and provided that the other moiety was to be held by the son and other persons in trust for the son's male

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(*w*) *Soorjemoney Dossee* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, s.c. 6 M.I.A. 526; *Kristoromoni* v. *Narendro* (1888) 16 Cal. 383, 392, 16 I.A. 29; *Bissonauth* v. *Bamasoondery* (1867) 12 M.I.A. 41, 48 [devise held absolute]; *Bhoobun Mohini* v. *Hurrish Chunder* (1878) 4 Cal. 23, 5 I.A. 138 [held gift operated as an absolute grant, as the event specified did not occur]; *Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51 [case of gift over of a life estate]; *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 850, 24 I.A. 76; *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 619, 620, 38 I.A. 112, 120, 11 I.C. 412; *Lakshminarayana* v. *Valliammal* (1911) 34 Mad. 250, 11 I.C. 767; *Sarajubala* v. *Jyotirmoyee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.P.C. 179: *Narsingh Rao* v. *Maha Lakshmi Bai* (1928) 55 I.A. 180, 50 All. 375, 109 I.C. 703, ('28) A.P.C. 156. See also Transfer of Property Act, 1882, ss. 28, 30; *Mt. Rameshwar Kuer* v. *Sheo Lal Upadheya* (1935) 14 Pat. 640, 156 I.C. 33, ('35) A.P. 401; *Mst. Tejo* v. *Chhape Ram* ('56) A. Punj. 45.

(*x*) *Bhoobun Mohini* v. *Hurrish Chunder* (1879) 4 Cal. 23, 5 I.A. 138.

(*y*) *Bhupendra* v. *Amarendra* (1916) 43 I.A. 12, 43 Cal. 432, 34 I.C. 892, ('15) A.P.C. 101.

issue and further provided that in case of the son's death without male issue it should go to a certain named charitable Institute. The son died without male issue. It was held by the Judicial Committee that the gift to the trust took effect on the death of the son and that the gift to charity, which was subject to the above condition, was valid (*z*).

(c) *A* executes a deed of settlement whereby he gives certain property to his daughter *B* absolutely with the condition superadded that the property should revert to *A's* heirs on failure of the male descendants of *A*. Here the event on the happening of which the defeasance clause is to operate, namely, the indefinite failure of male issue, may not take place at *B's* death. The gift over to *A's* heirs is therefore void, and the absolute estate granted to *B* remains unaffected: *Sarajubala* v. *Jyotirmayee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.P.C. 179.

(d) By a deed of settlement executed in 1875 the settlor created an absolute estate in favour of his wife with a condition that if a son was born to the settlor's son (whom he had disinherited), the property should go to him. *Held* that the gift over to the grandson being a gift in favour of an unborn person was void, with the result that the absolute estate granted to the wife remained unaffected. Had the case been governed by any of the Acts mentioned in the second paragraph of this section, the gift over would have been valid (*a*).

As to Settled Estates in Bengal, see the Bengal Settled Estates Act, 1904.

**390. Gift or bequest by way of remainder.**—A grant by way of remainder is valid provided—

(1) the grant is to take effect immediately on the close of a life in being, *and*

(2) it is made to a person in existence at the date of the gift or at the death of the testator as the case may be (*b*).

In cases, however, governed by the Hindu Disposition of Property Act, 1916, a gift by way of remainder may be made in favour of an unborn person.

*Illustration*

Property is bequeathed to *A* for life, and after his death to *B*. Both *A* and *B* are in existence at the death of testator. *A* takes an estate for life. *B* takes the remainder after *A*'s death. The bequest to *B* by way of remainder is valid: *Ranganadha* v. *Bagirathi* (1906) 29 Mad. 412.

**391. Trust valid for valid purposes.**—Trusts are not unknown to Hindu law, but they can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which are recognized by that law. A disposition of property which is inherently illegal, as where the donee is not a person legally capable of taking, or the estate which he is given is not recognized by Hindu law, cannot be made to take effect by the medium of a trust. That which cannot be done directly by gift cannot be done indirectly by the intervention of a trustee (*c*). See as to gifts, §§ 357, 359 and 360, and as to wills §§ 368, 372 and 373.

**392. Condition repugnant to interest created.**—Where by the terms of a deed or will an absolute estate of inheritance is created in favour of a per-

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(*z*) *Gadadhur Mullik* v. *Official Trustee of Bengal* (1940) 1 Cal. 415, 187 I.C. 108, 67 I.A. 129, ('40) A.P.C. 45.

(*a*) *Norendra Nath* v. *Kamalbasini Dasi* (1896) 23 Cal. 563, 23 I.A. 18; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal. 406.

(*b*) *Ranganadha* v. *Baghirathi* (1906) 29 Mad. 412; *Soorjeemoney Dossee* v. *Deenobundoo Mullick* (1862) 9 M.I.A. 123, s.c. 6 M.I.A. 526; *Motirahu* v. *Mamubai* (1897) 21 Bom. 709, 721, 24 I.A. 93; *Ram Bahadur* v. *Jagannath* (1918) 3 Pat. L.J. 199, 45 I.C. 749, ('18) A.P. 469 [F.B.].

(*c*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 401-402, I.A. Sup. Vol. 47, 71, 72; *Rajendar* v. *Sham Chund* (1881) 6 Cal. 106; *Kahandas Narrandas, in re* (1881) 5 Bom. 154, 173-174.

son, any subsequent clause purporting to restrict that interest is invalid, and the donee will take an absolute estate as if the document contained no such clause (*d*).

**393. Condition restraining alienation or partition.**—Where property is given absolutely to a person, but the transfer or will contains a direction that it shall not be alienated (*e*), or partitioned (*f*), or that it shall be applied or enjoyed in a particular manner (*g*), such direction is inoperative, and the donee will take the property as if the document had contained no such direction [§ 362].

**394. Direction postponing payment to donee or legatee.**—Where a transfer or will confers an absolute estate, but directs that the property shall not be made over to the donee or legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, and he is entitled to the property on attaining majority as if the document contained no such direction. But the direction will be valid and it will take effect if during the interval the income of the property is disposed of in favour of some other person (*h*).

Thus if property is bequeathed to *A*, a minor, with a direction that it shall not be handed over to him until he attains the age of 20 years, the direction is inoperative, and *A* is entitled to receive the property on his attaining majority. But if the will contains a direction that until *A* attains the age of 20 years, the income of the property shall be given to *B*, then *A* is not entitled to receive the property until he attains the age of 20 years.

The rule laid down in this section is based on the decision in *Gosling* v. *Gosling* (*i*), which is the leading English case on the subject. The same rule has been applied to cases governed by the Indian Succession Act, 1925 (*j*).

*Contingent gift.*—A gift by a Hindu to a living person on his attaining a particular age, is not invalid, even if the donee has not attained that age at the date of transfer and there is no prior gift supporting it. The artificial rule of English law that every contingent gift must be supported by prior estate and it must vest *eo instanti* that the prior estate determines has not been applied to gifts made by Hindus (*k*).

**395. Gift of income without limit of time.**—Where a gift is made of the income, but the estate given is not in terms limited to the lives of the beneficiaries, nor is any line of descent provided after their deaths, the gift is an absolute gift (*l*).

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(*d*) *Bhaldas* v. *Bai Gulab* (1922) 49 I.A. 1, 46 Bom. 153, 65 I.C. 974, ('22) A.P.C. 193; *Ragghunath Prasad* v. *Deputy Commissioner* (1929) 56 I.A. 372, 4 Luck. 483, 120 I.C. 641, ('29) A.P.C. 283; *Sarajubala* v. *Jyotirmayee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.P.C. 179; *Partap Chand* v. *Mt. Makhni* (1933) 14 Lah. 485, 144 I.C. 651, ('33) A.L. 365; *Kandarpamohan Goswami* v. *Akshaychandra Basu* (1934) 61 Cal. 106, 150 I.C. 179, ('34) A.C. 379.

(*e*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 395, I.A. Sup. Vol. 47, 65; *Ashutosh* v. *Durga* (1880) 5 Cal. 488, 6 I.A. 182; *Gokul Nath* v. *Issur Lochun* (1887) 14 Cal. 222; *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Chandi Churn* v. *Sidheswari* (1889) 16 Cal. 71, 15 I.A. 149; *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76; *Rameshwar* v. *Lachmi Prosad* (1904) 31 Cal. 111; *Sarajubala* v. *Jyotirmayee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.P.C. 179; *Umrao Singh* v. *Baldeo Singh* (1933) 14 Lah. 353, 143 I.C. 615, ('33) A.L. 201.

(*f*) *Mokoondo Lall* v. *Gonesh Chunder* (1875) 1 Cal. 104; *Raikishori* v. *Debendranath*, *supra*.

(*g*) *Cally Nath* v. *Chunder Nath* (1882) 8 Cal. 378; *Motivahu* v. *Mamubai* (1895) 19 Bom. 647.

(*h*) *Gosavi Shivgar* v. *Rivett Carnac* (1889) 13 Bom. 463; *Husenbhoy* v. *Ahmedhoy* (1902) 26 Bom. 319 [case of Khojas]. See also (1882) 8 Cal. 378, *supra*; *Mussammat Ram Kuar* v. *Atma Singh* (1927) 8 Lah. 181, 103 I.C. 506, ('27) A.L. 404.

(*i*) (1859) Johns, 265.

(*j*) *Lloyd* v. *Webb* (1897) 24 Cal. 44.

(*k*) *Kanai Lal* v. *Kumar Purnendu* (1946) 51 C.W.N. 227, (1947) 1 Cal. 48.

(*l*) *Madhavrao* v. *Balabhai* (1928) 55 I.A. 74, 52 Bom. 176, 107 I.C. 119, ('28) A.P.C. 33.

**396. Immoral conditions.**—A gift to which an immoral condition is attached remains a good gift, while the condition is void (*m*).

**397. Direction for accumulation.**—(1) Where the terms of a *transfer of property* direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(a) the life of the *transferor*, or

(b) a period of eighteen years from the date of the transfer, such direction shall, save as hereinafter provided [sub-§ (3)], be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) Where the terms of a *will* direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the *testator*, such direction shall, save as hereinafter provided [sub-§ (3)], be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(3) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the *transferor* or the *testator* or any other person taking any interest under the *transfer* or *will*, or

(ii) the provision of portions for children or remoter issue of the *transferor* or of the testator or of any other person taking any interest under the *transfer* or *will*, or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

Sub-§ (*1*) of this section is sub-sec. (*1*) of sec. 17 of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act 20 of 1929, sec. 10. Section 17 is one of the sections of Chapter II of the Transfer of Property Act, and that Chapter now applies to Hindus also.

Sub-§ (*2*) of this section is sub-sec. (*1*) of sec. 117 of the Indian Succession Act, 1925, as amended by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 14(3). By sec. 14(3) of the same Act, sec. 117 as amended was included in Schedule III to the Indian Succession Act, so as to apply to Hindu wills also.

Sub-§ (*3*) of this section is a combination of sub-sec. (*2*) of sec. 17 of the Transfer of Property Act and sub-sec. (*2*) of sec. 117 of the Indian Succession Act.

Both the amending Acts came into force on the 1st April, 1930. All transfers and wills executed before that date will still be governed by the rule of Hindu law as it was before those Acts.

*Religious endowments.*—The rules stated in this section do not apply to religious endowments. See § 411A below.

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(*m*) *Ram Sarup* v. *Bela* (1884) 6 All. 313, 11 I.A. 44, Cf. Transfer of Property Act, 1882 s. 25.

*Rule of Hindu law before legislation.*—Whether a direction for accumulation is valid or not, is a question which depends upon the facts of each case. No hard and fast rule can be laid down; in each case the particular direction must be examined to see what the object of the testator was and what the effect of carrying out the direction would be. If there is nothing *per se* illegal in a direction to accumulate made in a transfer *inter vivos* or a will, and if such direction is neither so unreasonable in its conditions as to be void against public policy, nor given for the purpose of carrying out an illegal object nor in its effect inconsistent with Hindu law, effect should be given to the direction (*n*).

The period during which an accumulation can be validly directed is the period for which the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable or the course of its devolution can be directed and controlled by a testator (*o*).

*Illustrations to the above rule*

(a) *Where the object is to create a perpetuity.*—Where there is no disposition of the beneficial interest in the property of which the income is directed to be accumulated and the direction to accumulate is an attempt to *create a perpetuity* as in the case put in the illustration to sec. 393, the direction is invalid, and the property will pass as on intestacy: *Shookmoy Chandra* v. *Monoharri Dassi* (*p*), *Kumara Asima* v. *Kumara Krishna* (*q*).

(b) *Where the direction to accumulate is repugnant to the grant.*—Where there is a *present* gift of property to a person, but the gift is followed by provisions postponing payment and directing accumulation, such provisions are invalid, and the donee is entitled to receive the property as if there were no such directions in the deed of gift or will. The reason is that an absolute gift cannot be qualified by a direction to postpone payment and to accumulate: *Cally Nath* v. *Chunder Nath* (*r*), *Bramamayi* v. *Jages Chandra* (*s*), *Mokoondo Lall* v. *Gonesh Chunder* (*t*).

(c) *Accumulation for payment of debts or for benefit of minors.*—A direction to accumulate for the payment of debts, or for the benefit of minor donees, is not invalid: *Amrito Lall* v. *Surnomoni* (*u*).

(d) *Accumulation for charitable purposes.*—A direction to accumulate the income of property for a charitable purpose is not invalid. It has accordingly been held that a direction to accumulate the income of property until it amounted to Rs. 10,000 and then to spend the proceeds in feeding the poor is valid: *Rajendra Lall* v. *Raj Coomari* (*v*). See § 411 below.

(dd) *Accumulation for marriage expenses.*—A direction to accumulate for the purpose of providing for the marriage expenses of the testator's son is valid: *Nafar Chandra* v. *Ratan* (*w*).

(e) *Where the direction is in its effect inconsistent with Hindu law.*—A Hindu bequeathed his property to trustees upon trust to pay a fixed monthly sum to his wife during her life, and to accumulate the surplus until the death of his wife. The testator also authorised his wife and two other persons to adopt a son, with a direction that neither the *corpus* nor the accumulations were to be handed over to the adopted son until the death of his wife. *B*, alleging that he was adopted to the testator pursuant to the authority given by him, contended that the direction for accumulation till the death of the widow was void, and claimed immediate possession of the *corpus* and the accumulations, subject to the payment to the widow of the monthly sum directed to be paid to her under the will. Jenkins, J., held that the adoption was proved, but that the direction to accumulate was valid and that the plaintiff was not entitled to possession until the death of the widow. The learned Judge said: "It appears to me, on principle that, if accumulations are permissible, then in the absence of special provision, the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator." The learned Judge added: "It is true that the object of the testator's bounty is not ascertained *at the testator's death* [for the son was to be adopted *after* his death], but that in itself is not a necessary indication of *illegal*

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(*n*) *Rajendra Lall* v. *Raj Coomari* (1907) 34 Cal. 5. See also *Benode Behari* v. *Nistarini Dassi* (1905) 32 I.A. 193, 33 Cal. 180, and the cases cited in the illustrations.

(*o*) *Watkins* v. *Administrator-General of Bengal* (1920) 47 Cal. 88, 93, 56 I.C. 376, ('20) A.C. 951.

(*p*) (1885) 11 Cal. 684, 12 I.A. 103.

(*q*) (1868) 2 Beng. L.R.O.C. 11, 37.

(*r*) (1882) 8 Cal. 378.

(*s*) (1871) 8 Beng. L.R. 400.

(*t*) (1875) 1 Cal. 104.

(*u*) (1898) 25 Cal. 662, 691.

(*v*) (1907) 34 Cal. 5.

(*w*) (1910) 15 C.W.N. 66, 7 I.C. 921.

remoteness": *Amrito Lall* v. *Surnomoye* (*x*). On appeal, it was held that adoption was invalid and it therefore became unnecessary to consider the validity of the direction for accumulation. Trevelyn, J., however, said: "I cannot see how a direction to accumulate can be valid unless there be a *present* gift to support the direction to accumulate"; *Amrito Lall* v. *Surnomoni* (*y*). The Judicial Committee agreed with the Appellate Court that the adoption was invalid and declined to enter upon the other question: *Amrito Lal* v. *Surnomoyee* (*z*). Referring to the observation of Trevelyan, J., Sir Lawrence Jenkins said in a later case which related to the same will: "I do not clearly understand what the learned Judge here intended to lay down," and his Lordship reiterated the views expressed in the earlier judgment.

*Accumulation to follow capital.*—In the absence of any direction to the contrary it is the rule of Hindu law that accumulations go with the capital (*a*).

**398. Power of appointment.**—A Hindu may, by deed or will, grant a power of appointment to a person or persons named in the will. Before the Hindu Transfer and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests (City of Madras) Act, 1921, it was necessary to the valid exercise of the power that it should be exercised in favour of a person who was in existence either actually or in contemplation of law at the date of the gift or at the testator's death, as the case might be (*b*). Since the passing of those Acts, the power may be exercised in favour even of an unborn person subject, however, to the limitations and provisions contained in those Acts [see §§ 383-387].

When an appointment is made pursuant to a power in favour of two or more persons, and the appointment is invalid as to some or one of them, it may still be valid as to the rest (*c*).

*Illustration*

*X* by his will gives certain property to *A* for life, and at his death to *A's* sons, but if *A* dies without male issue, then to such persons as *A* may by deed or will appoint. *A* has no male issue. *A*, in the exercise of the power, leaves the property by his will to his own daughters *C* and *D* to be divided equally between them. *C* was in existence at the death of the testator. *D* was born *after* the death of the testator. *C* is entitled to a moiety of the property. *D* is not entitled to anything, as she was born after the death of *X*. The share appointed by *A* to *D* will go to the heirs of *X* as on intestacy: *Javerbai* v. *Kablibai* (1892) 16 Bom. 492. [Under the Hindu Disposition of Property Act, 1916 the execution of the power in favour of *D*, though not in existence at the death of the testator, would be valid].

The leading case on the subject is that of *Motivahu* v. *Mambubai* (*d*), decided by the Privy Council in the year 1897. In that case it was contended that there was no place for a power of appointment in the Hindu system of law. As to this the Judicial Committee said that as *X* could himself have designated the person who was to take the property in the event of *A* dying without sons, there was nothing to prevent *X* from substituting *A* for himself and giving him power to designate the person who was to take in the aforesaid event. But to render the gift valid, the taker so designated must have been in existence at the death of *X* for he takes the property not from the donee of the power, but from *X*. At the same time the Committee observed that in their opinion the English law of power was *not fit to be applied generally* to Hindu wills. It has already been pointed out that in cases governed by the Hindu Disposition of Property Act, 1916, the taker need not be in existence at the death of *X*.

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(*x*) (1897) 24 Cal. 589, 618.
(*y*) (1898) 25 Cal. 662, 673, 690-691.
(*z*) (1900) 27 Cal. 996, 27 I.A. 128.
(*a*) *Bissonauth* v. *Bamasoondery* (1867) 12 M.I.A. 41, 60; *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66 [where there was a direction to the contrary].
(*b*) *Motivahu* v. *Mambubai* (1897) 21 Bom. 709, 24 I.A. 93; *Upendra Lal* v. *Hem Chundra* (1898) 25 Cal. 405; *Manorama* v. *Kali Charan* (1904) 31 Cal. 166; *Brij Lal* v. *Suraj Bikram* (1912) 39 I.A. 150, 34 All. 405, 16 I.C. 92; *Mahim Chandra* v. *Hara Kumari* (1915) 42 Cal. 561, 569, 30 I.C. 798, ('15) A.C. 487.
(*c*) *Javerbai* v. *Kablibai* (1892) 16 Bom. 492.
(*d*) (1897) 21 Bom. 709, 24 I.A. 93.

**399. Caution against applying English rules.**—"English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing. . . . It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen" (*e*).

**400. Gift or bequest to two or more persons.**—(1) Where a gift or bequest is made to two or more persons, the question arises whether they take as tenants-in-common or as joint tenants or as coparceners.

If the donees or legatees take as tenants-in-common, the share of each will on his death pass to his heirs by *succession*. If they take as joint tenants, the undivided interest of each donee will pass on his death by *survivorship*. If they take as coparceners, the undivided coparcenary interest of each donee will pass on his death by survivorship, and, further, the male issue of each donee will acquire an interest by birth in the property as if it were coparcenary property. [Note that the question whether the donees or legatees take as *coparceners* can only arise when they are members of a coparcenary. The reason is that a coparcenary is purely a creature of law; it cannot be created by an act of parties (see § 215)].

(2) Where a gift or bequest is made to two or more persons *who are not members of a coparcenary* without specification of shares, it has been held by the Judicial Committee that they take as tenants-in-common, and not as joint tenants (*f*). In the course of the argument in the above case it was contended on the authority of a Madras case (*g*), that where a bequest was made to two or more persons without specification of shares, the presumption was that they took the property as joint tenants, but their Lordships of the Privy Council held that the case was not rightly decided, and said: "It appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, *except in the case of a coparcenary between the members of an undivided family.*"

*Illustrations*

(a) A Hindu bequeaths his property to his widow and her son for their maintenance with *power to them to alienate* the property by sale or gift. Here the legatees take as tenants-in-common, and each takes an absolute interest in a moiety of the property, so that on the death of either of them his or her share will pass to his or her heirs by *succession* (*h*).

(b) A Hindu bequeaths his property to his two married daughters without specification of shares. The legatees take as tenants-in-common, and not as joint tenants (*i*).

(c) A Hindu bequeaths his property to his daughter and her husband without specification of shares. The legatees take as tenants-in-common (*j*).

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(*e*) Per Wilson J., in *Ram Lal Sett* v. *Kanai Lal Sett* (1886) 12 Cal. 663, 678, approved by the P.C. in *Bhagabati* v. *Kalicharan* (1911) 38 Cal. 468, 38 I.A. 54, 10 I.C. 641; *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 222, 41 I.A. 51, 71, 23 I.C. 166.

(*f*) *Jogeswar Narain* v. *Ram Chandra Dutt* (1896) 23 Cal. 670, 23 I.A. 37.

(*g*) *Vydinada* v. *Nagammal* (1888) 11 Mad. 258.

(*h*) *Jogeswar Narain* v. *Ram Chandra Dutt*, *supra*. Also see *Surareddy* v. *Venkata Subbareddi* ('60) A.A.P. 368.

(*i*) *Gopi* v. *Musammat Jaldhara* (1911) 33 All. 41, 7 I.C. 697.

(*j*) *Mst. Jia* v. *Mst. Rukman* (1927) 8 Lah. 219, 100 I.C. 54, ('27) A.L. 126.

(3) Where a gift or bequest is made to two or more persons *who are members of a coparcenary*, they nevertheless take as tenants-in-common, and not as joint tenants or coparceners, unless a contrary intention appears from that grant (*k*).

*Illustrations*

(a) A Hindu executes a deed of gift by which he gives his property to *A* and *B* who are brothers and members of a joint Hindu family. The Bombay High Court held that the donees take as tenants-in-common, and on the death of either of them his share will pass to his heirs *by succession* (*l*). In the course of the judgment Fulton, J., said: "If an unexpressed intention could be presumed, it would, we think, be more reasonable to suppose that the gift was meant to be to the two brothers as *coparceners;* but we doubt whether such a gift could be made consistently with the principles of *Tagore* case for a gift in *coparcenary* would purport to create interests in sons and grandsons who might be *unborn* at the time."

(b) A Hindu father bequeaths *a house* to his three sons in these terms: "Therefore, my three sons shall use and enjoy the house from son to grandson and so on in succession without power to give as gift or sell the same." As regards *his other properties*, he directs the income thereof to be divided among his sons: *"in equal shares,"* and the *corpus* to be divided among his grandsons after the death of his sons *"according to their respective shares."* One of the sons dies leaving a son, who dies leaving a widow. The widow claims a third share of the house, alleging that the three sons took the house as tenants-in-common. On the above facts it was held by the High Court of Madras that the sons took house as a Hindu coparcenary with rights of survivorship, and that on the death of any one of them without leaving male issue and without partitioning the property, the property passed to the survivors, and that the widow could claim no share in it. Subramania Ayyar, J., said: "In cases like the present, the question for determination is but one of *intention* to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a joint Hindu family, they can of course take only as tenants-in-common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the *prima facie* view is that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will. Of course, the donees here, the sons, were persons who could be, and were, members of a joint family. . . . And as to the terms of the gift they are clear to the effect that the donees were to take not in severalty but in coparcenary. That the distinction between the two was perfectly clear to the mind of the testator is beyond question, for where he wishes them to take as tenants-in-common, he uses apt expressions, as the words 'in equal shares' in the paragraph relating to the income, and 'according to their respective shares' in the paragraph relating to the division of the *corpus* of [the other properties], while with reference to the house under consideration he directs common enjoyment without any possibility of division" (*m*).

(c) *A* and his sons are members of a coparcenary. *A's* brother *B* bequeaths certain property to *A* and *A's* sons in these terms: "Items 4, 5, 6, 7, 8 and 9, I bequeath and leave to my brother *A* and his sons." The legatees, though members of a coparcenary, take as tenants-in-common, there being no express words in the will that they should take as members of a coparcenary (*n*).

**401. Gifts and bequest to widows, daughters and other females.**—(1) *Absolute gift and limited gift.*—When property is given to a female by a deed or will, the question frequently arises whether the gift passes an estate of inheritance, that is, an absolute estate, or merely a limited estate. If a gift made to a female, *e.g.*, the mother, daughter, brother's daughter, sister,

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(*k*) *Buchibai* v. *Nagpur University* (1946) Nag. 433.

(*l*) *Bai Diwali* v. *Patel Bechardas* (1902) 26 Bom. 445; *Kishori Dubain* v. *Mundra Dubain* (1911) 33 All. 665, 10 I.C. 565; *Bahu Rani* v. *Rajendra Bakhsh Singh* (1933) 8 Luck. 121, 60 I.A. 95, 142 I.C. 3, ('33) A.P.C. 72; *Ram Piari* v. *Krishna Piari* (1921) 43 All. 600, 63 I.C. 301, ('21) A.A. 50. [Gift to daughter's sons].

(*m*) *Yethirajulu* v. *Mukunthu* (1905) 28 Mad. 363, 373. See also *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66; *Bissonauth* v. *Bamasoonderry* (1867) 12 M.I.A. 41.

(*n*) *Janakiram* v. *Nagamony* (1926) 49 Mad. 98, 93 I.C. 662, ('26) A.M. 273.

etc., passes an estate of inheritance, she can dispose of it at her pleasure (*o*), but not if it passes a limited estate (*p*). In the former case, the property passes on her death intestate to her stridhana heirs (*q*); in the latter case it passes to the donor's heirs (*r*). The same rule applies where a gift is made by a *husband* to his *wife*, whether the gift be of movable or of immovable property. If the gift passes an absolute estate she can dispose of the property at her pleasure by act *inter vivos* or by will (*s*), but not if it passes a limited estate (*t*). In the former case the property passes on her death intestate to her stridhana heirs (*u*); in the latter case, it passes to her husband's heirs (*v*).

(2) Whether a gift passes an absolute or a limited estate depends on the terms of the grant in each case (*w*). This is so not only under the Hindu law, but under all other systems of law in force in India. The Judicial Committee laid down in an early case that in construing a deed of gift or a will made by a Hindu in favour of *female relations*, the Court was entitled to assume that the donor intended the donee to take a *limited estate only*, unless the contrary appeared from the deed or will. The basis of the rule was that females as a rule took a limited estate only in property inherited by them from male relations, and the donor must be presumed to have made the gift with that fact present to his mind. The leading case on the subject is *Mahomed Shumsool* v. *Shewukram* (*x*). In that case their Lordships of the Privy Council said: "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect to the devolution of property. It may be assumed that a Hindu . . . knows that, as general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In construing a will made after the coming into operation of the recent legislation and particularly the Hindu Succession Act, 1956, the Court may assume that the testator knew of the radical changes that have been brought about in the general law of inheritance and that women now take absolute estates of inheritance.

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(*o*) *Atul* v. *Sanyasi* (1905) 32 Cal. 1051 [bequest to mother]; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal. 406 [bequest to daughters and brothers' daughters]; *Kollany* v. *Luchmee* (1875) 24 W.R. 395 [gift to daughter]; *Madavarayya* v. *Tirtha* (1877) 1 Mad. 307 [gift to daughter].

(*p*) *Mahomed Shumsool* v. *Shewukram* (1874) 2 I.A. 7, 14 Beng. L.R. 226 [gift to daughter-in-law]; *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal, 896, 35 I.A. 118 [bequest to daughter]. In both these cases it was held that the donee took a limited estate only.

(*q*) *Ramasami* v. *Papayya* (1893) 16 Mad. 466 [gift to daughter]; *Basanta* v. *Kamikshya* (1906) 33 Cal. 23, 32 I.A. 181 [gift to sister—Dayabhaga case].

(*r*) *Annaji* v. *Chandrabai* (1893) 17 Bom. 503.

(*s*) *Surajmani* v. *Rabi Nath* (1908) 30 All. 84, 35 I.A. 17 [will upheld]; *Fateh Chand* v. *Rup Chand* (1916) 43 I.A. 183, 38 All. 446, 37 I.C. 122, ('16) A.P.C. 20 [will upheld]; *Ramachandra* v. *Ramachandra* (1919) 42 Mad. 283, 291-292, 52 I.C. 94, ('19) A.M. 557 [will upheld]; *Janki* v. *Bhairon* (1897) 19 All. 133 [will upheld]; *Padan Lal* v. *Tek Singh* (1907) 29 All. 217 [mortgage upheld]; *Damodar* v. *Purmanandas* (1883) 7 Bom. 155 [will upheld—case of movable property]. In some of the earlier cases, it was held that a wife cannot dispose of immovable property given to her by her husband to the prejudice of her *stridhana* heirs, *even if the gift was absolute* not even after her husband's death. That view, it is submitted, is no longer law. The cases above referred to are *Kotarbasappa* v. *Chanverova* (1873) 10 Bom. H.C. 403; *Bhujanga Ralu* v. *Ramayamma* (1884) 7 Mad. 387; *Nunnu Meah* v. *Krishnaswami* (1891) 14 Mad. 274. See also *Rudranarain* v. *Rup Kuar* (1878) 1 All. 734, at pp. 743-744.

(*t*) *Jamna Das* v. *Ramautar* (1905) 27 All. 364 [mortgage set aside]; (1891) 14 Mad. 274, *supra* [sale set aside].

(*u*) *Kessarbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I.A. 176.

(*v*) *Harilal* v. *Bai Rewa* (1897) 21 Bom. 376.

(*w*) *Ram Narain* v. *Pearay* (1883) 9 Cal. 830.

(*x*) (1874) 2 I.A. 7, 14-15, 14 Beng. L.R. 226, 231 [bequest to daughter-in-law held to pass a limited estate]; see also *Rabutty* v. *Sibchunder* (1854) 6 M.I.A. 1 [deed of family arrangement]. See in this connection the observation of Mukherjea in *Jiban Krishna* v. *Jitendra Nath* ('49) A.F.C. 64, 72.

Though the rule laid down by the Privy Council applied alike to all females who took a limited estate in property inherited by them, the Courts in India, following the spirit of the texts cited in § 141, drew a distinction between cases where a gift or devise of *immovable* property was made by a Hindu husband to *his wife*, and those where it was made by a Hindu to other females. In the former case, that is, where a gift was made by a husband to his wife, they started with a presumption against the gift being absolute, and held that the gift must be presumed to pass a limited estate, unless by express words or necessary implication an absolute estate was expressed to be conveyed (*y*). In the latter case, that is, where a gift was made to other female relations, *e.g.*, a mother (*z*), they did not in all cases start with that presumption. But there was nothing in *Mahomed Shumsool's* case to justify this distinction. The rule there laid down purported to apply to all females who took a limited estate in property inherited by them. In fact, the Judicial Committee applied it in a later case where a bequest was made to a *daughter* (*a*). The case was one from Bengal where daughters take a limited estate. The Madras High Court applied this rule in a case where father gave on partition a share to a widowed daughter who was without children (*b*). But the presumption was held to be weaker where the property given was movable property (*c*). The rule was held not applicable to a case where there was no gift by the husband to the wife but where the widow got the property as a result of a compromise with her relations (*d*). The principle of *Mahomed Shumsool's* case applied not only to wills mentioned in clauses (a) and (b) of s. 57 of the Indian Succession Act, 1925 [see § 369 above], but to all other wills (*e*).

(3) *Gift to a woman as "malik."*—In most of the cases referred to above, the High Courts interpreted the rule in *Mahomed Shumsool's* case to mean that a gift of *immovable* property to a woman cannot be deemed to confer upon her an absolute estate of inheritance which she could alienate at her pleasure unless the deed or will give her in *express terms* a heritable estate or power of alienation. But there was no warrant for such an interpretation. In fact later decisions of the Judicial Committee made it clear "that if words [are] used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership [including a full right of alienation] *without their being conferred by express and additional terms* unless the circumstances or the context were sufficient to show that such absolute ownership was not intended" (*f*); and that it was possible by the use of words of sufficient amplitude to convey in the term of gift itself the fullest rights of ownership including the power to alienate (*g*). Even then difficulty was felt in deducing the

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(*y*) *Harilal* v. *Bai Rewa* (1897) 21 Bom. 376 [bequest to widow—limited estate]; *Jamma Das* v. *Ramautar* (1905) 27 All. 364 [gift to wife—limited estate]; *Seshayya* v. *Narasamma* (1899) 22 Mad. 357 [bequest to widow—limited estate]; *Hirabai* v. *Lakshmibai* (1887) 11 Bom. 573 [bequest to widow—limited estate]; *Nunnu Meah* v. *Krishnaswami* (1891) 14 Mad. 274; *Motilal* v. *Advocate-General of Bombay* (1911) 35 Bom. 279, 11 I.C. 547; *Janki* v. *Bhairon* (1897) 19 All. 133 [bequest to widow—absolute estate]; *Padam Lal* v. *Tek Singh* (1907) 29 All. 217, dissenting from *Surajmani* v. *Rabi Nath* (1903) 25 All. 351.

(*z*) *Atul* v. *Sanyasi* (1905) 32 Cal. 1051. In *Annaji* v. *Chandrabhai* (1892) 17 Bom. 503 the gift was by a son to his mother and the Court started with the presumption against the gift being absolute and held that it passed a limited estate only.

(*a*) *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 903, 35 I.A. 118, 129 [held that the daughters took a limited estate only]. In *Ammammanna* v. *Kodanda Rao* (1940) Mad. 223, 190 I.C. 190, ('40) A.M. 210, (1940) 1 M.L.J. 188, it was held that the daughter took "a limited estate of a daughter" and the daughter's sons' interest, if any, was not vested remainder.

(*b*) *Mangamma* v. *Doraiyya* (1937) Mad. 335, 166 I.C. 59, ('37) A.M. 100.

(*c*) *Koonjbehari* v. *Premchand* (1880) 5 Cal. 684.

(*d*) *Pandit Adya Shankar Tewari* v. *Mst. Chandrawat* (1935) 10 Luck. 35, 150 I.C. 519, ('34) A.O. 265.

(*e*) *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 903, 35 I.A. 118, 130 [bequest to daughter —limited estate]; *Bhoba* v. *Peary Lall* (1897) 24 Cal. 646, 650-651 [bequest to widow—limited estate]; *Caralapathi* v. *Cota* (1910) 33 Mad. 91, 93, 3 I.C. 475, [bequest to widow—limited estate]. In *Saroda* v. *Kristo* (1900) 5 C.W.N. 300, the Court proceeded upon the plain meaning of sec. 82 of the Succession Act, and held that the bequest to the widow was absolute.

(*f*) *Bhaidas* v. *Bai Gulab* (1922) 49 I.A. 1, 7, 46 Bom. 153, 159, 65 I.C. 974, ('22) A.P.C. 193.

(*g*) *Ramachandra* v. *Ramachandra* (1922) 45 Mad. 320, 49 I.A. 129, 67 I.C. 408, ('22) A.P.C. 80; *Narsingh Rao* v. *Maha Lakshmi Bai* (1928) 55 I.A. 180, 50 All. 375, 109 I.C. 703, 703, ('28) A.P.C. 156; *Shalig Ram* v. *Charanjit Lal* (1930) 57 I.A. 282, 11 Lah. 645, 128 I.C. 265, ('30) A.P.C. 239 [*waris, i.e.* heir]; *Jagmohan Singh* v. *Sri Nath* (1930) 57 I.A. 291, 128 I.C. 270, ('30) A.P.C. 253 [gift to wife to be enjoyed by her *generation*

principle of law. The matter was clarified when the Supreme Court held (*h*) that to convey an absolute estate to a Hindu female no express powers of alienation need be given; it is enough if the words are of such amplitude as would convey full rights of ownership. In a more recent case the Supreme Court reiterated this proposition and endorsed the view that there is no presumption one way or the other and there is no difference between the case of a male and the case of a female, and the fact that the donee is a woman does not make the gift any the less absolute where the words are sufficient to convey an absolute estate to a male (*i*). In effect these decisions laid down that the rule of interpretation laid down in *Mahomed Shumsool* v. *Shewukram* (*j*) had come to be regarded as unsound. The decisions under this head may be divided into two classes, namely—

(a) Where the gift is coupled with a power of alienation.

(b) Where the word "malik" (owner), or other words importing *absolute ownership*, are used in the deed or will.

In case (a), that is, where a gift is coupled with a power of alienation, the Court readily infers an intention to grant an absolute estate. Thus where a testator bequeathed certain property to his daughter and her son "for your maintenance" *with power of making alienation thereof by sale or gift*, it was held by their Lordships of the Privy Council that each of them took an absolute interest in a moiety of the property, and the words "for your maintenance" did not reduce the interest of either of them to one for life only (*k*).

The second class of cases is the one where the word "malik" (owner) or other words importing *absolute ownership* are used in the deed or will. The word "*malik*" (owner) or "*malik mustakil*" (*kk*) imports full proprietary rights including a full right of alienation *unless* there is something in the context or in the surrounding circumstances to indicate that full proprietary rights were not intended to be conferred. Hence it has been held that words of disposition in a deed of gift (*l*) or will that the donee shall "become *malik* (owner) of all my properties," or similar words, confer an *heritable and alienable* estate in the absence of a context which indicates a different meaning (*m*).

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*after generation*]; *Lakshmeyya* v. *Tirupathamma* ('58) A.A.P. 720; *Jagannadha Rao* v. *Jatmal Madanlal* (1957) A.P. 806, ('58) A.A.P. 662 ("for pasupukumkuma"); *Krishnaswami Ayyar* v. *Ramachandra Rao* (1934) 67 Mad. L.J. 821, 153 I.C. 1005, ('34) A.M. 646; *Shivappa Rudrappa* v. *Rudrava Chanbasappa* (1933) 57 Bom. 1, 142 I.C. 164, ('32) A.B. 410.

(*h*) *Ram Gopal* v. *Nand Lal* ('51) A.S.C. 139; *Harnam Singh* v. *Mohan Lal* ('70) J. & K. 181; *Mohinder Singh* v. *Balbir Kaur* ('68) A. Punj. & H. 545; *Basant Kaur* v. *Tej Kaur* ('67) A. Punj. & H. 429 [for maintenance]; *Tulsan* v. *Sahib Ram* ('66) A Punj. 262; *Rampyari Kuer* v. *Bachuraj Kuer* ('65) A.P. 217 (Malik); *Madhusudhan* v. *Gobind Sabat* ('65) A. Orissa 54.

(*i*) *Nathoo Lal* v. *Durga Prasad* (1955) S.C.R. 51, ('54) A.S.C. 355. Also see *Seshayya* v. *Padalamma* ('57) Andh. Pra. 534; *Venkatarama* v. *Rajyalakshmi* ('60) A.A.P. 509.

(*j*) (1874) 2 I.A. 7, 14 Beng. L.R. 226.

(*k*) *Jogeswar Narain* v. *Ram Chandra Dutt* (1896) 23 Cal. 670, 23 I.A. 37; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I.A. 176, 186-187; *Paikabai* v. *Anyabai* (1935) Nag. 170, ('52) A.N. 327; *Yadeorao* v. *Vithal* (1952) Nag. 60, ('52) A.N. 55.

(*kk*) *Krishna Beharilal* v. *Gulabchand* ('71) A.S.C. 1041.

(*l*) *Bishnath Prasad Singh* v. *Chandika Prasad Kumari* (1933) 55 All. 61, 60 I.A. 56, 142 I.C. 6, ('33) A.P.C. 67.

(*m*) *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76, 88-89; *Surajmani* v. *Rabi Nath* (1908) 30 All. 84, 35 I.A. 17; *Fateh Chand* v. *Rup Chand* (1916) 43 I.A. 183, 38 All. 446, 37 I.C. 122, ('16) A.P.C. 20 [*Malik-o-qab z, i.e.* owner in possession]; *Sasiman* v. *Shib Narayan* (1922) 49 I.A. 25, 34, 1 Pat. 305, 315, 66 I.C. 193, ('22) A.P.C. 63 [*Molikiyati*]; *Sarajubala* v. *Jyotirmayee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.P.C. 179 (gift to daughter as *Malik*]; *Hitendra Singh* v. *Maharaja of Darbhanga* (1928) 55 I.A. 197, 7 Pat. 500, 109 I.C. 858, ('28) A.P.C. 112 [to hold the property *from generation to generation*]; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal.

In *Ram Gopal* v. *Nand Lal* (*n*) a Hindu widow who was entitled to maintenance as the wife of a predeceased son of the proprietor against the heir of the latter, relinquished by a deed all her rights to the property of her father-in-law in favour of the latter's heir, and as a part of the same transaction received two items of property for her maintenance by a deed of transfer, which was described as a "Tamliknama." The document expressly stated that the grantee was made a "malik" though there were no words making the gift heritable or alienable. It was held that an absolute estate was conveyed although the gift was expressed to be for maintenance and residence. The desire to provide maintenance or residence for the donee, it was observed in the judgment, only showed the motive which prompted the donor to make the gift, and it could not be read as a measure of the extent of the gift.

It has been stated above that a bequest to a woman as "malik" imports full proprietary rights unless there is something in the context to qualify it. In the undermentioned cases (*o*), it was held that the context cut down the absolute estate imported by the word "malik", and that the donee did not take an absolute estate.

In *Bhaidas* v. *Bai Gulab* (*p*) a testator (1) constituted his wife, "malik" (owner) of his property, and (2) provided that she should leave "whatever property might remain after her death" to two named daughters "as she liked." Their Lordships of the Privy Council held that the widow took an absolute estate, the second clause not constituting trust in favour of the daughters as the subject-matter—namely, what might remain—was uncertain. Similarly where a Hindu transferred by way of gift to his wife "all my zamindari rights" with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan* (lit., with sons generation after generation) it was held that the words "spend the produce" did not indicate that she was given a life-estate only (*q*). The word Malik in a wajib-ul-arz when used with reference to widows and qualified by words like 'tahayat' does not indicate an absolute estate (*r*). Where a testator gives a full estate to one person, he is entitled to make a gift over in favour of any one else (*s*).

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406, 409; *Naulakhi* v. *Jai Kishan* (1918) 40 All. 575, 46 I.C. 905, ('18) A.A. 255 [*Malik Mustaquil*]; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I.A. 176, 186-187; *Wazir Devi* v. *Ram Chand* (1920) 1 Lah. 415, 58 I.C. 988 [*Kullikhtiyar wamilkiat*]; *Mohan Lal* v. *Niranjan Das* (1921) 2 Lah. 175, 60 I.C. 619, ('21) A.L. 11 [*Malik*]; *Hitendra Singh* v. *Rameswar Singh* (1925) 4 Pat. 510, 87 I.C. 849, ('25) A.P. 625 [transfer to wife of "all my zamindari rights" with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan*, *i.e.*, with sons generation after generation]; *Thakur Jagmohan* v. *Musammat Sheoraj* (1928) 3 Luck. 19, 106 I.C. 593, ('28) A.O. 49 [F.B.]; *Mussammat Ram Kuar* v. *Atma Singh* (1927) 8 Lah. 181, 103 I.C. 506, ('27) A.L. 404; *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398; *Matru Mal* v. *Mehri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311; *Haripada Ojha* v. *Ichhamayee Debi* (1944) 23 Pat. 404; *Sita Saran* v. *Chandrabhan* (1949) All. 368.

(*n*) ('51) A.S.C. 139.

(*o*) *Mahomed Shumsool* v. *Shawukram* (1875) 2 I.A. 7, 14 Beng. L.R. 226; *Motilal* v. *Advocate-General of Bombay* (1911) 35 Bom. 279, 11 I.C. 547 [widow's estate]; *Mithibai* v. *Meherbai* (1922) 46 Bom. 162, 64 I.C. 397, ('22) A.B. 179 [life-estate]; *Ashurfi Singh* v. *Biseear* (1922) 1 Pat. 295, 65 I.C. 977, ('22) A.P. 362 [widow's estate]; *Basantkumar Basu* v. *Ramshankar Ray* (1932) 59 Cal. 859, 138 I.C. 882, ('32) A.C. 600; *Mehtab Singh* v. *Anrik Singh* ('57) A. Punj. 146.

(*p*) (1922) 49 I.A. 1, 46 Bom. 153, 65 I.C. 974, ('22) A.P.C. 193.

(*q*) *Hitendra Singh* v. *Rameswar Singh* (1925) 4 Pat. 510, 519, 87 I.C. 349, ('25) A.P. 625.

(*r*) *Tirbeni Sahai* v. *Ramsingh* (1938) 13 Luck. 230, 167 I.C. 925, ('37) A.O. 361.

(*s*) *Matru Mal* v. *Mehri Kunwar* (1940) All. 416 189 I.C. 597, ('40) A.A. 311.

## CHAPTER XXI

# RELIGIOUS AND CHARITABLE ENDOWMENTS

**404. Endowments.**—A Hindu who is of sound mind, and not a minor, may dispose of his property by gift or by will for religious and charitable purposes such as the establishment and worship of an idol (*t*), feeding Brahmans and the poor (*u*), performance of religious ceremonies like shraddha, durga pujah and lukshmi pujah (*v*), and the endowments of a university (*w*) or an hospital (*x*). No list of what conduces to religious merit in Hindu law can be exhaustive. But when any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit, it must be shown to have a Shastraic basis. The heads of religious purposes determined by belief in acquisition of religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society (*y*). When the question is whether the endowment is real or fictitious the mode of dealing with it by its donors and successors is an important element for consideration (*z*).

*Doubt as to certain gifts.*—The High Court of Calcutta has expressed a doubt as to whether gifts to Pundits holding *tolls* for learning in the country at the time of the Durga Pujah, or for the reading of the Mahabharat and Pooran, or for the prayer of God during certain months are valid (*a*).

*Superstitious uses not forbidden.*—The English law relating to superstitious uses does not apply to Hindu religious endowments. Thus a gift in favour of an idol, or for the performance of the worship of a deity is valid according to the Hindu law, though it may not be valid according to the English law (*b*). Dispositions for religious purposes are highly favoured by Hindu law, and the leaning of the Courts also is in the same direction. Dedication of property by a Hindu to a deity is not only lawful, but commendable in a high degree from the Hindu point of view (*c*).

*Games or sports: Education.*—In case of a trust created to set up an *akhara* it cannot be said that there was dedication for religious or charitable purpose even though two idols and Taswir were installed there to attract wrestlers both Hindus and Muslims. Distinction has been drawn between cases where the object of the dedication was the promotion of games and sports as part of education and cases where the object was the promotion of games or sports simplicitor. The former only have been upheld on the ground that the object was promotion of education (*cc*).

**404A. New Legislation.**—A number of statutes have been enacted by State Legislatures in the last few years dealing with Religious and Charitable Trusts and Endowments. The validity of the provisions of a number of them has been challenged under various Articles of the Constitution and

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(*t*) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 3 I.C. 642; *Khusalchand* v. *Mahadevgiri* (1875) 12 Bom. H.C. 214.

(*u*) *Dwarkanath* v. *Burroda* (1878) 4 Cal. 443; *Rajendra Lall* v. *Raj Coomari* (1907) 34 Cal. 5; *Manorama* v. *Kali Charan* (1904) 31 Cal. 166.

(*v*) *Prafulla* v. *Jogendra Nath* (1905) 9 C.W.N. 528; *Lakshmishankar* v. *Vaijnath* (1882) 6 Bom. 24.

(*w*) *Manorama* v. *Kali Charan* (1904) 31 Cal. 166.

(*x*) *Fanindra* v. *Adm-Gen. of Bengal* (1901) 6 C.W.N. 321.

(*y*) *Saraswathi Ammal* v. *Rajagopal Ammal* (1954) S.C.R. 277, 287, ('53) A.S.C. 491.

(*z*) *Chaturbhuj Singh* v. *Sarada Charan Guha* (1932) 11 Pat. 701, 141 I.C. 157, ('33) A.P. 6.

(*a*) (1878) 4 Cal. 443, *supra*. But see *In re Darling* (1896) 1 Ch. 50.

(*b*) *Juggut Mohini* v. *Sokheemoney* (1871) 14 M.I.A. 289, 301-302; *Khusalchand* v. *Mahadevgiri*, *supra*.

(*c*) (1910) 37 Cal. 128, 136-137, 141, 3 I.C. 642, *supra*; *Ananthakrishnan* v. *Chidambaran* ('53) Tra. Co. 442; *Brajabala* v. *Sree Saradiya Durgamata* (1953) 2 Cal. 268, ('53) A.C. 285.

(*cc*) *Ramchandra* v. *Shree Mahadoji* ('70) A.S.C. 458.

Courts have considered those provisions *inter alia* in the context of property of the trust or endowment, deities, idols; temples and institutions as also the income of the same and management of the property and affairs of the same including the right to and management of the worship of certain deities and idols. It is not necessary in this Chapter to refer to those decisions in any detail or to the constitutional questions raised and it will suffice only to mention a number of those decisions:

*Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar* (c1).—Madras Hindu Religious and Charitable Endowments Act (19 of 1951). *Ratilal* v. *State of Bombay* (c2).—Bombay Public Trusts Act 1950 (29 of 1950).

*Sri Jagannath* v. *State of Orissa* (c3).—Orissa Hindu Religious Endowments Act (4 of 1939).

*Venkataramana Devaru* v. *State of Mysore* (c4).—Madras Temple Entry Authorisation Act (5 of 1947).

*Moti Das* v. *S. P. Sahi* (c5).—Bihar Hindu Religious Trusts Act (1 of 1951).

*State of Bihar* v. *Charusila Dasi* (c6).—Bihar Religious Trusts Act (1 of 1951).

*State of Bihar* v. *Bhabapritananda* (c7).—Bihar Religious Trusts Act (1 of 1951).

*Narayana* v. *State of Andhra* (c8).—Madras Hindu Religious and Charitable Endowments Act (19 of 1951) [Extinction of Mahant's rights].

*Sadavarthy* v. *Commissioner Hindu Religious and Charitable Endowments* (c9).—Madras Hindu Religious Endowments Act (2 of 1927) [Temple].

*Sudhindra Thirtha Swamiar* v. *Commissioner for Hindu Religious and Charitable Endowments, Mysore* (c10).—Madras Hindu Religious Endowments Act (19 of 1951 as amended by Act 27 of 1954) [Udipi Maths founded by Shree Madhvacharya].

*Tilkayat Shri Govindlalji* v. *State of Rajasthan* (c11).—Rajasthan Nathwara Temple Act (13 of 1959).

*K. A. Samajam* v. *Commissioner of H. R. & C. Endowments, Hyderabad* ('71) A.S.C. 891.

**405. Gift to dharam void.**—A gift or bequest to *dharam* is void for vagueness and uncertainty; so also a bequest for good work (*f*). The objects meant by that word are too vague and uncertain for the administration of them to be under the control of a Court (*g*). Where the bequest is for dharam, dharmashala and Sanskrit education the bequest for dharam being void, the whole is void (*h*).

The new enactments indicated in § 404A above contain their own definitions and deal *inter alia* with public and charitable trusts as therein defined. As to the content and extent of the expressions "religion" and "matters of religion" reference may be made to the decisions of the Supreme Court referred to in § 404A above and particularly to *Ratilal* v. *State of Bombay* there mentioned.

It is a maxim of equity, that the execution of a trust shall be under the control of the Court. The trust therefore must be of such a nature that it can be under that con-

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(c1) ('54) S.C. 282, (1954) S.C.R. 1005.
(c2) ('54) S.C. 388; (1954) S.C.R. 1055.
(c3) ('54) S.C. 400.
(c4) ('58) S.C. 255.
(c5) ('59) S.C. 942.
(c6) ('59) S.C. 1002.
(c7) ('59) S.C. 1073.
(c8) ('59) A.A.P. 471.
(c9) ('63) S.C. 510.
(c10) ('63) S.C. 966.
(c11) ('63) S.C. 1638.
(*f*) *Gauri Shankar & Ors.* v. *Mohan Lal* (1940) 15 Luck. 674, 187 I.C. 597, ('40) A.O. 275; *Jairam* v. *Bhagirathi* (1949) Nag. 765 (Subject matter uncertain).
(*g*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71 affirming (1897) 21 Bom. 646.
(*h*) *Brij Lal* v. *Narain Das* (1933) 14 Lah. 827 146 I.C. 1013, ('33) A.L. 833.

trol. For that purpose it is necessary that the subject and object of the trust must both be such as can be ascertained by the Court. If the subject or object cannot be ascertained, the trust cannot be enforced by the Court, and it is void (*i*). In the case of a gift to *dharam* the Judicial Committee observed in *Runchordas* v. *Parvatibai* (*j*), that the objects which can be considered to be meant by that word are vague and uncertain. In Wilson's Dictionary the word *dharam* is defined to be law, virtue, legal or moral duty. Relying upon this definition of *dharam*, the Judicial Committee held that the word *dharam* was as vague as the words "purposes charitable or philanthropic" which, on account of their vagueness, render a trust for those purposes void in the English law (*k*). Gifts for "charitable or other purposes" or gifts expressed in other alternative terms are not charitable; for they may be executed without any part of the property being applied to charitable purposes (*l*). Thus a gift for "charitable or benevolent purposes" is void (*m*). Applying the above principles it has been held that a trust for *sarakam* [good work] (*n*), a trust for "purposes of popular usefulness *or* for purposes of charity as may be approved by the trustees" (*o*), a trust for spending money "in proper and just acts for the testator's benefit" (*p*), and a trust for disposing of the residue "in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors, and in such manner that people may speak well of me and that all my three heirs may acquire great fame" (*q*), are all void. Similarly an ultimate residuary gift to any agnate, and failing agnates to any Brahmin who would live in the testator's ancestral house, has been held to be void (*r*). A direction to trustees to pay a certain sum of money at their discretion towards dispensaries, hospitals, charitable societies, schools or any students' association, feeding of the poor, etc., marriage upanayan, etc., excavation and consecration of tanks, etc., or in the construction of ghats or maths, has also been held to be void (*s*). But a gift to *sadavrat* to be established at a definite place is valid (*t*). A gift to "such charities as the trustees may think deserving," is also valid (*u*); and so also a gift with power to trustees to give away the property "*in charity* in such manner and to such religious *and* charitable purposes as they may in their discretion think proper" (*v*).

A gift "for the performance of ceremonies and giving feasts to Brahmans" is not void for uncertainty (*w*). Nor is a devise of property to executors upon trust to distribute the same among the testator's poor relations, dependants and servants (*x*).

An endowment of property for the purpose of *samadhi kainkaryam, i.e.*, worship of and at the samadhi (tomb) of a person, is not valid (*y*). A gift for spreading of Hindu religion is void (*z*). There is a conflict of opinion whether a gift for the spread of the Sanskrit language is void for uncertainty (*a*).

When there is a bequest for feeding the poor—a bequest which is valid in law—the fact that it is referred to in a later part of the same will as "dharam" does not make it invalid (*b*).

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(*i*) *Morice* v. *The Bishop of Durham* (1804) 10 Ves. 522 [objects of benevolence or liberality]; *In re Riland* (1881) W.N. [Eng.] 173 [charitable or benevolent purposes]; *In re Macduff* (1896) 2 Ch. 451 [purposes, charitable or philanthrophic]; *Blair* v. *Duncan* (1902) A.C. 37 [such charitable or public purposes as my trustee thinks proper]; *Hunter* v. *Att.-Gen.* [1889] A.C. 309; *Grimond* v. *Grimond* [1905] A.C. 124. As to what are charitable objects, see the judgment of Lord Macnaghten in *The Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, at p. 583.

(*j*) (1899) 23 Bom. 725, 26 I.A. 71.

(*k*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Parthasarathy* v. *Thiruvengada* (1907) 30 Mad. 340 [*Dharam*]; *Gangabai* v. *Thavar* (1863) 1 Bom. H.C. 71 [*Dharam*]; *Advocate-General* v. *Damodhar* (1852) Perry's Oriental cases 526 [*Dharam*]; *Cursandas* v. *Vundravandas* (1890) 14 Bom. 482 [*Dharamada*]; *Devshankar* v. *Motiram* [1894] 18 Bom. 136 [*Dharamada*]. See also *Venkatanarasimha* v. *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376.

(*l*) Halsbury, Vol. IV, p. 146, art. 230.

(*m*) (1881) W.N. [Eng.] 173, *supra*. See also *In re Harbinson* (1902) 1 I.R. 103; *Re Sidney* (1908) 1 Ch. 488.

(*n*) *Bai Bapi* v. *Jamnadas* (1898) 22 Bom. 774.

(*o*) *Trikumdas* v. *Haridas* (1907) 31 Bom. 583; *Jamnabai* v. *Dharsey* (1902) 4 Bom. L.R. 893.

(*p*) *Gokool Nath* v. *Issur* (1887) 14 Cal. 222.

(*q*) *Nanalal* v. *Harlochand* (1890) 14 Bom. 476, 479.

(*r*) *Shyama Charan* v. *Sarup Chandra* (1912) 17 C.W.N. 39, 14 I.C. 708.

(*s*) *Sarat Chandra* v. *Pratab Chandra* (1913) 40 Cal. 232, 21 I.C. 194.

(*t*) *Morarji* v. *Nenbai* (1893) 17 Bom. 351.

(*u*) *Smith* v. *Massey* (1906) 30 Bom. 500; *Gordhan Das* v. *Chunni Lal* (1908) 30 All. 111; *Surbomungola* v. *Mohendronath* (1879) 4 Cal. 508.

(*v*) *Parvati* v. *Ram Barun* (1904) 31 Cal. 895.

(*w*) *Lakshmishanker* v. *Vaijnath* (1882) 6 Bom. 24; *Suryanarayanarao* v. *Rajeshwari* ('66) A.A.P. 269.

(*x*) *Manorama* v. *Kali Charan* (1904) 31 Cal. 166.

(*y*) *Saraswathi Ammal* v. *Rajagopal Ammal* (1954) S.C.R. 277, ('53) A.S.C. 491; *Veluswami* v. *Dandapani* (1947) Mad. 47; *Ramanasaramam* v. *Commissioner H.R. and C.E.* ('61) A.M. 265, (1960) Mad. 922. Also see *Ravanna K. Karuppannan* v. *V.P. Tirmalai* ('62) A.M. 500 [Samadhi and education of poor pupils].

(*z*) (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376, *supra*.

(*a*) (1923) 46 Mad. 300, 314-315, 73 I.C. 991, ('23) A.M. 376 [Spencer, J.], 325-345 [Devados, J.], *supra*.

(*b*) *Vaidyanatha* v. *Swaminatha* (1924) 47 Mad. 884, 51 I.A. 282, 82 I.C. 804, ('24) A.P.C. 221

**406. Subject of endowment.**—A Hindu may dedicate for religious and charitable objects all property which he can validly dispose of by gift or by will [§ 357 and § 368].

There is nothing to prevent a Hindu from dedicating the whole of his property for religious and charitable purposes (*c*).

**407. Endowment how created.**—(1) No writing is necessary to create an endowment (*d*), except where the endowment is created by a will, in which case the will must be in writing and attested by at least two witnesses if the case is governed by the Indian Succession Act, 1925, s. 57 [§ 369 above]. An entry in the account of a firm of moneylenders showing that the firm is inbebted to the temple followed by crediting of interest does not create an endowment (*e*).

(2) A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it. A trust is not required for that purpose. All that is necessary is that the religious or charitable purposes should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to those purposes. Even in the case of a dedication to an idol, which cannot itself physically hold lands, it is not necessary, though it is usual, to vest the lands in trustees. Nor is it necessary that there should be any express words of gift to the idol (*f*). No religious ceremony such as *sankalp, samarpan, pranapratishta* or *kumbhabhishekam* etc. (*f*1) is necessary and a clear and unequivocal manifestation of intention to create a trust and vesting of the same in the donor or another as a trustee is enough to constitute dedication (*g*).

The basic concept of a religious endowment under Hindu Law differs in essential particulars from the concept of trust known to English Law as will be seen from various paragraphs in this Chapter.

*The Indian Trusts Act,* 1882, s. 1.—The Indian Trusts Act, 1882, does not apply to public or private religious or charitable endowments (*h*).

*The Transfer of Property Act,* 1882, s. 123.—It has been held by the High Court of Madras that a dedication of land for a public temple is not a gift within the meaning of sec. 122 of the Transfer of Property Act, 1882. The provisions, therefore, of sec. 123 of the Act, which require a gift of land to be effected by a registered instrument, do not apply to such a dedication (*i*).

*Revocation of endowment.*—A valid endowment once created cannot be revoked by the donor (*j*).

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(*c*) See Sir F. MacNaghten's Considerations on Hindu Law, p. 335.

(*d*) *Muddun Lal* v. *Komul Bibee* (1867) 8 W.R. 42; *Ramalinga* v. *Sivachidambara* (1919) 42 Mad. 440, 49 I.C. 742, ('19) A.M. 809; *Pallayya* v. *Ramavadhanulu* (1903) 13 Mad. L.J. 364; *Gangi Reddi* v. *Tammi Reddi* (1927) 54 I.A. 136, 50 Mad. 421, 101 I.C. 79, ('27) A.P.C. 80, on appeal from (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236; *R. V. Reddiar* v. *Krishnaswamy* ('71) A.M. 262.

(*e*) *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil* (1939) Rang. 59.

(*f*) *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247, 263; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112, 127; *Prafulla* v. *Jogendra Nath* (1905) 9 C.W.N. 528, 534; *Venkatanarasimha* v. *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376; *S. N. P. Nadar* v. *T.P.T. Charity* ('71) A.M. 253 [dedication to a temple to be built for a deity].

(*f*1) *Pichai* v. *Commissioner H. R. & C. Endowments* ('71) A.M. 405.

(*g*) For a brief statement on the subject reference may be made to *Ramchandra* v. *Shree Mahadeoji* ('70) A.S.C. 458. Also see *Prem Nath* v. *Hari Ram* (1935) 16 Lah. 85, 154 I.C. 229, ('34) A.L. 771; *Jai Dayal* v. *Ram Saran Das* (1938) Lah. 704; *Deep Lal* v. *Gulabchand* ('56) A. Rajasthan 171; *Ram Ratan Lal* v. *Kashinath* ('66) A.P. 235.

(*h*) *Gopu* v. *Sami* (1905) 28 Mad. 517; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636 [F.B.].

(*i*) *Pallayya* v. *Ramavadhanulu* (1903) 13 Mad. L.J. 364; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636 [F.B.], *supra.*

(*j*) *Dasami* v. *Param* (1929) 51 All. 621, 116 I.C. 433, ('29) A.A. 315.

**407A. Illusory endowments.**—(1) The mere execution of a deed, though it may purport on the face of it to dedicate property to an idol, is not enough to constitute a valid endowment; for the real object of the executant may be to defraud creditors, or to defeat the provisions of the ordinary law of descent, or to restrain alienations and keep the property in perpetuity in the family. It is necessary for the validity of a deed of endowment that the executant should *divest himself of the property*. Whether he has done so or not, is to be determined by his subsequent acts and conduct. Thus, if the profits of the property are appropriated by the executant to his own use, and not to the worship of the idol, and his subsequent dealings with the property show that he *did not intend to create an endowment*, the dedication will be inoperative, and the property cannot be treated as debutter, *i.e.*, belonging to the idol. The property will still continue to be his, and it may be attached in execution of a decree against him (*k*). Similarly, if a Hindu purchases property in the name of his idol, without setting up the idol for public worship and without appointing priests for its worship, the property does not become the property of the idol, but remains his own private property (*l*). When an endowment is created by a will and is to take effect on the death of the testator, then unless there is evidence to show that the testator gave directions during his lifetime contrary to the terms of the will his mode of dealing with the endowed property is irrelevant for the purpose of determining the true nature of the endowment. The conduct of the manager after the testator's death, even if it is contrary to the terms of the will, cannot also be regarded as reflecting the intentions of the testator (*m*).

(2) Where there is no real dedication of property for the worship of an idol, but only an attempt to create a perpetuity in favour of the settlor's descendants, the gift to the idol is void (*n*). The mere fact, however, that the members of the settlor's family are nominated as Shebaits or mutawallis of the temple and that they are to be remunerated out of the income of the property is no ground for holding that the dedication is not real, provided the remuneration is reasonable having regard to the income of the property (*o*).

**408. Complete dedication—absolute grant in favour of charity.**—A dedication of property to religious or charitable uses may be complete, or it may be partial. If the dedication is complete a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular

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(*k*) *Watson and Co.* v. *Ramchund* (1891) 18 Cal. 10; *Konwar Doorganath* v. *Ram Chunder* (1877) 2 Cal. 341, 349, 4 I.A. 52; *Suppammal* v. *Collector of Tanjore* (1889) 12 Mad. 387; *Ram Dhan* v. *Prayag* (1921) 43 All. 503, 62 I.C. 862, ('21) A.A. 37; *Siri Thakur* v. *Atkins* (1919) 4 Pat. L.J. 533, 53 I.C. 106, *Parmod Banabihari* v. *Atkins* ('19) A.P. 442; *Bhekdhari Singh* v. *Sri Ramchanderji* (1931) 10 Pat. 388, 136 I.C. 290, ('31) A.P. 275; *Mahani Dasi* v. *Pareshnath Thakur* ('54) A. Orissa 198; *Sri Gopal Thakur* v. *Pravasini* ('67) A. Orissa 85.

(*l*) *Brojosoondery* v. *Luchmee* (1873) 20 W.R. 95 (P.C.).

(*m*) *Siva Kanta* v. *Rajaniram* ('50) A. Assam 154.

(*n*) *Promotho* v. *Radhika* (1875) 14 Beng. L.R. 175; *Sri Thakurji* v. *Sukhdeo Singh* (1920) 42 All. 395, 58 I.C. 583, ('20) A.A. 63 [F.B.].

(*o*) *Jadu Nath Singh* v. *Thakur Sita Ramji* (1917) 44 I.A. 187, 39 All. 553, 42 I.C. 225, ('17) A.P.C. 177; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083; *Ishwari Bhuvaneshwari Thakurani* v. *Projonath Dey* (1937) 64 I.A. 203, (1937) 2 Cal. 447, 39 Bom. L.R. 933, 168 I.C. 765, ('37) A.P.C. 185.

character (*o*1). The question whether it is complete or partial depends on the construction of the instrument of grant as a whole (*p*). Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity (*p*1).

When there was no formal dedication of a bathing ghat and the plaintiff (or his predecessors) acted as owners and not as Shebaits in effecting repairs and levying tolls it was held that the plaintiff is the owner and that there was no dedication (*q*).

Where the whole property is dedicated absolutely to the worship of an idol, and no beneficial interest in it is given to any person, the dedication is said to be absolute and complete. In such a case the property is held by the idol—though it is only in an ideal sense that property is so held—and it cannot be alienated except in the cases mentioned in § 415 (*r*).

In *Ramkishorelal* v. *Kamalnarayan* (*r*1) the Supreme Court had to construe an award embodying partition among members of a joint family. Under the award a village was given to a cosharer R "*kul huq haquq samet milkiyat*" and then followed mention of the purposes (meeting expenses of worship and maintenance of a public temple) for which the village was being given to R. It was held on a consideration of the instrument as a whole that the intention was not to make R the absolute owner of the village but to give him possession and management of the village for the benefit of the deity Shri Ramchandra Swamy.

**408A. Partial dedication—charge in favour of charity.**—Where by the grant a mere charge or trust is created in favour of an idol, the dedication is said to be partial or qualified. In such a case the property descends, and is alienable and partible, in the ordinary way; but subject always to the trust or charge in favour of the idol (*s*). Where the surplus income, after the ex-

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(*o*1) *Dasaratharami* v. *D. Subba Rao* ('57) A.S.C. 797, (1957) S.C.R. 1122; *Shanmugam Pillai* v. *K. Shanmugam Pillai* ('72) A.S.C. 2069; *Gouri Shankar* v. *Thakur Dass* ('72) A.J. & K. 53 (property dedicated descendible to heirs).

(*p*) *Pande Har Narain* v. *Surja Kunwari* (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34, ('21) A.P.C. 20; *Nirmala Bala* v. *Balai Chand* ('65) A.S.C. 1874; *Lakshminarasimhachari* v. *Agastheswaraswamivaru* ('60) A.S.C. 622; *Bhekdhari Singh* v. *Sri Ramchanderji* (1931) 10 Pat. 388, 136 I.C. 290, ('31) A.P. 275; *Ananthakrishnan* v. *Chidambaram* ('53) Tra. Co. 442. The above statement of law was examined in *Kamalnarayan* v. *R. Kishorelal* ('58) A.M.P. 246, 252; *Panchanan Dalai* v. *Lakshmidhar* ('58) A. Orissa 65; *Nirmala Bala* v. *Balai Chand* (1959) 64 C.W.N. 546; *Narasi* v. *Balamma* ('63) A.A.P. 130; *Sri Thakur Krishna* v. *Kanhaylal* ('61) A. All. 206; *Ram Ratan Lal* v. *Kashinath* ('66) A.P. 235; *Vadivelu Mudaliar* v. *N. S. Rajabada Mudaliar* ('67) A.M. 175 [benefit meant essentially to charity].

(*p*1) *Dasaratharami* v. *D. Subbha Rao*, *supra*.

(*q*) *Maharani Hemanta Kumari* v. *Gauri Shankar Tewari* (1941) All. 401, 193 I.C. 882, 68 I.A. 53, ('41) A.P.C. 38.

(*r*) *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203; *Jadu Nath Singh* v. *Thakur Sita Ramji* (1917) 44 I.A. 187, 39 All. 533, 42 I.C. 225, ('17) A.P.C. 177; *Shri Ganesh* v. *Keshavrao* (1891) 15 Bom. 625; *Rajendra* v. *Sham Chund* (1881) 6 Cal. 106; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112; *Sathinama* v. *Saravanabagi* (1895) 18 Mad. 266; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083.

(*r*1) ('63) A.S.C. 890.

(*s*) (1905) 32 Cal. 129, 31 I.A. 203, *supra*; *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66; *Ram Coomar* v. *Jogender Nath* (1879) 4 Cal. 56; *Ashutosh* v. *Doorga Churn* (1880) 5 Cal. 438, 6 I.A. 182; *Kulada Prosad* v. *Kali Das* (1915) 42 Cal. 536, 24 I.C. 899, ('14) A.C. 813; *Mahim Chandra* v. *Hara Kumari* (1915) 42 Cal. 561, 30 I.C. 798, ('15) A.C. 487; *Gopal Lal Sett* v. *Purna Chandra Basak* (1922) 49 I.A. 100, 49 Cal. 459, 67 I.C. 561, ('22) A.P.C. 253, (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34, ('21) A.P.C. 20, *supra*; (1931) 10 Pat 388, 136 I.C. 290, ('31) A.P. 275, *supra*; *Parshadi Lal* v. *Brij Mohan Lal* (1936) 11 Luck. 573, 159 I.C. 117, ('36) A.O. 52; *Gouri Shankar* v. *Thakur Dass* ('72) A. J. & K. 53.

penses of worship and ceremony were met, was to be invested in houses, for the residence of the settlor's descendants, it was held that there was no complete dedication (*t*).

In determining whether the will of a Hindu gives the estate to an idol subject to a charge in favour of the heir of the testator, or makes the gift to the idol a charge upon the estate, there is no fixed rule depending on the use of particular terms in the will; the question depends on the construction of the will as a whole. Thus although a will provides that the property of the testator "shall be considered to be the property of" a certain idol, the further provisions such as that the residue after defraying the expenses of the temples "shall be used by our legal heirs to meet their own expenses," and the circumstances such as that in respect of the ceremonies to be performed the expenditure was fixed by the will and would absorb only a small proportion of the total income, may indicate that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named (*u*).

The question has to be determined by a conspectus of the entire provisions of the deed or will by which the properties are dedicated. A provision giving a right to the sevayats to reside in the properties dedicated to the idol for the purpose of carrying on the daily and periodical worship and festivals does not detract from the absolute character of a dedication to the idol (*v*).

**409. Application of profits of property—evidence of dedication.**—(1) Where there is no instrument of grant, the mere fact that the profits of any land are being used for the support of an idol is not proof that that land formed an endowment for the purpose; but where there is apparently good evidence going back for a long period, *e.g.*, for more than half a century, that the land was given for the support of an idol, proof that from the time the profits had been so expended would be strong corroboration (*w*).

The fact that the deceased karta of a joint Hindu family regularly paid the expenses of a charitable institution out of the profits of a family property, those expenses however not exhausting the whole of those profits, does not establish a dedication of the property to the charity (*x*).

In the case last cited the Judicial Committee while reversing the decree passed by both the Subordinate Judge and the High Court, observed that the Subordinate Judge had failed to notice the distinction between meeting of the expenses of a charity out of a particular property, and applying all the receipts of that property to the charity.

(2) Though the mere fact of the profits of any land being used for the support of an idol may not be proof that the land formed an endowment for the purpose, yet it is a fact that might well be taken into consideration in cases where the intention of the founder is to be gathered from an ancient document expressed in ambiguous language (*y*). In the construction, again, of such a document evidence is admissible as to the manner in which the property has been possessed and used (*z*).

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(*t*) *Surendrakrishna Ray* v. *Shree Shree Iswar Bhubanshwari Thakurani* (1933) 60 Cal. 54, 144 I.C. 792, ('33) A.C. 295; *Ishwari Bhuvanshwari Thakurani* v. *Projonath Dey*, 64 I.A. 203, (1937) 2 Cal. 447, 39 Bom. L.R. 933, 168 I.C. 765, ('37) A.P.C. 185. Also see cases under § 408.

(*u*) *Pande Har Narain* v. *Surja Kunwari* (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34; *Parshadi Lal* v. *Brij Mohan Lal* (1936) 11 Luck. 575, 159 I.C. 117, ('36) A.O. 52. Reference may also be made to *Ram Ratan Lal* v. *Kashinath* ('66) A.P. 235.

(*v*) *Sree Sree Ishwar* v. *Sushila Bala* (1954) S.C. 69, (1954) S.C.R. 407. Also see cases under § 408.

(*w*) *Muddun Lal* v. *Sreemutty Komul Bibee* (1867) 8 W.R. 42, 44; *Konwar Doorganath* v. *Ram Chunder* (1877) 2 Cal. 341, 349, 4 I.A. 52.

(*x*) *Gangi Reddi* v. *Tammi Reddi* (1927) 54 I.A. 136, 50 Mad. 421, 101 I.C. 79, ('27) A.P.C. 80, reversing on this point same case in (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236.

(*y*) *Abhiram* v. *Shyama Charan* (1909) 36 Cal. 1003, 1012, 36 I.A. 148, 4 I.C. 449.

(*z*) *Kulada Prosad* v. *Kali Das* (1915) 42 Cal. 536, 543-544, 24 I.C. 899, ('14) A.C. 813.

**410. Bequest to idol not in existence at testator's death.**—The principle of Hindu law which invalidates a bequest other than to a person in existence at the death of the testator [§ 372], does not apply to a bequest to trustees for the establishment of the image of a deity after the death of the testator. Such a gift is valid, though the image is to be established and consecrated *after* the testator's death (*a*). Similarly a dedication of immovable property by means of an Arpannama to a number of deities some of which were installed at the date of the disposition are valid (*b*).

*Illustration*

A bequeaths his property to his executors upon trust to establish *after* his death an image of the goddess Kali in the name of his mother. and to devote the income of the balance to the worship of the goddess. The bequest is valid, though the image is to be installed for the first time after the testator's death. See §§ 359 to 362, and §§ 375 to 378.

*Dedication to a temple.*—Dedication to a temple which has yet to be built for a deity as indicated in a deed of trust and for services to be performed in the temple is valid (*b*1).

*The idol must be specified.*—The dedication must be to a *particular* deity. A dedication to "the Thakurji in my Thakurdwara" without mentioning the particular Thakurji to whom the bequest is to be given, is void for uncertainty (*c*). In a Madras case, however, opinion has been expressed that a gift for worship of God without mentioning any particular deity is valid (*d*).

*Mutilation of idol.*—The destruction or mutilation of the image does not affect the endowment. A new image may be established, and the endowment kept up (*e*). The actual installation of an idol in a temple or the construction of a temple for that purpose is not absolutely necessary for validating a settlement in favour of the idol (*f*).

**411. Endowments and rule against perpetuities.**—(1) A dedication of property for a public, religious or charitable purpose is not invalid because it transgresses the rule which forbids the creation of perpetuities. The rule against perpetuity applies to gifts and bequests in favour of private individuals [§ 385]. It does not apply to religious and charitable endowments (*g*).

(2) Where the estate created by a grant is in its nature secular, the mere fact that the motive for the grant was religious does not constitute it a religious endowment, so as to exempt it from the rule against perpetuities (*h*).

*A*, actuated by religious motives, makes a gift of certain property to *B* and *C*, both Brahmins, subject to the condition that they *should not alienate* the property and that it should be enjoyed by them and their heirs *for ever*. The restraint against alienation is void, and *B* and *C* take the property absolutely.

**411A. Endowments and directions for accumulations.**—The rule stated in § 397 as to directions for accumulations does not apply to religious endowments.

See Transfer of Property Act, 1882, S. 18.

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(*a*) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 3 I.C. 642; *Mohar Singh* v. *Het Singh* (1910) 32 All. 337, 5 I.C. 584; *Chatarabhuj* v. *Chatarjit* (1911) 33 All. 253, 8 I.C. 832.

(*b*) *Bhoopati Nath Chakrabarti* v. *Vasantkumari Debee* (1936) 63 Cal. 1098, ('36) A.C. 556.

(*b*1) *Pachamuthu Nader* v. *T.P.T. Charities* ('71) A.M. 253.

(*c*) *Phundan Lal* v. *Arya Prithi* (1911) 33 All. 793, 11 I.C. 260; *Chandi Charan* v. *Haribola* (1919) 46 Cal. 951, 51 I.C. 275, ('19) A.C. 199.

(*d*) *Velusicami* v. *Dandapani* (1947) Mad. 47.

(*e*) *Bijoychand* v. *Kalipada* (1914) 41 Cal. 57, 20 I.C. 78, ('14) A.C. 200.

(*f*) *Sarab Sukh* v. *Ram Prasad* (1924) 46 All. 130, 135, 78 I.C. 1018, ('24) A.A. 357.

(*g*) Transfer of Property Act, 1882, *s.* 18; Indian Succession Act, 1925, *s.* 118; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112; *Prafulla* v. *Jogendra Nath* (1905) 9 C.W.N. 528.

(*h*) *Anantha* v. *Nagamuthu* (1882) 4 Mad. 200.

**412. Estate in remainder.**—An endowment is not invalid because it is to take effect after the determination of an estate for life (*i*)

*Illustration*

*A* executes a deed by which he reserves to himself a life-estate in certain property and directs that after his death the income of the property shall be paid to his daughter for life and after her death it shall be devoted to a certain temple. The endowment is valid, though it is to take effect after the determination of the life-estate in favour of the settlor and his daughter.

**413. Devasthanam, Math, Shebait, Mohunt, Debutter property.**—Where property is devoted *absolutely* to religious purposes, in other words, where the dedication is absolute and complete, the possession and management of the property belongs, in the case of a *devasthanam* or temple, to the manager of the temple, called *shebait*; but a *shebait* is not mere pujari or archak of the temple. He is a human minstrant of the deity until a pujari is appointed by the founder or the *shebait* to conduct worship. The pujari is thus a servant of the *shebait* (*i*1). In case of a *math*, that is an abode for students of religion, the possession and management of the property belongs to the head of the *math* called *mohunt*; and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the case of temple property in the *shebait* and, not in the idol, and in the case of *math* property in the *mohunt* (*j*). For position of *shebait* and *mohunt* see § 414 *infra*. Property dedicated to religious uses is called *debutter* property. "Debutter" means literally 'belonging to a deity.'

Succeeding shebaits of a temple and mohunts of a math form a continuous representation of the property of the idol or of the math (*k*).

*Distinction between temples and maths.*—The religious foundations known as *Devasthanams* or temples are the most numerous in India and have the largest endowments especially in the shape of lands, assignment of public revenue, and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general, or for that of particular sects or sections thereof. Next to the temples, the most important religious foundations in this country are the ancient *maths* or monasteries presided over almost invariably by *sanyasis* or monks. The object of these *maths* (or *mutts*) is generally the promotion of religious knowledge, and the imparting of spiritual instruction to the disciples and followers of the *math*. In the case of *maths* though there are idols connected therewith, the worship of them is a secondary matter. The two classes of institutions, namely, temples and *maths*, are thus supplementary to each other in the Hindu Ecclesiastical system, both conducive to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge. In the case of temples, the endowed property vests in the idol; in the case of *maths*, it vests in the *math* itself as a juristic person (*l*). The *mohunt* like the *shebait* is the manager or custodian of the institution. The view taken in *Vidyapurna* v. *Vidyanidhi* (*m*), that in case of *maths* the ideal person is the office of the spiritual teacher which, as it were, is incarnate in the person of each successive *mohunt* who, for the time, is a real owner is not tenable after the pronouncement of the Judicial Committee in *Vidya Varuthi* v. *Balusami* (*n*). The actual decision in

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(*i*) *Gobind* v. *Gomti* (1908) 30 All. 288.

(*i*1) *Kalimata Thakurani* v. *Jibandhan* ('62) A.S.C. 1329.

(*j*) *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1905) 32 Cal. 129, 31 I.A. 203; *Babajirao* v. *Laxmandas* (1904) 28 Bom. 215; *Bidhu* v. *Kuladaprasad* (1919) 46 Cal. 877, 50 I.C. 525, ('19) A.C. 245; *Jodhi Rai* v. *Basdeo Prasad* (1911) 33 All. 735, 11 I.C. 47 [F.B.]; *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326.

(*k*) *Gulabbhai* v. *Sohangdasji* (1928) 52 Bom. 431, 110 I.C. 263, ('28) A.B. 183.

(*l*) As to what is a 'Mutt' within the scope of the Madras Hindu Religious Endowments Act, see *Raghavendra Swami Mutt* v. *Board of Commissioners H.R.E. Madras* ('57) A. Andh. Pra. 150.

(*m*) *Vidyapurna* v. *Vidyanidhi* (1904) 27 Mad. 435; *Sammantha* v. *Sellappa* (1879) 2 Mad. 175, 179; *Giyana* v. *Kandasami* (1887) 10 Mad. 375, 389.

(*n*) 48 I.A. 302.

*Vidyapurna* v. *Vidyanidhi* (*o*) is, however, correct for it was held there that the *mohunt* of an institution does not forfeit his office by reason of subsequent lunacy. So long as the duties of a *mohunt* or *shebait* can be discharged by an agent or guardian, subsequent lunacy would not occasion a forfeiture of rights or furnish any grounds of removal (*p*).

*Arya Samajist.*—An Arya Samajist, who is a Hindu can be a shebait, but the rites of the deity must be performed by a properly qualified person (*q*).

*Property held by an idol.*—"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait*, or manager" (*r*).

*Property held by a math.*—"A *math*, like an idol, is in Hindu law a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the *math*, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager [*Mohunt*]" (*s*).

*Idols and maths are both juridical persons.*—The Hindu law, like the Roman law and those [systems of law] derived from it, recognizes not only corporate bodies with rights of property vested in the corporation, apart from its individual members, but also the juridical persons or subjects called foundations (*t*). Temples and *maths* are both religious foundations.

Though there are some points of similarity between a minor and a Hindu idol still the idol is not a perpetual minor (*u*). Any next friend may sue on behalf of an idol for a declaration that certain property is debutter property. It is not necessary to ask for shebait to institute the suit before the next friend files it (*v*).

*Suit in name of temple.*—A temple is not a juridical person; no suit, therefore, relating to the temple property, can be instituted in the name of the temple (*w*).

Although a Hindu idol has a juridical status it cannot be regarded as a "person" capable of cultivating lands personally in the context of the Bombay Tenancy and Agricultural Lands (Vidarbha) Act of 1958 (*w*1). But it is a juristic entity capable of holding property and of being taxed through its shebaits (*w*2).

*Right to sue.*—The idol itself is a juridical person with the power of suing and being sued (*x*). Section 92 of the Civil Procedure Code is not a bar to the maintainability of a suit by the idol for possession of its property from a person who is in illegal possession of the same (*x*1). The Privy Council held in *Maharaja Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (*y*) that "possession and management of the dedicated property belong to the shebait and this carries with it the right to bring whatever suits are necessary for the protection of the property." When a shebait is unwilling or incapable of bringing a suit, such suit can be instituted by the prospective shebait, the heirs of the founder or any person interested and the deity itself can sue through a next friend (*z*). In any such case, as was recently pointed out by the Supreme Court (*z*1), a person interested in the worship of the idol can certainly be clothed with an *ad hoc* power of representation to protect its interest (*z*1). Reference may also be made to the undermentioned case (*a*).

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(*o*) (1904) 27 Mad. 435.

(*p*) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 761, ('43) A.C. 562.

(*q*) *Iswar* v. *Kshetra* ('49) A.C. 253.

(*r*) *Prosunno Kumari* v. *Golab Chand* (1875) 14 Beng. L.R. 450, 459, 2 I.A. 145, 152; *Pramatha Nath* v. *Pradyumna* (1925) 52 I.A. 245, 251-252, 52 Cal. 809, 816, 87 I.C. 305, ('25) A.P.C. 139.

(*s*) *Babajirao* v. *Laxmandas* (1904) 28 Bom. 215, 223.

(*t*) *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247, 263, affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50, 26 I.A. 199; *Narasimha* v. *Venkatalingam* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636; *In re Sarjubai* (1944) Nag. 81 [F.B.].

(*u*) *Tarit Bhusan Ray* v. *Sree Iswar Sridhar Salgramsila Thakur* (1941) Cal. 477, 199 I.C. 486, ('42) A.C. 99.

(*v*) *Thakur Sree Sree Annapurna Devi* v. *Shiba Sundari Dasi* (1944) 2 Cal. 144.

(*w*) *Thakardwara Pheru Mal* v. *Ishar Das* (1928) 9 Lah. 588, 110 I.C. 384, ('28) A.L. 375.

(*w*1) *Kalanka Devi Sansthan* v. *Maharashtra Revenue Tribunal* ('70) A.S.C. 439.

(*w*2) *Jogendra Nath* v. *I.T. Commissioner* ('69) A.S.C. 1089.

(*x*) *Pramatha Nath* v. *Pradyumna*, (1925) 52 I.A. 245.

(*x*1) *Bishwanath* v. *Radha Ballabhji* ('67) A.S.C. 1044.

(*y*) 31 I.A. 203.

(*z*) *Girish* v. *Upendra*, 35 C.W.N. 768; *Sree Sree Gopal* v. *Baldeo Narain* (1946) 2 Cal. 447; *Monmohan Haldev* v. *Dibhendra* (1944) A.C. 199. Also see *Mahadoba Devasthan* v. *Mahadoba* (1952) 54 Bom. L.R. 345, ('53) A.B. 38 (1952) Bom. 1071; *Sushama Roy* v. *Atul Kri..r* ('55) A.C. 624.

(*z*1) See *Bishwanath* v. *Radha Ballabhji supra.*

(*a*) *Jangi Lal* v. *Panna Lal* ('57) A.A. 743.

The Madras High Court has held in a Full Bench case that in the absence of a *de jure* trustee, a *de facto* trustee of a public religious or charitable endowment who is in possession and management of the institution is entitled to maintain a suit for recovery of trust property against an adverse claimant (*b*).

*Female manager.*—There is nothing to prevent a female from being the manager of a religious endowment, but she cannot perform any spiritual functions (*c*). According to the practice and precedents obtaining in the Madras State a Hindu female is not incompetent by reason of her sex to succeed to the office of Acharya in a temple and to the emoluments attached thereto (*d*).

*Trustees.*—Property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than the spiritual head (*e*).

**414. Position of shebait and mohunt.**—(1) *Shebait*—A shebait is, by virtue of his office, the administrator of the property attached to the temple of which he is the shebait. Both the elements of office and property or duties and personal interest are blended together in the conception of shebaitship and neither can be detached from the other (*e*1). As regards the *property* of the temple, he is in the position of a trustee. But as regards the *service of the temple* and the duties that appertain to it, he is rather in the position of the holder of an office or dignity (*f*). It would be wrong to regard him as a mere pujari or archak (*f*1).

It was laid down by the Judicial Committee, that a shebait has not the legal ownership in, but only the title of manager of, a religious endowment (*g*). It follows from this that the rent of property dedicated to the services of an idol (*h*), as well as offerings made to the idol [§ 442], belong to the idol, and not to the shebait. A shebait being a manager only, ceases to be shebait when he ceases to manage the property and carry on the worship of the idol (*h*). Where the founder has reserved to himself the puja of the idol he is the shebait, but if he chooses not to administer the endowment property and appoints another to perform the duty the former is competent to dismiss the latter (*i*).

*Benami purchase by shebait of debutter property.*—As a shebait occupies a fiduciary position with respect to debutter property, a purchase of such property by him benami and without disclosing that he is the real purchaser is invalid, even if he buys at a sale execution proceedings and has paid the full market value (*i*1).

*Adverse possession.*—No shebait can, as long as he continues to be the shebait, claim adverse possession against the idol for that would be a notion void of all content (*j*).

(2) *Mohunt.*—The property of a math is held by the mohunt as spiritual head of the institution, but the property may by the usage and custom of the institution vest in trustees other than the spiritual head. In any case the property is held solely in trust for the purposes of the institution (*k*); surplus income must be added to the endowment and not applied for the personal enjoyment of the head of the math (*l*). A mohunt is not a trustee in

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(*b*) *Sankaranarayana Ayyar* v. *Sri Poovanatha Swami Temple* (1950) Mad. 191 (F.B.).

(*c*) *See Janoki Debi* v. *Gopal* (1882) 9 Cal. 766, 10 I.A. 32; *Keshavbhat* v. *Bhagirathibai* (1866) 3 Bom. H.C.A.C. 75.

(*d*) *Annaya* v. *Ammakka* (1918) 41 Mad. 886, 47 I.C. 341, ('19) A.M. 598 [F.B.].

(*e*) *Arunachellam* v. *Venkatchalapathi* (1919) 46 I.A. 204, 43 Mad. 253, 53 I.C. 288, ('19) A.P.C. 62.

(*e*1) *Commissioner, Hindu Religious Endowments, Madras* v. *Swamiar* ('54) S.C. 282, (1954) S.C.R. 1005.

(*f*) *Ramanathan* v. *Murugappa* (1906) 29 Mad. 283, 33 I.A. 139; *Moti Das* v. *S. P. Sahi* ('59) S.C. 942.

(*f*1) *Sree Kalimata Thakurani* v. *Jibandhan* ('62) A.S.C. 1329.

(*g*) *Shibessouree* v. *Mothooranath* (1869) 15 M.I.A. 270, 273.

(*h*) *Bhuban Mohan* v. *Narendra Nath* (1931) 35 C.W.N. 478, 135 I.C. 865, ('32) A.C. 27.

(*i*) *Ram Das* v. *Shri Ram Lakshman Janki* (1943) All. 845, 209 I.C. 463, ('43) A.A. 352.

(*i*1) *Peary Mohan* v. *Manohar* (1921) 48 I.A. 258, 48 Cal. 1019, 62 I.C. 76, ('22) A.P.C. 235.

(*j*) *Sree Sree Ishwar* v. *Sushila Bala* (1954) S.C.R. 407; *Surendrakrishna Ray* v. *Shree Shree Ishwar* (1933) 60 Cal. 54, 77.

(*k*) *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramchandaran Ramanuj Das* (1936) 63 Cal. 326.

(*l*) *Arunachellam* v. *Venkatachalapathi* (1919) 46 I.A. 204, 43 Mad. 253, 53 I.C. 288, ('19) A.P.C. 62; *Ram Parkash Das* v. *Anand Das* (1916) 43

the English legal sense of the term (*m*). His functions and duties are regulated by custom. His very wide discretion as to the application of the income is subject to the obligation to manage the property so as to serve effectively the objects for which the Math exists (*n*). In the conception of Mahantship, as in Shebaitship, both the elements of office and property are blended together and neither can be detached from the other. The personal or beneficial interest of the mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect of endowed properties; and these and other rights of a similar character of proprietary right which, though anomalous to some extent, is still a genuine legal right. A mahant, as a superior of a Math, has, in addition to his duties, a personal interest of a beneficial character which is much larger than that of a shebait in debutter property (*n*1). Mohunt of a Math though not duly installed can maintain a suit to recover the property for its benefit from trespassers (*o*).

The hereditary trusteeship of a religious institution constitutes "property" within the ambit of sec. 7 of the Guardian and Wards Act, 1890 (*p*).

*Dharmakarta.*—A dharmakarta is no more than a manager, and his rights, apart perhaps from the question of personal support, are never higher than those of a mere trustee; in this respect he differs from a shebait or the head of a *math*. Those functionaries have a much higher right with larger powers of disposal and administration (*q*). Reference may be made to the recent Full Bench decision of the Madras High Court (*q*1).

*Office of hereditary trustee.*—The position of a hereditary trustee of a religious or charitable endowment or institution is not in any way different from that of a Dharmakarta or a mere manager or custodian of any such endowment or institution. The only difference being that he succeeds to the office as of right and in accordance with the rules governing succession. His position cannot be equated with that of a shebait or the head of a math (*q*2).

*Maintenance of chela or disciple.*—Though the head of a *muth* is bound to maintain his disciples, and such maintenance is a legitimate expenditure of the *muth* property, yet no specific right in favour of individual *chelas* can be recognised apart from usage which can be made the subject matter of a suit. The remedy in such cases is the general remedy by way of administration of trust (*r*).

*Married Mohunts.*—As a rule the Mohunt is a celibate. There are certain exceptional cases where the Mohunt who presides over the Math is permitted to marry. There are instances of Maths in which the Mohuntship descends to a personal heir of the Mohunt (*s*).

*Personal property of Mahant.*—A Mahant of a Math may own and acquire personal property. Reference may be made to the undermentioned decision of the Supreme Court (*s*1).

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I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.P.C. 256; *Sethuramaswamiar* v. *Meruswamiar* (1918) 45 I.A. 1, 41 Mad. 296, 43 I.C. 806, ('17) A.P.C. 190; *Balaswamy* v. *Venkataswamy* (1917) 40 Mad. 745, 40 I.C. 531, ('18) A.M. 984.

(*m*) *Ananta Krishna Shastri* v. *Prayag Das* (1937) 1 Cal. 84.

(*n*) *Mahant Kesho Das* v. *Amar Dasji* (1935) 14 Pat. 379, 156 I.C. 1099, ('35) A.P. 111.

(*n*1) *Commissioner, Hindu Religious Endowments, Madras* v. *Swamiar* ('54) A.S.C. 282, (1954) S.C.R. 1005.

(*o*) *Mahadeo Prasad Singh* v. *Karia Bharti* (1935) 57 All. 159, 62 I.A. 47, 153 I.C. 1100, ('35) A.P.C. 44; *Sri Radha Krishna Asthapit Thakurdwara* v. *Mst. Maharaj Kunwar* (1937) 12 Luck. 331, 164 I.C. 919, ('37) A.O. 69.

(*p*) *Kanteti* v. *Venkateswara* ('50) A.A.P. 232.

(*q*) *Srinivasa Chariar* v. *Evalappa Mudaliar* (1922) 49 I.A. 237, 45 Mad. 565, 68 I.C. 1, ('22) A.P.C. 325.

(*q*1) *Manathunainatha* v. *Sundaralingam* ('71) A.M. 1 (F.B.).

(*q*2) *K. A. Samajam* v. *Commissioner of H.R. & C. Endowments* ('71) A.S.C. 891.

(*r*) *Ramamohan Das* v. *Basudeb* ('50) A. Orissa 28.

(*s*) *Tulasiram* v. *Ramprasanna* ('56) A. Orissa 41.

(*s*1) *Gurcharant Prasad* v. *Krishnanand* ('68) A.S.C. 1032.

**415. Alienation of debutter property.**—(1) As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable. It is competent, however, for the shebait or mohunt in charge of the property, in his capacity of shebait or mohunt and as manager of the property, to incur debts and borrow money on a mortgage of the property for the purpose of keeping up the religious worship, and for the benefit and preservation of the property. The power, however, to incur debts must be measured by an existing necessity for incurring them.

(2) The power of a shebait or a mohunt to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Persaud* v. *Mussamat Babooee* (1856) 6 M.I.A. 393. As held in that case, he has no power to alienate debutter property except "in a case of need or for the benefit of the estate." He is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity, grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage (*t*). Where, however, a grant of a permanent lease has been affirmed by judgment of the Court, the judgment will operate as *res judicata,* and the succeeding shebait or mohunt will be bound by it (*u*).

*Powers of shebait and mohunt.*—"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as shebait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them" (*v*).

It was at one time held that the *corpus* of endowed property could *not in any case* be sold or permanently alienated, though the *income* might be mortgaged for necessary purposes (*w*). But this view is no longer tenable. The temple itself cannot, however, be sold in execution of a decree against the mohunt or shebait (*x*).

A shebait cannot delegate his duties though he may appoint a sub-agent for the purpose of carrying out his duties in the usual course of business. A lease granted by a sub-agent without the knowledge of the shebait is not binding on the temple (*y*).

*Permanent lease.*—Except for unavoidable necessity, the head of a math cannot create any interest in the math property to enure *beyond his life* (*a*). A *permanent* lease of temple lands at a fixed rent, or rent-free for a premium, whether the lands are agricultural lands or a building site, is valid only if made for a necessity of the institution. It is not

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(*t*) *Prosunno Kumari* v. *Golab Chand* (1875) 2 I.A. 145, 14 Beng. L.R. 450 (Mortgage); *Abhiram* v. *Shyama Charan* (1909) 36 Cal. 1003, 36 I.A. 148, 4 I.C. 449 [lease]; *Palaniappa* v. *Deivasikamony* (1917) 44 I.A. 147, 40 Mad. 709, 39 I.C. 722, ('17) A.P.C. 33 [lease]; *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.P.C. 123 [lease]; *Konwar Doorganath* v. *Ram Chunder* (1877) 2 Cal. 341, 351, 4 I.A. 52, 62 [lease]; *Shibessouree* v. *Mothoornath* (1869) 13 M.I.A. 270 [lease]; *Ramachandra* v. *Kashinath* (1895) 19 Bom. 271; *Prosunno Kumar* v. *Saroda* (1895) 22 Cal. 989; *Sheo Shankar* v. *Ram Shewak* (1897) 24 Cal. 77; *Parsotam Gir* v. *Dat Gir* (1903) 25 All. 296; *Ram Chandra* v. *Ram Krishna* (1906) 33 Cal. 507; *Muthusamier* v. *Sreemethanithi* (1915) 38 Mad. 356, 19 I.C. 694, ('16) A.M. 332; *Mahanth Jai Krishna* v. *Bhukhal* (1921) 6 Pat. L.J. 638, 65 I.C. 290, ('22) A.P. 165 [lease]; *Ramchandarji Maharaj* v. *Lalji Singh* ('59) A.P. 305, 38 Pat. 49.

(*u*) (1869) 13 M.I.A. 270, *supra.*

(*v*) (1875) 14 Beng. L.R. 450, 459, 2 I.A. 145, 152, *supra; Pashupathinath Seal* v. *Pradyumnakumar Mallik* (1936) 63 Cal. 454.

(*w*) *Narayan* v. *Chintaman* (1881) 5 Bom. 393; *Collector of Thana* v. *Hari* (1882) 6 Bom. 546; *Nallayappa* v. *Ambalavana* (1904) 27 Mad. 465.

(*x*) *Mukundji Maharaj* v. *Persotam Lalji* ('57) A.A. 77.

(*y*) *Shree Shree Gopal Shreedhar Mahadeb* v. *Shasheebhushan Sarkar* (1933) 60 Cal. 111, 142 I.C. 465, ('33) A.C. 109.

(*a*) *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.P.C. 123. *Deosthan* v. *Ramdayal* (1944) Nag. 51.

permissible by a local custom, or by a practice of the institution, to grant lands in that manner (*b*). In *Abhiram* v. *Shyama Charan* (*c*), where the question arose as to whether a permanent lease granted by a mohunt was valid, it was held that it was not, as there was no legal necessity for it. In the course of the judgment their Lordships of the Privy Council said: "The second question is whether . . . . the mohunt had power to grant a mokarrari pottah of the mouzah. It is well settled law that the power of the mohunt to alienate debutter property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity: *Prosunno Kumari Debya* v. *Golab Chand* (*d*). In the case of *Konwar Doorganath Roy* v. *Ram Chunder Sen* (*e*) a mokarrari pottah of debutter land, was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Shibessouree Debia* v. *Mothooranath Acharjo* (*f*), that *apart from such necessity* to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the mohunt. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor."

*Legal necessity.*—In *Prosunno Kumari* v. *Golab Chand* (*g*) their Lordships of the Privy Council said: "The power, however [of a shebait], to incur debts must be measured by the *existing* necessity for incurring them." In that case it was found that the shebait was a man of profligate habits, and that he, having spent the income of the debutter property on his own pleasures, borrowed Rs. 4,000 to defray the expenses of the worship of the idol, and mortgaged the property as security for the advance. In a suit to enforce the mortgage a decree was passed for the mortgagee providing for the realisation of the loan out of the profits of the mortgaged property. In a suit by the successor to set aside the decree, it was held that the debts having been contracted for legal necessity, the decree was binding upon the successor in office, and that decision was confirmed by the Judicial Committee. The principle of that decision was applied by the Judicial Committee in the later case of *Niladri Sahu* v. *Mahant Chaturbhuj Das* (*h*). In that case the mahant of a math borrowed money at 2 per cent per mensem mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the math and in part for the ordinary expenses of the worship. Afterwards he mortgaged certain of the math properties at one per cent. per mensem in order to discharge the loan at two per cent. per mensem which was an accumulating burden upon the endowment. In a suit to enforce the mortgage it was held that the mortgage was for legal necessity so as to be within the power of the mahant, even if the original loans were incurred recklessly and not for the benefit of the math, which, however, was not shown to be the case. In the course of the judgment their Lordships said: "The importance of this case in its application to the present consists in this, that it was the immediate not the remote cause, *the causa causans* of the borrowing which has to be considered. The immediate cause of the borrowing was the math's need of money to carry on and pay for its services. The remote cause of the math's need was due to the profligate expenditure of the shebait. It would have been no answer to the creditor's suit to say: Your money was only borrowed because the income of the math was spent, by a profligate shebait, and there was no money available to carry on the services of the math. So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound, and liable to fail, which has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which the earlier loans were made imposed upon him? It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case above mentioned applied to this case." The principle was applied by the Supreme Court where a mahant had borrowed money to meet legal expenses of litigation against a trespasser claiming hostile title against the math and had executed a mortgage and subsequently a sale of math property (*hh*).

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(*b*) *Palaniappa* v. *Deivasikamony* (1917) 44 I.A. 147, 40 Mad. 709, 39 I.C. 722, ('17) A.P.C. 33; *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326; *Srimath Daivasikhamani* v. *Periyanan Chetti* (1936) 63 I.A. 261, 59 Mad. 809, 38 Bom. L.R. 702, 162 I.C. 465, ('36) A.P.C. 183.

(*c*) (1909) 36 Cal. 1003, 36 I.A. 148, 165, 4 I.C. 44.

(*d*) (1875) 2 I.A. 145, 14 Beng. L.R. 450.

(*e*) (1877) 2 Cal. 341, 4 I.A. 52.

(*f*) (1869) 13 M.I.A. 270.

(*g*) (1875) 2 I.A. 145, 151-152, 14 Beng. L.R. 450 [mortgage].

(*h*) (1926) 53 I.A. 253, 6 Pat. 139, 98 I.C. 576, ('26) A.P.C. 112; *Laxmi Narasingha Swami* v. *Patta Sahuani* ('57) A. Oudh. 86.

(*hh*) *Biram Prakash* v. *Narendra Dass* ('66) A.S.C. 1011.

Though a mohunt has agreed in a suit to the validity of an alienation made without legal necessity, his successor is not bound by such agreement and it cannot prevent an investigation into the original nature of the transaction (*i*).

Constructing pakka buildings for the accommodation of visitors to a math is a legal necessity (*j*). So too is the rebuilding of a dining hall for feeding visitors (*k*).

*"For the benefit of the estate."*—The phrase "benefit of the estate," as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment, cannot be precisely defined but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances (*l*). See § 233A, where this subject is fully discussed.

**415A. Burden of proof of necessity.**—(1) Where an alienation is made of debutter property, the burden lies on the alienee to prove *either* that there was a legal necessity in fact, or that he made proper and *bona fide* enquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity. An order of Court giving a trustee or shebait leave to mortgage the trust property on the ground of necessity may be relied on by the mortgagee as *prima facie* evidence of his having made due and proper enquiries as to the necessity. Such an order cannot be questioned on the ground of defect of procedure or incorrect exercise of jurisdiction (*m*). In fact, the rules as to burden of proof in the case of an alienee from a shebait or mohunt are the same as those which apply to the case of an alienee from the manager for an infant heir (*n*). Those rules are set forth in §§ 182 and 244. The notes to § 243 may also be referred to as throwing further light on the subject. Where only a portion of the loan is proved to have been applied to purposes of necessity, the rule laid down in § 245 applies (*o*).

(2) Where the validity of a permanent lease granted by a shebait comes in question a long time after the grant so that it is not possible to ascertain what were the circumstances in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor (*p*).

**415B. Who can maintain suit.**—In § 413 reference has already been made to the right of a *shebait* and a *mohunt* to bring a suit for the protection of the property of a devasthanam, temple or math. It is also well-established that a *person* who has been *in de facto possession and management* of math properties has sufficient interest to maintain a suit for the protection of the interest of the public trust. Such a person can maintain a suit for the benefit of the math (*p*1).

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(*i*) *Mahanth Ramdhan Puri* v. *Mst. Parbati Kuer* (1937) 16 Pat. 476, 171 I.C. 457, ('37) A.P. 519.

(*j*) *Niladri Sahu* v. *Mahant Chaturbhuj Das* (1926) 53 I.A. 253, 267, 6 Pat. 139, 98 I.C. 576, ('26) A.P.C. 112.

(*k*) *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 50 Mad. 497, 101 I.C. 545, ('27) A.P.C. 131.

(*l*) *Palaniappa* v. *Deivasikamony* (1917) 44 I.A. 147, 155, 40 Mad. 709, 718, 39 I.C. 722, ('17) A.P.C. 33.

(*m*) *Pashupathinath Seal* v. *Pradyumnakumar Mallik* (1936) 63 Cal. 454.

(*n*) *Konwar Doorganath* v. *Ram Chunder* (1877) 2 Cal. 341, 351-352, 4 I.A. 52, 62-64; *Murugesam* v. *Manickavasaka* (1917) 44 I.A. 98, 40 Mad. 402, 39 I.C. 659, ('17) A.P.C. 6; *Baidyanath* v. *Kunja Kumar* ('49) A.P. 75.

(*o*) 2 Cal. 341, pp. 353-354, *supra*.

(*p*) *Bawa Magniram* v. *Kasturbhai* (1922) 49 I.A. 54, 46 Bom. 481, 66 I.C. 162, ('22) A.P.C. 163 [lease impeached after 100 years].

(*p*1) *Mahanth Ram Charan Das* v. *Naurangi Lal* (1933) 60 I.A. 124, 126; *Mahadeo Prasad Singh* v. *Keria Bharti* 62 I.A. 47; *Mahant Ram Sarup Das* v. *Lakshmi Ojha* (1957) 36 Pat. 1022. But if he claims to sue as a shebait he must make out that basis of his claim *Chamelibai* v. *Ramchandrajee* ('65) A.M.P. 167.

**416. Creditor's suit for money lent for legal necessity.**—(1) Where a shebait or mohunt contracts a debt for legal necessity, the creditor is entitled to a decree against him providing for the payment of the decretal amount out of the profits of the debutter property even if no charge was created on the property to secure the loan. After the death of the debtor, the creditor is entitled to a similar decree against his successor (*q*).

(2) In a case where the loan was made for legal necessity, the proper decree to be passed in a creditor's suit, whether the loan be secured or unsecured, and whether the suit is brought against the debtor or his successor, is one directing the defendant to pay the decretal amount within a fixed period, and directing further that if the amount is not paid within that period, a receiver shall be appointed to realise the rents and profits of the debutter property and the proceeds from offerings, etc., and after payment of all expenses connected with the institution and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the shebait or mohunt, the balance shall be applied in discharge of the plaintiff's debt until such debtor has been paid off (*r*).

**417. Decree against shebait or mohunt, when binding on successor.**—It being competent to a shebait or mohunt to borrow money for necessary purposes, it follows that judgments obtained aginst a shebait or mohunt in respect of debts so incurred are binding upon his successors who form a continuing representation of the debutter or endowed property. But before applying the principle of *res judicata* to such judgments, the Court should be satisfied that the judgments relied upon were not obtained by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them (*s*). If the decree is based on a compromise, the Courts should be satisfied that the compromise was entered into *bona fide* in the interest of the temple or math (*t*). See the Code of Civil Procedure, 1908, sec. 11, Expln. VI.

**418. Devolution of office of mohunt.**—(1) The succession to the office of mohunt depends on the usage of each particular math. As observed by their Lordships of the Privy Council, "the only law as to mohunts and their office, functions and duties, is to be found in custom and practice, which is to be proved by testimony." The custom that prevails in the majority of cases is that the mohunt nominates his successor by appointment during his lifetime or by will. Where there is no such custom, or where no nomination has been made, the usage of some institutions is to have a successor appointed by a system of election by all the mohunts of the sect in the neighbourhood. In some cases, the succession depends upon election by the disciples and fol-

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(*q*) *Shankar* v. *Venkapa* (1885) 9 Bom. 422; *Sree Sree Iswar Gopal Jiew* v. *Pratapmal* (1951) A.S.C. 214 affirming *Pratap Mull* v. *Iswar Gopal Jiew*, 48 C.W.N. 172; *Srimath Daivasikamani* v. *Noor Mahomed* (1908) 31 Mad. 47; *Lakshmindrathirtha* v. *Raghavendra* (1920) 43 Mad. 795, 59 I.C. 287, ('20) A.M. 678; *Sundaresan* v. *Viswanada* (1922) 45 Mad. 703, 72 I.C. 103, ('22) A.M. 402; *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 230 (argument of counsel), 50 Mad. 497, 101 I.C. 545, ('27) A.P.C. 131.

(*r*) *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 50 Mad. 497, 101 I.C. 545, ('27) A.P.C. 131; *Niladri Sahu* v. *Mahant Chaturbhuj Das* (1926) 53 I.A. 253, 6 Pat. 139, 98 I.C. 576, ('26) A.P.C. 112.

(*s*) *Prosunno Kumari* v. *Golab* (1875) 14 Beng. L.R. 450, 2 I.A. 145.

(*t*) *Manikka* v. *Balagopalakrishna* (1906) 29 Mad. 553.

lowers of the math (*u*). But the appointment as a general rule is to be made from among the disciples of the deceased mahant and failing disciples from among his spiritual kindred (*v*). Where mohant has the power to appoint his own successor, he cannot delegate or transfer that power to a mohunt of a neighbouring math or to any other person (*w*).

(2) It is now well established that religious offices can be hereditary and that the right to such an office is in the nature of property. In *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar* (*x*) the Supreme Court reiterated and extended the rule to the office of a Mohunt.

(3) *Partition.*—The headship of a math is not a matter of partition (*y*); nor is the property of the math (*z*).

In the case of a maurasi math, the senior chela succeeds *a fortiori* in the absence of a valid nomination by the reigning Mohunt (*a*). The mohunt can cancel nomination of a chela to become successor made in a will by another will (*a*1). As to succession to Turki Asthal see the undermentioned case (*a*2).

Where the appointment of a successor is not made *bona fide* in the interests of the math, but in furtherance of the interests of the appointor, the appointment is invalid (*b*). Similarly, a collusive appointment is not valid (*c*).

Where the head of a math designates his successor, but dies before the latter can be formally initiated, the appointment is nevertheless valid (*d*).

When the usage in a math consisting of several asthals has been to have only one mohunt, a separation of the office, it would seem, is improper, unless there are special circumstances justifying it (*e*).

**419. Devolution of office of shebait.**—(1) The devolution of the office of shebait depends on the terms of the deed or will by which it is created. Where there is no provision in the deed or will as to the succession or where the mode of succession prescribed in the deed or will comes to an end, the title to the property or to the management and control of the property as the case may be, follows the ordinary rules of inheritance according to Hindu law; in other words it follows the line of inheritance from the founder and passes to his heirs (*f*), unless there has been some usage or course of dealing

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(*u*) *Gredharee Doss* v. *Nundokissore Doss* (1867) 11 M.I.A. 405, 428; *Genda Puri* v. *Chatar Puri* (1887) 9 All. 1, 13 I.A. 100; *Ramalingam* v. *Vythilingam* (1893) 16 Mad. 490, 20 I.A. 150; *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.P.C. 256; *Lahar Puri* v. *Puran Nath* (1915) 42 I.A. 115, 37 All. 298, 29 I.C. 724, ('15) A.P.C. 4; *Bhagaban* v. *Ram Prapanna* (1895) 22 Cal. 843 [P.C.]: *Madho Das* v. *Kamta Das* (1878) 1 All. 539; *Vidyapurna* v. *Vidyanidhi* (1904) 27 Mad. 435; *Trimbakpuri* v. *Ganga Bai* (1887) 11 Bom. 514; *Bishambar Das* v. *Mst. Phulgari* (1930) 11 Lah. 673, 125 I.C. 621, ('30) A.L. 715; *Premanand Bharaty* v. *Yogendra Bharaty* (1965) Ker. L.T. 824.

(*v*) *Sital Das* v. *Sant Ram* ('54) A.S.C. 606.

(*w*) *Mahanath Ramji* v. *Lachhu* (1902) 7 C.W.N. 145.

(*x*) (1954) S.C.R. 1005, ('54) A.S.C. 282. Also see *Raj Kali Kuer* v. *Ram Rattan Pandey* (1955) 2 S.C.R. 186, ('55) A.S.C. 493.

(*y*) *Sethuramaswamiar* v. *Meruswamiar* (1918) 45 I.A. 1, 9, 41 Mad. 296, 305, 43 I.C. 803, ('17) A.P.C. 190.

(*z*) *Gobinda* v. *Ram Charan Das* (1925) 52 Cal. 748, 89 I.C. 804, ('25) A.C. 1107.

(*a*) (1925) 52 Cal. 748, 89 I.C. 804, ('25) A.C. 1107, *supra.*

(*a*1) *Ramaprapanna* v. *Sudarsan* ('61) A. Orissa 137.

(*a*2) *Girjanand* v. *Bhagwan* ('67) A.P. 101.

(*b*) *Ramalingam* v. *Vythilingam* (1893) 20 I.A. 150, 16 Mad. 490; *Nataraja* v. *Kailasam,* (1921) 48 I.A. 1, 44 Mad. 283, 57 I.C. 564, ('21) A.P.C. 84.

(*c*) *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.P.C. 256.

(*d*) *Krishnagiri* v. *Shridhar* (1922) 46 Bom. 655, 67 I.C. 129, ('22) A.B. 202.

(*e*) *Ram Charan* v. *Gobinda* (1928) 56 I.A. 104, 56 Cal. 894, 114 I.C. 571, ('29) A.P.C. 65.

(*f*) *Chokalinga Sethurayar* v. *Arumanayakam* ('69) A.S.C. 569; *Ganesh Chunder Dhur* v. *Lal Behary Dhur* (1936) 63 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, (36) A.P.C. 318; *Bhaba Tarini Debi* v. *Asha Lata Debi* (1943) 2 Cal. 137, 207 I.C. 377, ('43) A.P.C. 89; *Surendra Narayan Sarbadhi-*

which points to a different mode of devolution (*g*), e.g., devolution on a single heir (*h*). This rule applies also where the right of nomination is given to a committee, but the committee has ceased to exist (*i*). But this rule cannot be applied so as to vest the shebaitship in persons who, according to the usages of the worship, cannot perform the rites of the office (*j*).

There is no power in a shebait to relinquish his right so as to exclude his heirs where under the terms of the endowment the right of shebaitship is inherited by heirs in direct line (*j*1).

(2) On the view that *Shebaiti* is property, the Supreme Court in *Angurbala* v. *Debobrata* (*k*) recognised the right of a female to succeed to the religious office of Shebaitship, where the question for consideration was as to the applicability of the Hindu Women's Right to Property Act, 1937. But while the right to such office is property, it involves also substantial elements of duty. In the above case it was said: "both the elements of office and property, of duties and personal interest are blended together (in such offices) and neither can be detached from the other". In respect of such offices especially where they are attached to public institutions, the duties are to be regarded as primary and that the rights and emoluments are only appurtenant to the duties (*l*).

(3) When the office has become vested by descent in more than one person, it is lawful for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence (*m*). If the parties do not agree, then, if the right to worship carries with it the right to receive offerings, any one of them may sue for a division of the right just as he may sue for partition of the joint family property, and to have periods fixed during which he may exercise the right. Such a right is "property" liable to partition, and the joint owners are entitled to perform the worship in turn (*n*). But if the right to worship does not carry with it the right to receive offerings, a suit for a division of the right does not lie. In such a case the parties are bare managers or trustees, and the debutter property must be managed by them

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*kari* v. *Bhola Nath Ray Chaudhuri* (1944) 1 Cal. 139. Also see *Manathunainatha* v. *Sundaralingam* ('71) A.M. 1 (F.B.). Reference may also be made to *Venugopala* v. *Krishnaswamy* ('71) A.M. 262 [Right of heir of founder].

(*g*) *Gossami Sri Gridhariji* v. *Romanlalji* (1890) 17 Cal. 3, 16 I.A. 137; *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1905) 32 Cal. 129, 31 I.A. 203; *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69; *Janoki* v. *Gopal* (1883) 9 Cal. 766, 10 I.A. 32; *Rajah Vurmah* v. *Ravi Vurmah* (1876) 1 Mad. 235, 4 I.A. 76; *Rajah Muttu* v. *Perianayagum* (1874) 1 I.A. 209; *Mohan* v. *Madhsudan* (1910) 32 All. 461, 6 I.C. 77; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663, (1918) 45 I.A. 1, 41 Mad. 296, 43 I.C. 806, ('17) A.P.C. 190, *supra*; *Sheoratan* v. *Ram Pargash* (1896) 18 All. 227; *Chandrika Bakhsh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373; *Gulab Dass* v. *Manohar Dass* (1938) 13 Luck. 577, 171 I.C. 81, ('37) A.O. 490; *Mst. Anuragi Kuer* v. *Paramanand Pathak* (1939) Pat. 171; *Jogendra Nath* v. *Charan Das* ('58) A. Orissa 160.

(*h*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928, ('26) A.M. 84.

(*i*) *Dhram Narain* v. *Suraj Narain* (1940) All. 815, 193 I.C. 697, ('41) A.A. 1.

(*j*) *Mohan Lalji* v. *Gordhan Lalji* (1913) 35 All. 283, 40 I.A. 97, 19 I.C. 337; *Sri Sankareswar* v. *Bhagbati* ('49) AP. 193.

(*j*1) *Janki Raman* v. *Koshalyanandan* ('61) A.P. 293.

(*k*) (1951) S.C.R. 1125, (1952) 2 Cal. 209, ('51) A.S.C. 293.

(*l*) *Raj Kali Kuer* v. *Ram Rattan Pandey* (1955) 2 S.C.R. 186, 189, 190, ('55) A.S.C. 493.

(*m*) *Ramanathan* v. *Murugappa* (1906) 29 Mad. 283, 33 I.A. 139; *Meenakshi* v. *Somasundaram* (1921) 44 Mad. 205, 59 I.C. 464, ('21) A.M. 388.

(*n*) *Mitta* v. *Neerunjun* (1874) 14 Beng. L.R. 166, approved in *Pramatha Nath* v. *Pradyumna Kumar* (1925) 52 I.A. 245, 52 Cal. 809, 87 I.C. 305, ('25) A.P.C. 139; *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298; *Limba* v. *Rama* (1889) 13 Bom. 548; *Trimbak* v. *Lakshman* (1896) 20 Bom. 495; *Sethuramaswamiar* v. *Meruswamiar* (1911) 34 Mad. 470, 4 I.C. 76; *Seshacharyulu* v. *Venkatacharyulu* ('57) A. Andh. Pra. 876.

jointly (*o*). But a civil court is competent to entertain a suit the object of which is to have a scheme framed for the administration of a private Debutter. If the deity is interested in the result of the suit the deity will be made a party and, in cases in which the interests, of the Shebaits are adverse to those of the deity, it will have to be represented by a disinterested person; but if the only dispute relates to the right of management and the deity's interests will not be affected by the adjustment of the individual rights of the shebaits the deity is not a necessary party (*p*). A worshipper has no unqualified right to sue for a declaration that certain property is debutter property of the idol; if the shebait is negligent or alienates the property in breach of trust either a prospective shebait or a member of the family (in case of a family endowment) may maintain the suit (*q*). But a suit can be brought by a person who has made large donations to a private Hindu temple against a pujari (*q*1). One of two shebaits cannot sue for his half share of the royalty due to the deity under a lease (*r*). If the parties are members of a joint family governed by the Mitakshara law, the senior male member is entitled to manage the property; the other members are not entitled to demand the exercise of the right by rotation (*s*).

The founder himself may appoint joint shebaits (*t*). In *Pramatha Nath* v. *Pradyumma* (*u*), the question arose whether one of three brothers, who was entitled under an arrangement between themselves to his annual turn of worship, had the right to remove the idol to his own house during his turn of worship. The Judicial Committee held that the idol could not be regarded as a mere chattel, and that the will of the idol as to its location must be respected, and the suit was remanded in order that the idol might appear by a disinterested next friend to be appointed by the Court.

It may sometimes become necessary to distinguish between a shebaitship and bare managership (*v*). Distinction has also to be drawn at times between a shebait and a pujari (*w*).

(4) *Nomination by will.*—There is a conflict of decisions as to whether a shebait can nominate his successor by will. It has been held by the High Court of Calcutta that he cannot, unless there be a usage justifying a nomination by will (*x*). On the other hand it has been held by the High Court of Bombay, that a valid devise may be made of the office of shebait, provided the devisee is a person standing in the line of succession, and is not disqualified by personal unfitness (*y*). The High Court of Allahabad has taken much the same view as the Calcutta High Court (*z*). In view, however, of the law now wellsettled that shebaitship is property and not a mere office, shebaitship can be the subject matter of a disposition by will (*z*1). In any case it is clear that where a person is appointed shebait *with a power of appoint-*

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(*o*) *Sri Raman* v. *Sri Gopal* (1897) 19 All. 428

(*p*) *Bimal Krishna Ghosh* v. *Jnanendra Krishna Ghosh* (1937) 2 Cal. 105, 172 I.C. 161, ('37) A.C. 338.

(*q*) *Sashi Kumari Debi* v. *Dhirendra Kishore Ray* (1941) 1 Cal. 309, 196 I.C. 241, ('41) A.C. 248.

(*q*1) *Ramchand* v. *Thakur Janki Ballabhji Maharaj* ('70) A.S.C. 532.

(*r*) *Baraboni Coal Concern Ltd.* v. *Gokulananda Mohanta Thakur* (1934) 61 I.A. 35, 61 Cal. 313, 147 I.C. 884, ('34) A.P.C. 58.

(*s*) *Thandayaroya* v. *Shunmugam* (1909) 32 Mad. 167, 2 I.C. 314.

(*t*) *Asita Mohan* v. *Nirode Mohan* (1920) 47 I.A. 140, 24 C.W.N. 794, ('20) A.P.C. 129.

(*u*) (1925) 52 I.A. 245, 52 Cal. 809, 87 I.C. 305, ('25) A.P.C. 139.

(*v*) *Sri Kishan* v. *Jagannathji* (1953) 2 All. 822, ('53) A.A. 289.

(*w*) *Dharam Karan* v. *Shahzad Kunwar* (1953) 2 All. 631, ('53) A.A. 359.

(*x*) *Rajeshwar* v. *Gopeshwar* (1908) 35 Cal. 226.

(*y*) *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298.

(*z*) *Chandranath* v. *Jadabendra* (1906) 28 All. 689; *Goswami Puran Lalji* v. *Ras Bihari Lal* (1922) 44 All. 590, 67 I.C. 328, ('22) A.A. 285.

(*z*1) *Banku B. Das* v. *Kashi N. Das.* ('63) A.C. 85. Reference may be made to *Sovabati Dassi* v. *Kashi Nath* ('72) A.C. 95 for an analysis of the case-law on the point.

*ing his successor*, he may nominate his successor by an act *inter vivos* or by will. If he dies without exercising the power, the office reverts to the founder or his heirs (*a*). It is not competent for a shebait by his own act to alter the line of succession to the office of the Shebait. But if he makes a fresh grant to the existing endowment making a new line of shebaits an essential condition to the grant, the grant may be rejected on behalf of the deity but if it is accepted it must be accepted subject to the condition (*b*).

**419A. Devolution of office of Pujari.**—Though a female is personally disqualified from officiating as a Pujari for the shastraically installed and consecrated idols in the temples, the usage of a female succeeding to a priestly office and getting the same performed through a competent deputy has been well-recognised and it is not contrary to textual Hindu law nor opposed to public policy. In *Raj Kali Kuer* v. *Ram Rattan Pandey* (*c*) the Supreme Court upheld such usage. Subject to the proper and efficient discharge of the duties of the office being safeguarded by appropriate action when necessary, a Hindu female has a right to succeed to the hereditary priestly office of a Pujari and Panda held by her husband and to get the duties of the office performed by a substitute except in cases where usage to the contrary is pleaded and established (*c*).

**420. Transfer of right of management.**—(1) *Sale.*—A sale by a shebait or mohunt of his right to manage debutter property is void, even though the transfer may be coupled with an obligation to manage the property in conformity with the trust attached thereto (*d*). Nor can the right be sold in execution of a decree against him (*e*). Even if a custom be proved which sanctions the sale of such a right, the Courts should refuse to recognize it, as being against public policy, especially where the sale is made to a stranger for the pecuniary benefit of the vendor. In *Rajah Vurmah* v. *Ravi Vurmah* (*f*), which was a case of a sale by the Urallers (managers) of a certain pagoda of their right to manage the pagoda, the Judicial Committee said: "Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."

(2) *Gift.*—It has been held in Bombay that it is competent to the shebait to renounce his right of management and transfer it without receiving any consideration to a person standing in the line of succession, provided the

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(*a*) *Annasami* v. *Ramakrishna* (1901) 24 Mad. 219; *Ranjit Singh* v. *Jagannath* (1886) 12 Cal. 375; *Jagannath* v. *Runjit Singh* (1898) 25 Cal. 354; *Radha Nath Mukerji* v. *Shaktipado Mukherji* (1936) 58 All. 1053, 164 I.C. 595, ('36) A.A. 624.

(*b*) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 763, ('41) A.C. 562.

(*c*) (1955) 2 S.C.R. 186, (1955) Pat. 530, ('55) A.S.C. 493.

(*d*) *Rajah Vurmah* v. *Ravi Vurmah* (1876) 1 Mad. 235, 4 I.A. 76; *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69; *Kuppa* v. *Dorasami* (1882) 6 Mad. 76; *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326; *Biranchi Narayan* v. *Biranchi Narayan* ('53) A. Orissa 333.

(*e*) *Durga* v. *Chanchal* (1881) 4 All. 81; *Ganesh* v. *Shankar* (1886) 10 Bom. 395.

(*f*) (1876) 1 Mad. 235, 4 I.A. 76, 84-85.

transferee is not disqualified by personal unfitness (*g*). But a transfer by way of a sale to a divided agnatic relation of the transferor will not be upheld. In Bombay the restrictions on alienations of offices are less strictly enforced when the alienee happens to be a member of the family. In the Madras Presidency greater objection would seem to have prevailed in the matter (*h*). The High Court of Andhra Pradesh has expressed agreement with the Bombay view (*i*). Where there are several joint shebaits, they may renounce their right in favour of any one of them, provided the arrangement is for the benefit of the endowment (*j*). The transfer of a shebait right or of the idol with the endowed property is invalid in law (*k*). A gift of the right of management made to a *stranger* is not valid, unless it is sanctioned by custom (*l*). A *bona fide* compromise by the plaintiff in a suit for the office of shebait relinquishing the claim in favour of the person in possession of the office who would be entitled to it after the plaintiff, is valid (*m*).

As to transfer of right to receive offerings, see note to § 422.

*Removal of image from one temple to another.*—The manager of a public temple has no right to remove the image from the temple, in which it is installed and install it in a new building especially when the removal is objected to by a majority of the worshippers (*n*).

**421. Rights of Founder.**—(1) According to the Hindu law, when the worship of an idol has been founded, the shebaitship is held to be vested in the founder and his heirs, unless—

(a) he has disposed of it otherwise; or

(b) there has been some usage or course of dealing which points to a different mode of devolution (*o*) [§ 419].

This principle applies to private as well as public trusts (*p*). The founder may appoint another person to manage the trust on his behalf and when he does so he can supervise his actions and remove him if he misbehaves. But where the founder hands over all his rights to another and divests himself of every vestige of interest in the matter, he cannot subsequently sue for being restored to the right of management (*q*).

Every donor contributing at the time of foundation of a trust does not necessarily become a founder of the trust. It may be that in a particular case all the contributors of a trust fund become the founders of the trust itself, but the question when a contributor would become in law a joint founder of the trust would depend not merely upon the fact of his contribution but also upon the surrounding circumstances and the subsequent conduct of the parties (*q*1).

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(*g*) *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298, 300. Also see *Hanmappa* v. *Hanmantgauda* (1947) Bom. 789, ('48) A.B. 233.

(*h*) Reference may be made to *Sheshacharyulu* v. *Venkatacharyulu* ('57) A. Andh. Pra. 876 where the Madras decisions are reviewed.

(*i*) *Sheshacharyulu* v. *Venkatacharyulu, supra.*

(*j*) *Nirad* v. *Shibadas* (1909) 36 Cal. 975, 3 I.C. 76; *Narayana* v. *Ranga* (1892) 15 Mad. 183. Also see *Bameswar Bamdev* v. *Anath Nath* ('51) A.C. 490.

(*k*) *Surendra Narayan Sarbadhikari* v. *Bhola Nath Ray Chaudhuri* (1944) 1 Cal. 139; *Bairagidas* v. *Udayachandra* ('65) A. Orissa 201 (gift).

(*l*) *Rajaram* v. *Ganesh* (1899) 23 Bom. 131; *Ukoor Doss* v. *Chunder* (1865) 3 W.R. 152.

(*m*) *Srimathi Sabitri Thakurain* v. *Mrs. Savi* (1933) 12 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

(*n*) *Hari* v. *Antaji* (1920) 44 Bom. 466, 56 I.C. 459, ('20) A.B. 67.

(*o*) *Gossami Sri Gridharji* v. *Romanlalji* (1890) 17 Cal. 3, 16 I.A. 137; *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1905) 32 Cal. 129, 31 I.A. 203; *Mohan Lalji* v. *Madhsudan* (1910) 32 All. 461, 6 I.C. 77; *Kali Krishna* v. *Makhan Lal* (1923) 50 Cal. 233, 72 I.C. 686, ('23) A.C. 160; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663; *Mst. Anuraji Kuer* v. *Parmanand Pathak* (1939) Pat. 171.

(*p*) *Prakash Chandra Nag* v. *Subodh Chandra Nag* (1937) 1 Cal. 515, 170 I.C. 290, ('37) A.C. 67.

(*q*) *Gangaram* v. *Dooboo* (1936) Nag. 111, ('36) A.N. 223.

(*q*1) *Thenappa Chettiar* v. *Karuppan Chettiar* ('68) A.S.C. 915.

(2) The ruling in *Tagore* v. *Tagore* (*r*), that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in terms which English law would designate estates tail, is applicable to an hereditary office and endowment as well as to other immovable property. A Hindu, therefore, cannot by gift or will direct that the office of shebait shall be held by his sons, grandsons and their male descendants in perpetuity (*s*). The right to the office of shebait is subject to the rules in §§ 372, 382 and 392 (*t*) above. These rules do not apply to the Dharmakarthaship of a temple, which is not a species of property like shebaitship, and therefore, where the founder provided that the office of trusteeship should be held by his descendants both in the male and the female line, it was held that the provision is valid (*u*).

As to the appointment as shebait of a person born after the death of the founder, see notes to § 372, "Exceptions to the rule."

(3) Where the founder has prescribed a line of succession of the office of shebait, but the succession to the office has entirely failed, the right of management reverts to the founder and his heirs (*v*). But the founder is not entitled to alter the line of succession or to interfere in the management, unless he has, by the deed of endowment, reserved the right to do so (*w*).

(4) Once a grant is made for religious purposes, it becomes irrevocable (*x*). The beneficial ownership cannot under any circumstances revert to the founder or his heirs. If the objects of the endowment are not carried out, the founder or his heirs may bring a suit to have the funds applied to their lawful purposes, but they cannot resume the grant (*y*). If the trust fails for want of objects, they may move the Court to apply the funds *cy-pres*, that is to say, to other objects as nearly as may be of a similar character (*z*).

Where a trust is made *inter vivos* for a charity which fails for illegality there is no scope for application of the doctrine of *cy-pres* unless a general charitable intent can be gathered from the document (*z*1).

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(*r*) (1872) I.A. Supp. 47, 9 Beng. L.R. 377.

(*s*) *Gananasambanda* v. *Velu* (1899) 27 I.A. 69, 23 Mad. 271; *Gopal Chunder* v. *Kartick Chunder* (1902) 29 Cal. 716 [P.C.]; *Chundrachoor Deo* v. *Bibhutibhushan Deva* (1944) 23 Pat. 763. Also see *Gokul Chand* v. *Gopi Nath* ('52) A.C. 705 and *Ralkishori Dassi* v. *Official Trustee* ('60) A.C. 235, 64 C.W.N. 646.

(*t*) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791; *Kandarpamohan Goswami* v. *Akshaychandra Basu* (1934) 61 Cal. 106, 150 I.C. 179, ('34) A.C. 379; *Ganesh Chunder Dhur* v. *Lal Behary Dhur* (1936) 63 I.A. 448, 38 Bom. L.R. 1250, 163 I.C. 347, ('36) A.P.C. 378.

(*u*) *Manathunainatha Desikar* v. *Gopala Chettiyar & Ors.* (1943) Mad. 858, ('44) A.M. 1.

(*v*) *Jai Bansi* v. *Chattar* (1870) 5 Beng. L.R. 181; *Hori Dasi* v. *Secretary of State* (1880) 5 Cal. 228; *Sheoratan* v. *Ram Pargash* (1896) 18 All. 227; *Jagannath* v. *Runjit Singh* (1898) 25 Cal. 354; *Gopal Chunder* v. *Kartick Chunder* (1902) 29 Cal. 716; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663; *Chaturbhuj Singh* v. *Sarada Charan Guha* (1932) 11 Pat. 701, 141 I.C. 157, ('33) A.P. 6; *Radha Nath Mukerji* v. *Shakthipada Mukherji* (1936) 58 All. 1053, 164 I.C. 595, ('36) A.A. 624; *Chandrika Bakhsh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373; *Gulab Dass* v. *Manohar Dass* (1938) 13 Luck. 577, 171 I.C. 81, ('37) A.O. 490; *Chundrachoor Deo* v. *Bibhutibhushan Deva* (1944) 23 Pat. 763.

(*w*) *Gaurikumari* v. *Ramanimoyi* (1923) 50 Cal. 197, 70 I.C. 175, ('23) A.C. 30; *Teertaruppa* v. *Soonderaikijien* (1851) Mad. S.D.A. p. 57; *Brindaban* v. *Sri Godamaji* (1937) All. 555, 165 I.C. 217, ('37) A.A. 394; *Narayan* v. *Bhuban Mohini*, 38 C.W.N. 15; *Radhika* v. *Amrita* ('47) A.C. 301, 52 C.W.N. 447.

(*x*) *Juggut Mohini* v. *Sokheemoney* (1871) 14 M.I.A. 289, 302.

(*y*) *Ram Narayan* v. *Ramoon* (1874) 23 W.R. 76; *Mohesh Chunder* v. *Koylash Chunder* (1869) 11 W.R. 443.

(*z*) *Mayor of Lyons* v. *Adv. Gen. of Bengal* (1876) 26 W.R. 1.

(*z*1) *Karuppannan Ambalam* v. *Trumalai Ambalam* ('62) A.M. 500.

Where there has been no permanent endowment but only a temporary arrangement it is not irrevocable (*a*).

The person providing the original endowment is the founder. But persons who subsequent to the foundation, furnish additional contributions, do not thereby become founders: their benefaction is regarded as merely an accretion to an existing foundation (*b*).

See the Code of Civil Procedure, 1908 ss. 92 and 93.

**422. Offerings.**—Offerings made to an idol belong to the idol as much as land dedicated to an idol, and not to the officiating priest, unless there be a custom or an express declaration by the founder to the contrary. Such offerings are intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities, and not to become the personal property of the priest (*c*). But there may be cases in which the offerings, though made to the idols, are received by certain persons and when they are so received independently of any obligation to render services they are alienable and attachable (*d*).

The right to receive offerings from pilgrims resorting to a temple or shrine is inalienable (*e*). By custom there can be hereditary priesthood in a family, and such right may be analogous to real property. The right to Yajman vritti is a right in property and is heritable and divisible (*f*).

**423. Removal of shebaits and mohunts—Scheme for management.**—The Courts have jurisdiction to deal with the managers of public Hindu temples, and, if necessary for the good of the religious endowment, to remove them from their position as managers (*g*). The Court may also remove a shebait of a private endowment for misconduct and direct him to render accounts for a certain period in its discretion. Though ordinarily all the shebaits must join in a suit on behalf of the idol when the suit is for the removal of a shebait for misconduct, this rule need not be followed. Such a suit by one of the shebaits is maintainable (*h*). But a shebait whether *de jure* or *de facto* must be a party to the suit before he can be removed (*i*). It is sufficient ground for removing a shebait from his office that in the exercise of his duties he has placed himself in a position, in which the Court thinks that he can no longer faithfully discharge the obligations of the office (*j*). A member of the interested community may sue in a representative capacity for rendition of accounts of the profits collected by the shebait but is not entitled to call upon the defendant to hand over the funds of the temple except on proof of gross mismanagement or misapplications of the funds (*k*).

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(*a*) (1932) 11 Pat. 701, 141 I.C. 157, ('33) A.P. 6, *supra*.

(*b*) *Appasami* v. *Nagappa* (1884) 7 Mad. 499; *Annasami* v. *Ramakrishna* (1901) 24 Mad. 219; *Gossami Sri Gridhariji* v. *Romanlalji* (1889) 16 I.A. 137, 147, 17 Cal. 3, 23; *Ananda Chandra* v. *Braja Lal* (1923) 50 Cal. 292, 301-302, 74 I.C. 793, ('23) A.C. 142.

(*c*) *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247, 265, affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50, 26 I.A. 199; *Girijanund* v. *Sailajanund* (1896) 23 Cal. 645; *Shibessouree* v. *Mothooranath* (1869) 13 M.I.A. 270, 273 [as to rents].

(*d*) *Nand Kumar Datt* v. *Ganesh Das* (1936) 58 All. 457, 159 I.C. 812, ('36) A.A. 131.

(*e*) *Puncha* v. *Bindeswari* (1916) 43 Cal. 28, 28 I.C. 675, ('16) A.C. 269.

(*f*) *Ghisibai* v. *Mangilal* ('53) M.B. 7; *Sidhe Nath* v. *Prem* ('72) A.A. 324.

(*g*) *Chintaman* v. *Dhondo* (1891) 15 Bom. 612; *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.P.C. 256; *Srinivasa* v. *Evalappa* (1922) 49 I.A. 237, 253-254, 45 Mad. 565, 583-585, 68 I.C. 1, ('22) A.P.C. 325 [concocting of accounts]; *Bhagwan Dass* v. *Jairam Dass* ('65) A. Punj. 260.

(*h*) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 763, ('41) A.C. 562.

(*i*) *Doongarsee* v. *Tirbhawan* (1947) All. 263.

(*j*) *Peary Mohan* v. *Manohar* (1921) 48 I.A. 258, 48 Cal. 1019, 62 I.C. 76, ('22) A.P.C. 235.

(*k*) *Phuttibai* v. *Shri Dev Mandir* (1942) Nag. 555, 202 I.C. 185, ('42) A.N. 105.

But a mere mistake on the part of the manager as to his true legal position or a mere laxity of management on his part not accompanied by any fraud or dishonest misappropriation, does not of necessity afford a ground for removing him from his post of manager, and entrusting it to new hands. In such a case, the Court may appoint a committee to supervise and control him, and, if necessary, frame a scheme for the management of the temple. It does not make any difference that the office is a hereditary office (*l*).

As to the framing of a scheme, see the Code of Civil Procedure, secs. 92 and 93. No scheme can be framed *under those sections* in the case of a *private* endowment (*m*).

Where a person claiming as his own what is really a public charity appoints a trustee to manage the property, the appointment is invalid (*n*).

**423A. Sadabartas, Tanks, Seats of Learning, Homes for disabled or destitutes.**—In a recent decision the Supreme Court (*nn*) held that a tank can be an object of charity and when a dedication is made in favour of a tank it can be considered as a "charitable institution". The Court, while referring to the statement of law in Mukerjee's standard work did not decide whether such an institution can also be considered as a juristic person.

"Though Mutts and temples are the most common forms of Hindu religious institutions, dedication for religious or charitable purposes need not necessarily take one of these forms and the maintenance of sadabartas, tanks, seats of learning and homes for the disabled or the destitutes and similar institutions are recognized by and were known to Hindu law and when maintained as public institutions, they must be taken to have a legal personality as a math or the deity in a temple has, and the persons in charge of the management would occupy a position of trust".

A school meant for imparting general education to the public would be a charitable institution and such an institution will be regarded as possessing a juristic personality and will be capable of holding property (*nnn*).

**424. Distinction between public and private endowments: Public and Private temples.**—(1) Religious endowments are either public or private. In a public endowment the dedication is for the use or benefit of the public. The essential distinction between a public and a private endowment is that in the former the beneficial interest is vested in an uncertain and a fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description; in a private endowment the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained. The fact that the fluctuating and uncertain body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would

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(*l*) *Annaji* v. *Narayan* (1897) 21 Bom. 556; *Damodar* v. *Bhogilal* (1898) 22 Bom. 493; *Tiruvengadath* v. *Srinivasa* (1899) 22 Mad. 361; *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247 affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50; *Prayag Dass* v. *Tirumala* (1900) 30 Mad. 138, 34 I.A. 78, in app. from 28 Mad. 319; *Thackersey* v. *Hurbhum* (1884) 8 Bom. 432; *Sivashankara* v. *Vadagiri* (1890) 13 Mad. 6; *Nelliappa* v. *Punnaivanam* (1927) 50 Mad. 567, 101 I.C. 420, ('27) A.M. 614.

(*m*) *Gopal Lal Sett* v. *Purna Chandra Basak* (1922) 49 I.A. 100, 49 Cal. 459, 67 I.C. 561, ('22) A.P.C. 253.

(*n*) *Vaidyanatha* v. *Swaminatha* (1924) 51 I.A. 282, 47 Mad. 884, 82 I.C. 804, ('24) A.P.C. 221.

(*nn*) *Venkatakrishna Rao* v. *Sub-Collector, Ongole* ('69) A.S.C. 563.

(*nnn*) *D.A.V. College* v. *S.N.A.S.H. School* ('72) A. Punj. & H. 245 (F.B.).

not make it a private endowment (*n*1). The essence of a public endowment consists in its being dedicated to the public; and in the absence of any document creating the endowment, long user is the material factor from which an inference of dedication may arise. Besides user by the public, conduct of the founder and his descendants is also relevant, and if they in fact held out the temple to be a public one a very strong presumption of dedication would arise (*o*). When property is set apart for the worship of a family god in which the public are not interested, the endowment is a private one (*p*). Where the main purpose of the endowment was the puja of deity established by the settlor in a house, and the surplus income was directed to be utilised for feeding the poor and helping students it was held that the trust was a private one and that all the trustees must join in its execution (*q*). In the Madras State "it is very unusual for a Hindu to construct a temple outside his dwelling house for private worship (*r*) and the general presumption is that temples in the Southern State are public temples unless the contrary is proved". There is no such presumption in Bengal. In Bombay question arose in some cases whether a temple in which the idol is worshipped by the Vaishnava devotees of the Vallabha cult is a private or public temple on the ground of dedication. It has been held that the historical origin of the temple, the rights exercised by the devotees in regard to the worship in the temple, the consciousness of the manager and the consciousness of the devotees themselves and similar other considerations have to be weighed in deciding the question. If it is shown that the rents and profits of any property are exclusively utilised for the purpose of public charity for a fairly long period, it may be possible to infer dedication of such property to public charity (*s*).

The question of dedication is a mixed question of law and fact. In an endowment in favour of the idol itself, proof of user by the public without interference is cogent evidence that the dedication was in favour of the public. Performance of *Pratishta,* which is a ceremony relating to the installation of an idol, may show that there was dedication to the public. The Court will consider all the aspects of the matter (*t*). When user by the public generally to the extent to which there is a worshipping public in the locality is established, it would be reasonable to presume that the user by the public was as of right, unless there are circumstances clearly suggesting that the user must have been permissive, or that the authorities in charge of the temple have exercised such arbitrary power of exclusion that it can only be ascribed to the private character of the institution (*u*). As mentioned above the Court will take into consideration all the aspects of the matter and the

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(*n*1) *Ram Saroop Dasji* v. *S. P. Sahi* ('59) S.C. 951; *State of Bihar* v. *Charusila Dasi* ('59) S.C. 1002. *Deoki Nandan* v. *Murlidhar* ('57) S.C. 133; *Nabi Shirazi* v. *Province of Bengal* (1942) 1 Cal. 211, 228.

(*o*) *Pujari Lakshmana* v. *Subramania,* 29 C.W.N. 112 (P.C.)

(*p*) Reference may be made to *Bihar State Board* v. *Palat Lal* ('72) A.S.C. 57 [Bihar Hindu Religious Trusts Act, 1950]. *Jugalkishore* v. *Lakshmandas* (1899) 23 Bom. 659.

(*q*) *Prasaddas Pal* v. *Jagannath Pal* (1933) 60 Cal. 538, 144 I.C. 894, ('33) A.C. 519. See, however, *State of Bihar* v. *Charusila Dasi* ('59) S.C. 1002.

(*r*) *Peesapati* v. *Kanduri* (1915) M.W.N. 842; *Nallakaruppan* v. *Commissioner H.R. & C. Endowments* ('66) A.M. 99.

(*s*) *Ranchhoddas* v. *Mahalaxmi Vahuji* (1952) 54 Bom. L.R. 982. Affirmed in appeal *Gosvami Shri Mahalaxmi Vahuji* v. *Ranchhoddas* ('70) A.S.C. 2025. Also see *Sri Ram* v. *Prabhu Dayal* ('72) A. Raj. 180.

(*t*) *Deoki Nandan* v. *Murlidhar* ('57) A.S.C. 133. The question at times becomes somewhat difficult; *Sarat Chandra* v. *Rabindra Nath* ('57) A.C. 11.

(*u*) *Narayan* v. *Gopal* ('60) S.C. 100.

pertinent circumstances. The grants and gifts made to the temple would be pertinent to the enquiry. The manner in which accounts of the temple have been maintained would also be a pertinent factor (*u*1). Where evidence in regard to the foundation of a temple is not clearly available the Court will consider all these aspects as also certain other facts which are treated as relevant. Is the temple built in such an imposing manner that it may *prima facie* appear to be a public temple? Are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple? Are their offerings accepted as a matter of right? The participation of the members of the public in the *darshan* in the temple and in the daily acts of worship or in the celebrations of festival occasions may be very important factors to consider in determining the character of the temple (*u*2). In making the requisite induction the Court will also address to the questions such as: Are the temple expenses met from contributions made by the public? Whether the *sevas* and the *utsavas* conducted in the temple are those usually conducted in public temples? Have the management as well as the devotees been treating the temple as a public temple (*u*3)? A temple which began as a private temple may, in course of time, become a public temple by express or implied dedication (*v*). If a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity then there must be proof to show that it is being used as a public temple (*v*1)'.

Important legal consequences flow from the distinction between private and public endowments and they have a material bearing on the question as to what remedies are open to the parties in cases where there is maladministration of the endowment by the manager or trustee. A private endowment lies outside the purview of the Religious Endowments Act of 1863, and the Charitable and Religious Trust Act of 1920, and what is more, sec. 92 of the C.P. Code cannot be invoked unless the endowment is of public character.

In a recent decision (*v*2) the Supreme Court pointed out that the Civil Courts have jurisdiction to frame a scheme for the management of a temple even though there is a private and not a public trust. Section 92 of the C.P. Code would not apply to a suit in respect of the temple. Any person who has made large donations for the maintenance of the temple has a substantial interest to maintain a suit on behalf of the deity to prevent mismanagement and protect the property of the temple. The pujari who had set up a personal title to the temple properties and had converted the properties to his own use was removed from management and possession and appropriate directions were given by the Court.

(2) According to English law the beneficiaries in a private trust if they are *sui juris* and of one mind can at their option modify or put an end to the trust (*w*). In *Konwar Doorganath* v. *Ram Chunder* (*x*), their Lordships of the Privy Counsel observed: "Where the temple is a public temple the dedi-

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(*u*1) *Ranchhoddas* v. *Mahalaxmi Vahuji supra,* affirmed in appeal, see f.n. (*u*3) below.

(*u*2) *Tilkayat Shri Govindlalji* v. *State of Rajasthan* ('63) S.C. 1638, 1648.

(*u*3) *Goswami Shri Mahalaxmi Vahuji* v. *Ranchhoddas* ('70) A.S.C. 2025.

(*v*) *V. Mahadeva* v. *Commissioner, H.R.E.* ('56) A.M. 522; *Bala Krishna* v. *Ganesh Prasad* ('52) A. Orissa 203.

(*v*1) see f.n. (*u*3) above.

(*v*2) *Ramchand* v. *Jankiballabhji* ('70) A.S.C. 532; *Thenappa Chettiar* v. *Keruppan Chettiar* ('68) A.S.C. 915 (foundation for conducting certain pujas).

(*w*) Underhill on Trust and Trustees Act, 55.

(*x*) (1877) 2 Cal. 341, 4 I.A. 52, 58.

cation may be such that the family itself could not put an end to it but in the case of a family idol the consenus of the whole family might give the estate another direction." The observation was an *obiter dictum* pure and simple, as the property in dispute was not found to be debutter at all but the observation was treated as authoritative in a Calcutta case (*y*) where it was held that properties dedicated to a family idol may be converted into secular property by the consensus of the family and that in that particular case the properties had been so converted with common consent. The correctness of this decision has been doubted in subsequent cases, and it has been said that even if the consent of the family could effect such a diversion, it must be the consent of all members of the family, both males and females, as they are all interested in the worship of the idol (*z*).

As to the tests for determining whether a temple is a public or private charity, also see the cases in foot-note (*b*). Where there was a complete dedication, the temple being built in a place removed from the residential house of the testator and the public having free access, it was held that the temple was a public temple and the existence of a samadhi in memory of religious persons is not inconsistent with this conclusion (*c*). In a case where the members of the family treated the temple as a family property, dividing profits (offerings or rents), excluding the public from worship at the time of marriages and other ceremonies in their home, erecting samadhis in honour of the dead, it was held that the mere fact the public are not turned away ordinarily from the temple worship in the temple does not show that it was a public temple (*d*). Remission of land revenue in respect of the land, on which the temple stands is one of the decisive factors in determining whether the temple was a public or private one (*e*).

*The Religious Endowments Act, 1863.*—The Religious Endowments Act, 1863, does not apply to *private* endowments (*a*). As to the history of the Act and the cases to which it applies, see Mulla's Code of Civil Procedure, notes to s. 92. See also Prannath Sarasvati's Tagore Lectures on the Hindu Law of Endowments.

Though maths as a rule are public endowments, a math may be a private institution (*f*).

**425. Right of worship.**—Where a temple is established for the worship of members of a particular sect, persons belonging to other sects are not entitled to worship in the temple (*g*).

The right of entry and worship in a public temple can be regulated as to time and hours during which members of the public would be allowed access to the shrine. It is competent to the temple authorities to make and enforce rules to ensure good order and proper worship (*h*).

*Fees for admission to the sanctuary of a temple.*—Rules prohibiting, except upon payment of fixed fees, entry into the inner sanctuary of a temple, are illegal (*i*).

**426. Limitation.**—(1) *Unauthorized alienation by shebait and mohunt.*—Where the head of a math grants a permanent lease of math property or sells

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(*y*) *Gobinda Kumar* v. *Debendra Kumar* (1907) 12 C.W.N. 98.

(*z*) *Gopal* v. *Radha* (1925) 41 Cal. L.J. 396, 426, 88 I.C. 616, ('25) A.C. 996; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083.

(*a*) *Protab Chandra* v. *Brojnath* (1892) 19 Cal. 275.

(*b*) *Puraviya* v. *Poonachi* 40 Mad. L.J. 289, 62 I.C. 655; *Parmanand* v. *Nihal Chand* (1938) 65 I.A. 252, 1938 Lah. 453, 40 Bom. L.R. 907, 175 I.C. 459, ('38) A.P.C. 195.

(*c*) *Premo* v. *Sheo Nath Pandit* (1933) 8 Luck. 266, 140 I.C. 896, ('33) A.O. 22.

(*d*) *Bhagwan Din* v. *Gir Harsarwoop* (1940) 15 Luck. 1, 185 I.C. 305, 67 I.C. 1, ('40) A.P.C. 7. Reference may also be made to *Bihar State Board of Religious Trust* v. *Biseshwar Das* ('71) A.S.C. 2057.

(*e*) *Laxmanrao* v. *Govindrao*, (1950) Nagpur 1, (1950) A. Nagpur 213.

(*f*) *Sathappayyar* v. *Periasami* (1891) 14 Mad. 1.

(*g*) *Sankaralinga* v. *Rajeswara* (1908) 31 Mad. 236, 35 I.A. 176.

(*h*) *Nar Hari Shastri* v. *Badrinath Temple Committee* (1952) S.C.R. 849, ('52) S.C. 245; *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar* (1954) S.C.R. 1005, 1031, ('54) A.S.C. 282.

(*i*) *Asharam* v. *Manager of Dakore Temple Committee* (1920) 44 Bom. 150, 55 I.C. 956, ('20) A.B. 153.

Table showing relevant Articles relating to religious and charitable endowments under the old Indian Limitation Act, 9 of 1908 as amended in 1929 and the new Limitation Act 36 of 1963.

| Indian Limitation Act 9 of 1908 | | | | Limitation Act 36 of 1963 | | | |
|---|---|---|---|---|---|---|---|
| Article | Description of suit | Limitation Period of | Time from which period begins to run | Article | Description of suit | Period of Limitation | Time from which period begins to run |
| 134A | Suit to *set aside a transfer of immovable property* comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration. | Twelve years | When the *transfer* becomes known to the plaintiff. | 94 | Suit *to set aside a transfer of immovable property* comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration. | Twelve years | When the *transfer* becomes known to the plaintiff. |
| 48B | Like suit to set aside *a sale of movable property.* | Three years | When the *sale* becomes known to the plaintiff. | 95 | Like suit to set aside *a transfer of movable property.* | Three years | When the *transfer* becomes known to the plaintiff. |
| 134B | Suit by the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment *to recover possession of immovable property* comprised in the endowment which has been transferred by a previous manager for a valuable consideration. | Twelve years | The death, resignation or removal of the *transferor.* | 96 | Suit by the manager of a Hindu, Muslim, or Buddhist religious or charitable endowment to *recover possession of movable or immovable property* comprised in the endowment which has been transferred by a previous manager for a valuable consideration. | Twelve years | The date of the death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is later. |
| 134C | Like suit to recover *possession of movable property* which has been sold by a previous manager. | Twelve years | The death, resignation or removal of the seller. | | | | |

*Note*: Arts. 134A and 48B (new Arts. 94 and 95) apply to suit by persons interested in the endowment. Arts. 134B and 134C (new Art. 96) apply to suits by the successor in office of the transferor or seller.

Art. 134-B (new Art. 96) would apply to suit to set aside a lease of property comprised under a religious endowment, and where more than 12 years elapse, the lease is binding on the actual mohunt and he can only recover the agreed rent (*j*). This Article has no application to an execution sale (*k*).

The transfer of a portion of a muth and the properties appertaining thereto by one mohunt in favour of another in settlement of *bona fide* dispute between the two mohunts about the office of the mohunt of the muth is a transfer for a valuable consideration.

(*j*) *Ram Kishore Das Mohanta* v. *Ganga Gobinda Patil* (1937) 2 Cal. 242, 172 I.C. 315, ('37) A.C. 305.
(*k*) *Sudarsan* v. *Ram Kirpal* 77 I.A. 42.

it without legal necessity, or where the math property is sold in execution of a decree passed against him for a debt not contracted for a legal necessity, the question arises as to the period of limitation for a suit by his successor for possession of the property. Difficulties frequently arose as regards this question, and the Indian Limitation Act, 1908, was amended by Act 1 of 1928 to meet those difficulties. This was done by inserting a new paragraph in sec. 10 of the Act of 1908, and four new articles in Schedule I to the Act, namely, 134A, 48B, 134B and 134C. The Act of 1928 came into force on the 1st January, 1929. The Act of 1908 has now been replaced by the new Limitation Act 36 of 1963.

Now see corresponding Section 10 and corresponding Articles 94, 95 and 96 of the new Limitation Act, 1963.

When the sale is in execution of a money decree against the shebait or manager personally it is a void sale, and time runs against the purchaser from the date of sale (*l*).

(2) *Amendments:*

Originally sec. 10 of the Indian Limitation Act, 1908, prior to its amendment hereinafter mentioned, stood as follows:

"10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

Before the Indian Limitation (Amendment) Act I of 1929, neither a shebait nor a mohunt was regarded as a trustee of the *debutter* property. By that Act, sec. 10 of the Indian Limitation Act, 1908, was amended, and the following paragraph was inserted in it:—

"For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

By the same Act four new articles were inserted in Schedule I to the Act 9 of 1908. The old Indian Limitation Act 9 of 1908 has now been repealed and replaced by the new Limitation Act 36 of 1963.

(3) Where a shebait or mohunt is dispossessed of debutter property during his minority he is entitled to sue for possession within twelve years from the date of the dispossession or within three years from the date on which he attains majority, whichever is the longer period. The fact that he has no proprietary interest in debutter property does not disentitle him to the benefit of the provisions of sec. 8 of the Indian Limitation Act, 1908 (*m*).

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(*l*) *Subbaiya* v. *Mustapha*, 50 I.A. 295; *Sudarsan* v. *Ram Kirpal*, 77 I.A. 42; *Guranditta* v. *Amar Dass* ('65) A.S.C. 1966 [date of effective possession where the Mahant represented the institution: Akhara].

(*m*) *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203.

Now see corresponding sec. 8 of the new Limitation Act, 1963.

Where a shebait appointed for life died and his heirs took possession of the property, the suit by the heirs of the founder to recover the property was held to be governed by Art. 144 (Art. 65 of 1963 Limitation Act) and not by Art. 120 (*n*).

(4) *Suit for possession of hereditary office.*—A suit for possession of an hereditary office must be brought within 12 years from the date when the defendant takes possession of the office adversely to the plaintiff or the plaintiff's predecessor in title (*o*). See Art. 107 of the Limitation Act, 1963.

Note that the office of a hereditary priest (*yajman vritti*) is *nibhanda* and is ranked among the hereditary rights of immovable property (*p*).

(5) *Suit by reversioner against alienee of widow for recovery of shebaiti right.*—A suit by a reversioner for recovery of a shebaiti right from a person to whom a widow, who had succeeded to the right on the death of her husband, had alienated it is governed by Article 124 of the Limitation Act and not by Article 141 and the period of limitation begins to run against the reversioner only when the succession opens to him (*q*).

Now see Articles 107 and 65 of the new Limitation Act, 1963.

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(*n*) *Chandrika Bakhsh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373.

(*o*) *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69.

(*p*) *Ghelabhai* v. *Har Gowan* (1912) 36 Bom. 94, 12 I.C. 928; *Dhuram Narain* v. *Surai Narain* (1940) All. 815, 193 I.C. 697, ('41) A.A. 1.

(*q*) *Kalipada* v. *Palani Bala* (1953) S.C.R. 503, ('53) A.S.C. 125.

# CHAPTER XXII.

# MARRIAGE

## LAW PRIOR TO HINDU MARRIAGE ACT, 1955

*Note.*—Material and important changes in the law relating to marriage have been brought about by recent legislation embodied in the Hindu Marriage Act, 1955. Those changes have been briefly pointed out in the Introductory Note to that Act. The Act abrogates all the rules of the law of marriage previously applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. It also supersedes any other law, contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in it. *The rules in the following paragraphs of this Chapter state the law prior to the coming into operation of that Act.*

**427. Marriage, Minority, Lunacy, Fraud.**—(1) Marriage, according to the Hindu law, is a holy union for the performance of religious duties (*a*). It is not a contract; the mere fact, therefore, that a marriage was brought about during the minority of either party thereto, does not render the marriage invalid (*b*). But even considering Hindu marriage to be entirely a sacrament, as the acceptance of the bride is a necessary and indispensable part of the ceremony a person whose loss of reason is complete should be held incompetent to accept the bride, and the marriage must be regarded as invalid on that ground. There are however degrees of insanity, and if the mental aberration is not of such a character as to make the bridegroom incapable of understanding the ceremonies of marriage and taking an intelligent part in them, the marriage should be held to be valid (*c*). When a congenital idiot's marriage was arranged by his father and his wife gave birth to two sons it was held that he was lawfully married (*d*).

(2) A marriage brought about by force or fraud is altogether invalid (*e*) [§ 434].

It has been held by the High Court of Bombay that marriage is a *sanskara* or sacrament. It is the last of the ten sacraments, enjoined by the Hindu religion for purifying the body from inherited taint (*f*). The same view has been taken by the High Court of Madras (*g*).

*Marriage with an impotent.*—It has been held in some cases that marriage of a person who is impotent and has not been able to consummate the marriage is a nullity (*h*).

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(*a*) *Sundrabai* v. *Shivanarayana* (1908) 32 Bom. 81.

(*b*) *Purshotamdas* v. *Purshotamdas* (1897) 21 Bom. 23, 30-31; *Atma Ram* v. *Banku Mal* (1930) 11 Lah. 598, 125 I.C. 369, ('30) A.L. 561. See also *Khwaja Muhammad Khan* v. *Husaini Begam* (1910) 32 All. 410, 37 I.A. 152 [a Mahomedan case].

(*c*) *Ratneshwari* v. *Bhagwati*, 1949 F.C.R. 715, ('50) A.F.C. 142 (per Mukherjea J); *Mouji Lal* v. *Chandrabati* (1911) 38 Cal. 700, 706, 38 I.A. 122, 125, 11 I.C. 502. But see *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316, 318.

(*d*) *Amirthammal* v. *Vallimayil Ammal* (1942) Mad. 807, 203 I.C. 648, ('42) A.M. 693.

(*e*) (1891) 14 Mad. 316, 320, *supra; Kunta Devi* v. *Sri Ram* ('63) A. Punj. 235.

(*f*) (1908) 32 Bom. 81, *supra*. But see *A* v. *B* (1953) Bom. 486, ('52) A.B. 486.

(*g*) *Gopalkrishnam* v. *Venkatnarasa* (1914) 37 Mad. 273 [F.B.], 17 I.C. 308, ('14) A.M. 432, overruling *Govindarazulu* v. *Devarabhotla* (1904) 27 Mad. 206 [a case of Brahmans]; *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I.C. 195 [a case of Sudras].

(*h*) *Sm. Ratan Moni Debi* v. *Nagendra Narain Singh* (1949) A.C. 404; *A* v. *B* ('52) A.B. 486. *Contra Malla Reddy* v. *Subbama* ('56) A. Andh. Pra. 237. Also see *Kantilal* v. *Vimla* ('52) A. Saurashtra 44. But see *Ram Devi* v. *Raja Ram* ('63) A. All. 564, (1963) All. L.J. 658.

*Child Marriage Restraint Act*, 1929, (XIX of 1929).—This Act restrains the solemnisation of marriages between children. The word "child" has been defined in the Act as a male under eighteen years of age and a female under fifteen years of age. It makes it penal for a male under the age of eighteen years to marry a girl under the age of fifteen years. It also prescribes punishment for parents and guardians who are parties to a marriage between a minor male and a girl under the age of fourteen years. But the Act does not affect the validity of such marriages. The material provisions of the Act are set out in Appendix III below.

**428. Forms of Marriage.**—(1) The ancient Hindu law recognized eight forms of marriage, of which four were approved forms, and four unapproved. The approved forms were *Brahma, Daiva, Arsha* and *Prajapatya*. The unapproved forms were *Asura, Gandharva, Rakshasa* and *Paishacha*. The only forms of marriage now recognized are—

(i) the *Brahma* form, which is one of the approved forms; and

(ii) the *Asura* form, which is one of the unapproved forms.

(2) Where the father or other guardian of the bride gives the bride in marriage without receiving any consideration from the bridegroom for giving the girl in marriage the marriage is called *Brahma*. But where he receives such consideration, which is technically called *shulka* or bride's price, the marriage is called *Asura*, even though it may have been performed according to the rites prescribed for the *Brahma* form. The test is twofold: "There shall", as the Supreme Court has laid down, "not only be benefit to the father, but the benefit shall form a consideration for the sale of the bride" (*h*1). Bearing of the expenditure of the marriage wholly or partly by the bridegroom of the parent is not a criterion of the matter. Such an indirect gain by the bride's father cannot be regarded as *shulka* or price for giving the bride in marriage (*h*2). The mere giving of a present to the bride or to her mother as a token of compliment to her does not render it an *Asura* marriage (*i*).

It has been held in Madras that a marriage in which *memmekanom* is taken need not necessarily be a marriage in *Asura* form. The decision would depend upon the fact as to whether payment was actually taken as a price for the bride, or as a matter of form only out of respect for a custom (*j*).

(3) Hindus belonging to any class may marry either in the *Brahma* form or the *Asura* form. Thus a Brahman may contract an *Asura* marriage, and a Shudra may contract a *Brahma* marriage (*k*).

The *Brahma* form is the only one now left of the four approved forms. It required that the bridegroom should be "a man learned in the *Veda*," and it was originally peculiar to *Brahmans*. But even a *Shudra* may now marry in that form. The *Asura* form is the only one now left, of the four unapproved forms. What distinguishes the one form from the other is that in the *Brahma* form it is a *gift* of the girl pure and simple, in the *Asura* form it is a *sale of* the bride for pecuniary consideration. That consideration is called shulka.

Of the other three unapproved forms, only the *Gandharva* requires notice. The Gandharva marriage is the voluntary union of a youth and a damsel which springs from

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(*h*1) *Veerappa* v. *Michael* ('63) A.S.C. 933.
(*h*2) *Veerappa* v. *Michael, supra.*
(*i*) *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 3 I.C. 765; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I.C. 541; *Hira* v. *Hansji* (1913) 37 Bom. 295, 17 I.C. 949; *Govind* v. *Savitri* (1919) 43 Bom. 173, 177, 47 I.C. 883, (18) A.B. 93; *Kailasanatha Mudaliar* v. *Parasakthi Vadivanni* (1935) 58 Mad. 488, ('35) A.M. 740.
(*j*) *Muthu* v. *Narayanan* (1949) 2 M.L.J. 804, (1950) A.M. 351.
(*k*) *Bhaoni* v. *Maharaj Singh* (1881) 3 All. 738. Also see *Kishan Dei* v. *Sheo Paltan* ('26) A.A. 1.

desire and sensual inclination. It has at times been erroneously described as an euphemism for concubinage. This view is based on a total misconception of the leading texts of the Smritis. It may be noted that the essential marriage ceremonies are as much a requisite part of this form of marriage as of any other unless it is shown that some modification of those ceremonies has been introduced by custom in any particular community or caste. In an Allahabad case (*k*1) it was remarked that the Gandharva form had become obsolete. The Madras High Court has expressed the view that the Gandharva form of marriage is not obsolete in the State of Madras (*l*). In Calcutta the view has been taken that this form of marriage has fallen into disuse and it is only by custom that it is validated in case of Bairagis (*m*). It has been held in Patna that a minor girl is incompetent to contract a marriage in *Gandharva* form (*n*); the Patna High Court has decided however that the Gandharva form of marriage is not invalid according to the Mithila school of Hindu law; at any rate the relationship created by such marriage is sufficient to entitle the wife to claim maintenance from her husband (*o*). Among *Shudras* a marriage in the *katar* form (in which the bride is given to the bridegroom with a sword or dagger in place of the bridegroom) is not a valid marriage, in the absence of proof that the ordinary ceremonies of a Hindu marriage were performed (*p*). It is not necessary that a marriage should take place in the presence of a priest. Tying up of a *thali* in the presence of an idol was considered to be a valid form of marriage in Madras (*q*).

*Shulka* was originally regarded as the property of the bride's father. Though marriages by sale fell into disrepute, the custom of paying the *shulka* remained; but it was no longer regarded as the property of the bride's father; it came to be regarded as the bride's stridhana. Though *shulka* is now regarded as stridhana, it still preserves its original character in that it devolves in the first instance, unlike stridhana of other kinds, on the bride's mother and brothers [§ 146]. Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father in consideration of such marriage is not valid and the money cannot be recovered by suit. This is on the ground that such an agreement is to be regarded as opposed to public policy (*r*). The questions of validity of the marriage and invalidity of such consideration require to be distinguished. Error is almost sure to arise if the distinction between a point of status and the point of a contract falling within the purview of sec. 23 of the Act is not emphasized. In a decision of the High Court of Travancore-Cochin (*s*) this aspect of the matter appears to have been overlooked.

**429. Presumption as to form.**—When there is a question as to whether a marriage was in the *Brahma* form or the *Asura* form, the Court will presume, even where the parties are Shudras, that it was in the *Brahma* form; in other words, that no consideration for the marriage passed from the bridegroom to the father or other guardian of the bride. But this presumption may be rebutted by showing that the marriage was in the *Asura* form (*t*).

Where a woman dies without leaving issue, if her marriage was in the *Brahma* form her *stridhana* devolves in one way, and if in *Asura* form, it devolves in another way (§§ 147, 151). Hence the importance of the distinction between the two forms of marriage. The essential ceremonies for these forms of marriage are the same as will be seen presently.

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(*k*1) See foot-note (*k*) at page 508.

(*l*) *Deivani* v. *Chidambaram* (1955) 1 M.L.J. 120, ('54) A.M. 657; *Brindavana* v. *Radhamani* (1889) 12 Mad. 72.

(*m*) *Lalit Mohan* v. *Shyamapada Das* ('52) A.C. 771.

(*n*) *Bamdeb Das* v. *Raja Brajasunder Deb* (1938) 17 Pat. 134.

(*o*) *Kamani Devi* v. *M. D. Sir Kameshwar Singh* (1946) 25 Pat. 58.

(*p*) *Ramsaran Singh* v. *Mahabir Sewak Singh* (1934) 61 I.A. 106, 147 I.C. 667, ('34) A.P.C. 74.

(*q*) In re *Ponnuswami* ('50) A.M. 777.

(*r*) *Venkata Kristnayya* v. *Venkatachalam*, 32 Mad. 185 (F.B.). See Pollock and Mulla's Contract Act, S. 23, "Marriage brocage contracts" where some cases on the subject are considered. Also see *Gopi Tihadi* v. *Gokhei Panda*, A.I.R. (1954) Orissa 17.

(*s*) *Chidambara Iyer* v. *Ananthakrishna*, A.I.R. (1954) Tra-Co. 231. [It is submitted that the execution of a promissory note can make no difference].

(*t*) *Mussumat Thakoor Deyhe* v. *Rai Baluk Ram* (1866) 11 M.I.A. 139; *Veerappa* v. *Michael* ('63) S.C. 933; *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 437, 3 I.C. 765; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I.C. 459; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I.C. 541; *Hira* v. *Hansji* (1913) 37 Bom. 295, 17 I.C. 949 (remarriage of divorced Koli woman); *Kishan Dei* v. *Sheo Paltan* (1926) 48 All. 126, 90 I.C. 358, ('26) A.A. 1 [marriage in Karao form]; *Kamla Parsad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398; *Gopi Tihadi* v. *Gokhel Panda* ('54) A. Orissa 17.

*Pat-marriage.*—A Pat-marriage of a Hindu widow, in the absence of any evidence to show payment to the bride's relations is to be regarded as marriage in an approved form (*u*).

Such marriage with a divorced woman would not be regarded to be in an unapproved form, because a payment was made for securing the divorce (*v*).

For presumption as to legality of marriage, see § 438.

**430. No restriction as to number of wives.**—A Hindu may marry any number of wives, although he has a wife or wives living (*w*), except in those States in which Anti-bigamy Acts have been passed.

The Bombay Prevention of Hindu Bigamous Marriage Act (XXV of 1946) was held to be valid when it was challenged on the ground that it contravened the fundamental rights guaranteed under Articles 14, 15 and 25 of the Constitution (*x*). The Madras Hindu (Bigamy Prevention and Divorce) Act VI of 1949 also was held not to offend Articles 15 and 25 of the Constitution (*y*).

**431. Only one husband at a time.**—A woman cannot marry another man while her husband is alive, except where her marriage has been dissolved by divorce [§ 441].

**432. Remarriage of widows.**—The remarriage of Hindu widows is now expressly legalized by the Hindu Widow's Remarriage Act, 1856.

The rule of prohibited degrees of marriage apply to the case of a remarriage by a widow except where such marriage is sanctioned by custom (*a*).

*Forfeiture of property by remarriage.*—See notes to § 43, No. 4 (widow), under the head "remarriage."

**433. Who may give in marriage.**—(1) The Shastras enjoin the marriage of a female before she arrives at puberty, and prescribe rules for guardianship in marriage. The following persons are qualified, in the order mentioned below, to give a girl in marrige:—

*According to the Mitakshara school*—

(1) the father;

(2) the paternal grandfather;

(3) the brother (*b*);

(4) other paternal relations of the girl in order of propinquity;

(5) the mother.

*According to the Bengal school.*—The Bengal school places the maternal grandfather and maternal uncle before the mother. In other respects the rules are the same as under the Mitakshara.

(2) The marriage of a male minor is not prohibited, and his lawful guardian may consent to his marriage.

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(*u*) *Mahadeo* v. *Chandrabhagabai* (1946) Nag. 378.
(*v*) *Kodu* v. *Lola* (1947) Nag. 885.
(*w*) *Virasami* v. *Appasami* (1863) 1 Mad. H.C. 375.
(*x*) *State* v. *Narsu Appa* (1951) Bom. 775, (1951) 53 Bom. L.R. 779.
(*y*) *Srinivasa Iyer* v. *Saraswathi Ammal* (1953) Mad. 78, ('52) A.M. 193.
(*a*) *Akshoy Kumar* v. *Jatindra Nath* ('55) A.C. 612.
(*b*) *Nek Ram* v. *Emperor* ('35) A.A. 920.

*Mother.*—Though the mother is postponed to the paternal male relations, it does not follow that she, who in the absence of the father, is the legal *guardian* of her daughter [§ 518], is to have no voice at all *in the choice of a husband* for the daughter. The only reason why the mother is postponed is that she cannot perform the ceremony of giving the girl in marriage called *kanyadana,* and even when in default of paternal male relation she makes the gift, she has to employ some male to perform that ceremony (*c*). The Madras High Court has gone further and said that even if there be a paternal grandfather, the mother as the natural guardian of her daughter is *entitled to select* a husband for her (*d*). The Lahore High Court is inclined to the same view (*e*). A step-mother has no right to give her step-daughter in marriage, if there is a paternal grandmother (*f*).

*Paternal relatives and maternal relatives.*—So long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage; but where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl (*g*).

*Remarriage of widows.*—As to the consent necessary to the remarriage of *minor* widows, it is provided by sec. 7 of the Hindu Widows' Remarriage Act, 1856, that if the widow remarrying is a *minor whose marriage has not been consummated,* she shall not remarry without the consent of her father, or, if she has no father, her paternal grandfather, or, if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or, failing also brothers, her next male relative. A marriage made in contravention of the above provisions, *e.g.,* a marriage of a widowed girl with the consent of her *mother-in-law* (*h*), may be declared void by the Court, but not after it has been consummated. In the case of a widow who is of *full age, or whose marriage has been consummated,* her own consent is sufficient to constitute her remarriage lawful and valid.

*The Indian Majority Act,* 1875.—Minority, according to the Mitakshara school, terminates on completion of the sixteenth year; according to the Bengal school, on completion of the fifteenth year. The Indian Majority Act, 1875, does not apply to Hindus in matters of marriage, divorce and adoption.

**434. Marriage without consent of guardian.**—(1) The primary duty, and the correlative right, of giving a girl in marriage, rests with the father. This right is not lost merely because the father has been convicted of theft or any other offence not connected with domestic relations (*i*). But where the father has deserted his wife and daughter, the mother can give the daughter in marriage without the consent of the father (*j*). Even where the father is alive and otherwise capable of giving away his daughter, the Court will not declare a marriage invalid, merely because the daughter was given in marriage by the mother without his consent, provided the necessary ceremonies have been perfomed, and there has been no force or fraud (*k*). This rests on the principle that guardianship for the purpose of marriage is not so much a right as a duty, and the consent, therefore, of the guardian is not a condition precedent to the validity of the marriage (*l*). There is a difference of opinion among Hindu text-writers as to the correctness of this principle (*m*). Whatever the correct view may be, the rule established by the decisions is that a marriage which is duly solemnized, and is otherwise valid, is not ren-

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(*c*) *Bai Ramkore* v. *Jamnadas* (1913) 37 Bom. 18, 17 I.C. 95.

(*d*) *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 734, 11 I.C. 570.

(*e*) *Mst. Indi* v. *Ghania* (1920) 1 Lah. 146, 53 I.C. 783; *Mst. Jiwani* v. *Mula Ram* (1922) 3 Lah. 29, 67 I.C. 253, ('22) A.L. 112.

(*f*) *Ram Bunsee* v. *Soobh Koonwaree* (1867) 71 W.R. 321.

(*g*) *Kasturi* v. *Panna Lal* (1916) 38 All. 520, 36 I.C. 245, ('17) A.A. 451.

(*h*) *Sant Ram* v. *The Crown* (1930) 11 Lah. 178, 189, 124 I.C. 310, ('29) A.L. 713.

(*i*) *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110, 119.

(*j*) *Khushalchand* v. *Bai Mani* (1887) 11 Bom. 247.

(*k*) *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316.

(*l*) (1887) 11 Bom. 247, *supra.*

(*m*) See Ghose's Hindu Law, 3rd ed., pp. 802-803; Banerji's Law of Marriage, 5th ed., pp. 55, 56; G. Sarkar's Hindu Law, 7th ed., p. 165.

dered invalid, because it was brought about by misrepresentation to the guardian (*n*) or without the consent of the guardian for the purpose of marriage (*o*), or in contravention of an express order of the Court (*p*). But a marriage though performed with the necessary ceremonies, may be set aside by the Court, if it was brought about by force or fraud (*q*).

(2) The rule referred to in the preceding sub-section applies only where a marriage has been actually celebrated. But while there is only a contract for marriage, it is competent to a guardian to sue for an injunction to prevent the marriage of his ward to a person of whom he does not approve and the Court may grant an injunction subject to such terms as it may consider necessary to impose on the guardian for the benefit of the minor (*r*).

*Factum valet quod fieri non debuit.*—It is a doctrine of the Hindu law enunciated by the author of the *Dayabhaga* and recognised also by the *Mitakshara* school, that "a *fact* cannot be altered by a hundred texts." The "texts" referred to above are texts that are directory as distinguished from those that are mandatory. The meaning of the doctrine is that where a fact is accomplished, in other words, where an act is done and finally completed, though it may be in contravention of a hundred *directory* texts, the fact will stand, and the act will be deemed to be legal and binding. The maxim of the Roman Civil law corresponding to this doctrine is *factum valet quod fieri non debuit* which means that what *ought* not to be done is valid when done. It is otherwise where an act is done in contravention of texts which are in their nature *mandatory*. The texts which prescribe rules for the consent of guardians for the purpose of marriage have been held to be merely directory; hence a marriage once performed and solemnized, though it be without the consent of the guardian, has been held to be valid. But the non-observance of essential ceremonies cannot be overlooked by applying the doctrine unless it is shown that the ceremonies have been modified by custom (*s*).

It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, where the texts are merely directory, the principle of *factum valet* applies, and the act done is valid and binding (*t*). But the texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption are *mandatory*. Hence the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provision of those texts (*u*).

**435. Identity of caste or of sub-caste.**—(1) A marriage between persons belonging to different sub-divisions of the same caste is not invalid (*v*). This

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(*n*) *Kshiteesh Chandra Chakrabarti* v. *Emperor* (1937) 2 Cal. 221, 168 I.C. 708, ('37) A.C. 214.

(*o*) *Khushalchand* v. *Bai Mani* (1887) 11 Bom. 247; *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316; *Sivanandy* v. *Bhagvathyamma* ('62) A.M. 400; *Mulchand* v. *Bhudhai* (1898) 22 Bom. 812; *Ghazi* v. *Sukru* (1897) 19 All. 515; *Brindabun* v. *Chundra* (1886) 12 Cal. 140; *Kasturi* v. *Chiranji Lal* (1913) 35 All. 265, 18 I.C. 927; *Gajja Nand* v. *The Crown* (1921) 2 Lah. 288, 64 I.C. 500, ('22) A.L. 139.

(*p*) *Bai Diwali* v. *Moti* (1898) 22 Bom. 509.

(*q*) (1891) 14 Mad. 316, *supra*; (1898) 22 Bom. 812, *supra*.

(*r*) *Kashi, in the matter of* (1882) 8 Cal. 266; *Shridhar* v. *Hiralal* (1888) 12 Bom. 480; *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110; *Kasturi* v. *Panna Lal* (1916) 38 All. 520, 36 I.C. 245, ('17) A.A. 451 [damages for wrongful injunction].

(*s*) *Deivanai* v. *Chidambaram* ('54) A.M. 657, (1955) 1 M.L.J. 120.

(*t*) *Wooma Dace* v. *Gokoolanund* (1878) 3 Cal. 587, 5 I.A. 40; *Balusu* v. *Balusu* (1899) 22 Mad. 398, 26 I.A. 113; (1898) 22 Bom. 812, *supra*.

(*u*) *Lakshmappa* v. *Ramaya* (1875) 12 Bom. H.C. 361, 398, (1899) 22 Mad. 398, 26 I.A. 113, 144, *supra*; *Ganga* v. *Lekhraj* (1887) 9 All. 253, 296-297; *Gopal* v. *Hanmant* (1879) 3 Bom. 273, 293-294; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160, 167, (1898) 22 Bom. 812, supra; *Bhanwar Lal* v. *Mangi Bai* ('55) 5 Rajasthan 625; *Nene* v. *Mahadeo* ('52) Vind. Pra. 20.

(*v*) Marriage between persons belonging to Sudra sub-castes; (1869) 13 M.I.A. 141, 158-159, *supra*; *Ramamani* v. *Kulanthai* (1871) 14 M.I.A. 347; *Upoma* v. *Bholaram* (1888) 15 Cal. 708; *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277; *Biswanath* v. *Shorashibala* (1921) 48 Cal. 926, 66 I.C. 390, ('21) A.C. 48; *Sohan Singh* v. *Kabla Singh* (1929) 10 Lah. 372, 112 I.C. 593, ('28) A.L. 706 [Jat male and Maskadi female]; *Har Prasad* v. *Kewal* (1925) 47 All. 169, 83 I.C. 163, ('25) A.A. 26 [Bisa husband and Dasa wife]; *Gopikrishna Kasandhan* v. *Mt. Jaggo* (1936) 63 I.A. 295, 58 All. 397, 38 Bom. L.R. 751, 162 I.C. 993, ('36) A.P.C. 198; *Kshiteesh Chandra Chakrabarti* v. *Emperor* (1937) 2 Cal. 221, 168 I.C. 708, ('37) A.C. 214, (A case of Brahmin sub-castes). Marriage between Golwara and Agarwala—which are two subdivisions of Vaisya caste is valid. *Kashi Nath* v. *Bhagwan Das*, 1947 All. 578.

has been expressly embodied in the Hindu Marriage Disabilities Removal Act, Act 28 of 1946, and the Hindu Marriages Validity Act, Act 21 of 1949.

Both these Acts have been repealed by sect. 30 of the Hindu Marriage Act, 25 of 1955, and their provisions have now been embodied in sect. 29 (1) of the Hindu Marriage Act, 25 of 1955.

A marriage between a Grihasth Goshain and a woman of another caste initiated as a goshain is valid (*w*).

(2) For the purposes of marriage, converts to Hinduism are regarded as *Shudras*. Therefore, the marriage of a Hindu who is a *Shudra* by caste with a Christian woman who has become a convert to Hinduism before the marriage, is treated as a marriage between two *Shudras*, and it is valid if it otherwise complies with the requirements of the Hindu Law (*x*).

The second marriage of a person who was reconverted from Christianity to Hinduism during the lifetime of his first wife is valid (*y*).

(3) *As to identity of castes.*—Section 3 of the Hindu Marriages Validity Act, 1949, laid down that no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belong to different religions, castes, sub-castes or sects. The object of the Act obviously was not only to regularise the status of husband and wife but also to confer legitimacy on the children born of the marriages validated (*y*1). The Act validated inter-caste marriages and gave retrospective effect to the Hindu Marriage Disabilities Removal Act, 1946. As regards marriages between sub-divisions of the same caste, they are regarded as valid even under the existing decisions. The provision that Hindu marriages should be valid though the parties belong to different religions, does not mean that a marriage between a Hindu and a Christian or between a Hindu and a Mohomedan would be valid, the object of the Act being to legalise marriages between Hindus, Jains and Sikhs who, though they belong to different religions, come under the description of Hindus as defined in Section 2 of the Act.

*Old law.*—Ancient texts prohibited prathiloma marriages, i.e., between males of lower caste and females of higher caste. Accordingly such marriages have been held by courts to be invalid (*z*). But Anuloma marriages were permitted and recognised by the texts (*a*). Accordingly the Bombay High Court held that a marriage between a *Vaishya* male and a *Shudra* female (*b*), or a Brahman male and a *Shudra* female is valid. In the latter case it was held that the son born of such a marriage is legitimate and is entitled to inherit a one-tenth share in the estate of his uncle, the other nine-tenths going to the reversioner of the uncle (*c*). The High Court of Calcutta has held that a marriage between a Brahman and a *Shudra* woman both of whom are Jati Vaishanavas is valid (*d*). A similar view has been taken by the Assam High Court (*e*). It has been held by the

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(*w*) *Kaura Devi* v. *Indra Devi* (1943) All. 703, 210 I.C. 464, ('43) A.A. 310.

(*x*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I.C. 42, where the earlier decisions are reviewed.

(*y*) *Goona Durgaprasad Rao* alias *Pedda Babu* v. *Goona Sudarsanswami and Ors.* (1940) Mad. 653, 190 I.C. 868, ('40) A.M. 513.

(*y*1) *Sadagopa* v. *Bakthavatsalam* ('64) A.S.C. 1126.

(*z*) *Lakshmi* v. *Kalian Singh* (1900) 2 Bom. L.R. 128 [Kshatriya male and Brahman female]; *Bai Kashi* v. *Jamnadas* (1912) 14 Bom. L.R. 547, 16 I.C. 133 [Sudra male and Brahman female]; *Manni Lal* v. *Shiama* (1926) 48 All. 670, 97 I.C. 347, ('26) A.A. 656 [Sudra male and Vaishya female].

(*a*) Manu, Yajanavalkya, Sankha, Gauthama, Vyas, Vishnu and Mitakshara.

(*b*) *Bai Gulab* v. *Jiwanlal* (1922) 46 Bom. 871, 65 I.C. 602, ('22) A.B. 32.

(*c*) *Natha* v. *Mehta Chhotalal* (1931) 55 Bom. 1, 130 I.C. 17, ('31) A.B. 89.

(*d*) *Nalinaksha* v. *Rajanikanta* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

(*e*) *Makhana Katani* v. *Thaneshwar* ('56) A. Assam 11.

Madras High Court that a Nattukottai Chettiar who is a Shudra can legally marry a dancing girl who has not been dedicated to a temple. Whether he could marry a girl who was actually dedicated was not decided in the case (*f*).

Even Anuloma marriages were held to be invalid in Allahabad and Madras (*g*).

*Marriage of illegitimate persons.*—In the case of the marriage of an illegitimate person who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste the members of which have recognised him or her as a caste fellow (*h*).

*Mixed marriages.*—The Hindu law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes, and gives separate names to the mixed castes to which such offspring belong. When intermarriages were permitted by ancient Hindu law, children born of mixed marriages were termed *Anulomajah*, that is, offspring of *Anuloma* marriage, and their caste was neither that of their father nor that of their mother. They belonged to an intermediate caste higher than that of their mother, and lower than that of their father. Thus a son begotten by a Brahman upon a Kshatriya wife is a Murdhavasikta, upon a Vaishya wife is an Ambashta, and upon a Shudra wife is Nishada or Parasava. A son begotten by a Kshatriya on a Vaishya wife is a Mahishya, and upon a Shudra wife an Ugra. A son born of a Vaishya by a Shudra wife is a Karana. It has accordingly been held that the illegitimate son of a Kshatriya by a Shudra woman is not a Shudra, but of a higher caste called Ugra (*i*).

This section does not apply to Arya Samajists (Act XIX of 1937).

*The Indian Christian Marriage Act, 1872.*—As to marriages between Hindus and Christians, see the Indian Christian Marriage Act, 1872, and the undermentioned cases (*j*).

**436. Prohibited degrees of relationship.**—No marriage is valid if it is made between persons related to each other within the prohibited degrees, *unless such marriage is sanctioned by custom* (*k*).

A karewa marriage between a father-in-law and daughter-in-law among the Jats (who are presumed to be Shudras) is invalid and cannot be validated by custom (*l*).

The following are the rules regarding prohibited degrees:—

(1) The Hindu Marriage Disabilities Removal Act, 1946, laid down that notwithstanding any text, rule or interpretation of the Hindu Law or any custom or usage, a marriage between Hindus, which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto belong to the same *gotra* or *pravara*.

Before this Act it was held that a man could not marry a girl of the same *gotra* or *pravara* the theory being that his father and the girl's father were both descendants of a common ancestor in the male line. It was held in Allahabad that where a widow had remarried a person belonging to her father's gotra the marriage was not invalid as she had not reverted to her father's gotra by her husband's death and her issue was legitimate (*m*). In a later case it was held in Madhya Pradesh that a widow remarrying another person in her deceased husband's *gotra* was validly married as she could be regarded as having reverted to her father's *gotra* (*m*1). The rule did not apply to *Shudras*

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(*f*) *Nagappa* v. *Subramanian* (1946) Mad. 103.

(*g*) *Padam Kumari* v. *Suraj Kumari* (1906) 28 All. 458 [Brahman male and Kshatriya female]; *Swayampakula Subbaramayya* v. *Swayampakula Venkatasubbamma* (1941) Mad. 989, ('41) A.M. 513. Reference may also be made to observations in *Kastoori Devi* v. *Chiranji Lal* ('60) A. All. 446.

(*h*) *In the matter of Ram Kumari* (1891) 18 Cal. 264; *Emperor* v. *Madan Gopal* (1912) 34 All. 589, 16 I.C. 513.

(*i*) *Brindavana* v. *Radhamani* (1889) 12 Mad. 72, 78-80; *Jwala Singh* v. *Sardar* (1919) 41 All. 629, 51 I.C. 216, ('19) A.A. 317.

(*j*) *Chetti* v. *Chetti* (1909) Probate 67; *Chandramani Dubey* v. *Dubey* (1951) 2 All. 439, ('51) A.A. 529.

(*k*) Banerjee's "Law of Marriage," 5th ed., pp. 70-71, 269-274, 285, 289. The custom must not be opposed to public policy or abhorrent to decency and morality: *Balusami* v. *Balkrishna* ('57) A.M. 97.

(*l*) *Jagnahar Singh* v. *Sadhu Ram* (1934) 15 Lah. 688, 149 I.C. 94, ('34) A.L. 283.

(*m*) *Radha Nath Mukerji* v. *Shaktipado Mukerji* (1936) 58 All. 1053, 164 I.C. 595, ('36) A.A. 624.

(*m*1) *Rewa* v. *Galharisingh* ('61) A.M.P. 164.

the reason given being that *Shudras* have no *gotra* of their own. It has been held by the Bombay High Court that in accordance with a custom prevailing in the Deccan Brahmin community, a marriage between persons of the same gotra is valid provided before the marriage, the girl is given in adoption to a person of another gotra (*n*).

This rule is called exogamy. Its effect is that a man cannot marry the daughter of an agnate. The next rule provides for the case where the girl is a cognate relation of the boy, that is, related to him through a female.

(2) A man cannot marry a girl who is his *Sapinda*. This rule is accepted both by the Bengal and Mitakshara schools. But there is a difference of opinion between the two schools as to who are *Sapindas* for marriage.

*Bengal school.*—According to the Dayabhaga law, a man cannot marry a girl—

(a) if she is within the 7th degree in descent from his father or from one of his father's six ancestors in the male line;

(b) if she is within the 5th degree in descent from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line;

(c) if she is within the 7th degree in descent from his father's three technical *bandhus,* or from one of their six ancestors through whom the girl is related to him [§ 46, sub-§ (4), Pitri Bandhus];

(d) if she is within the 5th degree in descent from his mother's three technical *bandhus* or from one of their four ancestors through whom the girl is related to him [§ 46, sub-§ (4), Matri Bandhus] (*o*).

*Exception.*—A girl, though related within the degrees mentioned above, may be taken in marriage if she is removed by three *gotras* from him (*p*).

*Mitakshara school.*—According to the Mitakshara law, a man cannot marry a girl if their common ancestor, being traced through his or her father, is not beyond the seventh in the line of ascent from him or her or, if their common ancestor, being traced through their mothers, is not beyond the fifth in line of ascent from him or her (*q*). In other words, descendants up to the seventh degree through males or females of paternal ancestors up to the seventh degree, and descendants up to the fifth degree of maternal ancestors up to the fifth degree, are excluded as being *sapindas* (*r*).

In the Madras State the rules restricting marriages between cognate sapindas are practically obsolete, e.g., the marriage of cognate first cousins (children of brother and sister) is common among Telugus. It was recognised by Baudhayana. The marriage of a male to his sister's daughter is common among Reddis. The marriages of cognate sapindas beyond these limits has always been regarded as lawful and as not prohibited in the whole of Southern India—except between cousins who are children of two sisters.

(3) In computing the degrees for the purposes of sub-§ (2), the common ancestor and the person in question are each to be counted as one degree.

(4) Relationship by marriage is not by itself an impediment to marriage. Thus a man may marry the daughter of his wife's sister (*s*).

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(*n*) *Madhavrao* v. *Raghavendrarao* (1946) Bom. 375.

(*o*) *Bijan Majumdar* v. *Ranjit Lal Sen Gupta* (1942) 2 Cal. 443, 202 I.C. 33, ('42) A.C. 458.

(*p*) Banerjee's "Law of Marriage," 5th ed., pp. 69-70.

(*q*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 309-311, 42 Cal. 384, 417-419, 25 I.C. 290, ('14) A.P.C. 1.

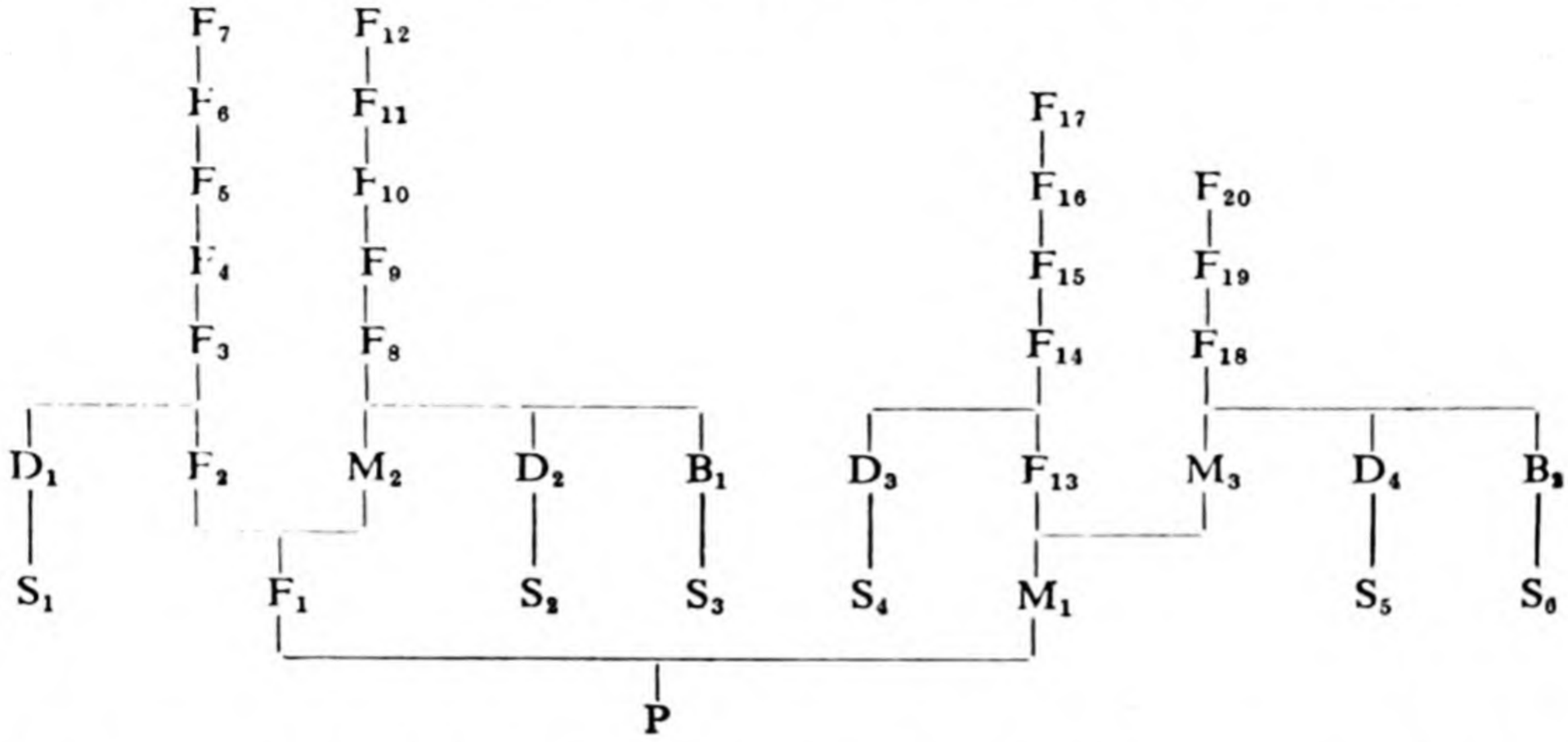
(*r*) Bhattacharya's "Hindu Law," 2nd ed. p. 90.

(*s*) *Ragavendra* v. *Jayaram* (1897) 20 Mad. 283; *Ramakrishna* v. *Subbamma* (1920) 43 Mad. 830, 59 I.C. 268, ('20) A.M. 715.

*Sagotra.*—Two persons are *sagotra*, that is, of the same *gotra* or family, if both of them are descended in the male line from the *Rishi* or sage after whose name the *gotra* is called, however distant either of them may be from the common ancestor.

*Samana-pravara.*—Two persons are *Samana-pravara*, that is, of the same *pravara*, if they are descendants in the male line of the three paternal ancestors of the founder of a *gotra* (*t*).

Sub-sec. (2).—The following diagram (*u*) will enable the reader to understand the four rules applied by the Dayabhaga school to determine *sapindaship*:—




In the above diagram P is the bridegroom; $F^1$ is his father; $M^1$ is his mother; $M^2$ is his father's mother; $M^3$ is his mother's mother.

$F^1$ to $F^7$ are his 7 paternal ancestors in the male line $F^8$ to $F^{12}$ are his father's 5 maternal ancestors in the male line. $F^{13}$ to $F^{17}$ are his mother's 5 paternal ancestors in the male line. $F^{18}$ to $F^{20}$ are his mother's 3 maternal ancestors in the male line. $S^1$, $S^2$ and $S^3$ are his father's *bandhus*. $S^4$, $S^5$ and $S^6$ are his mother's *bandhus*.

According to sub-rule (a), *P* cannot marry a girl within the 7th degree in descent from any one of his 7 paternal ancestors $F^1$ to $F^7$.

According to sub-rule (b), *P* cannot marry a girl within the 5th degree in descent from any one of his mother's 5 paternal ancestors $F^{13}$ to $F^{17}$ [$F^{13}$ is P's maternal grandfather].

For the purposes of sub-rule (c), the father's *bandhus* are restricted to the three relations expressly mentioned as such in the Mitakshara, namely:—

(λ) Father's [$F^1$] father's [$F^2$] sister's [$D^1$] son, that is, $S^1$;

(β) „ „ mother's [$M^2$] sister's [$D^2$] son, that is, $S^2$;

(γ) „ „ mother's [$M^2$] brother's [$B^1$] son, that is, $S^3$.

According to sub-rule (c), *P* cannot marry a girl within the 7th degree in descent from—

(*i*) $S^1$, $S^2$ or $S^3$;

[(*ii*) $F^3$ to $F^7$, ancestors of $S^1$, already included in sub-rule (a)];

(*iii*) any one of the 5 persons $F^8$ to $F^{12}$, ancestors of $S^2$ and $S^3$;

(*iv*) $B^1$, father of $S^3$.

For the purposes of sub-rule (d), the mother's *bandhus* are restricted to the three relations expressly mentioned as such in the Mitakshara, namely:—

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(*t*) G. Sarkar's "Hindu Law," 7th ed., p. 89.
(*u*) The diagram is reproduced from G. Sarkar's "Hindu Law," 7th Ed., p. 140.

( λ ) Mother's [$M^1$] father's [$F^{13}$] sister's [$D^3$] son, that is, $S^4$;
( β ) „ „ mother's [$M^3$] sister's [$D^4$] son, that is $S^5$;
( ν ) „ „ mother's [$M^3$] brother's [$B^2$] son, that is, $S^6$.

According to sub-rule (d), *P* cannot marry a girl within the 5th degree in descent from—

(*i*) $S^4$, $S^5$ or $S^6$;
[ (*ii*) $F^{14}$ to $F^{17}$, ancestors of $S^4$, already included in sub-rule (b) ];
(*iii*) any one of the 3 persons $F^{18}$ to $F^{20}$, ancestors of $S^5$ and $S^6$; and
(*iv*) $B^2$, father of $S^6$.

The reader will find the above rules in Dr. Banerjee's "Law of Marriage." The rules relating to the Bengal school are set forth in Raghunandana's *Udvahattattva,* a work of authority in Bengal, and are repeated by Kamalakara Bhatta in his *Nirnayasindhu,* a work of authority in the Benares school. The Bengal rules are in accordance with the interpretation put by Raghunandana upon the text of Manu.

There is no difference between sapinda-relationship in respect of marriage and that in respect of inheritance (*v*).

**437. Marriage ceremonies.**—(1) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—

(1) invocation before the sacred fire, and

(2) *saptapadi,* that is, the taking of *seven* steps by the bridegroom and the bride jointly before the sacred fire.

The marriage becomes completed when the seventh step is taken; till then it is imperfect and revocable (*w*). Consummation is not necessary to make a marriage complete and binding (*x*).

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong (*y*).

If the community to which the parties belong has modified by long established usage the ceremonies prescribed by the Shastras and has adopted new forms and new conventions, they must be recognised by the Courts. But the essential requisite for recognition of such a custom is that it must be sufficiently ancient and definite, and the members of the caste or sub-caste or family must recognise it as obligatory. It should not be left to the will of the caste or sub-caste to alter it at their will and pleasure, for the essence of custom or usage is that it is an ancient one recognised and adopted by the caste and has certainty about it. The validity of a marriage has to be tested and determined in accordance with the provisions of the law governing the parties and not in accordance with the rules laid down by any association or a society. If the caste has been able to establish its usage regulating the form and the requisites of a valid marriage, such a usage being transcendant law is obligatory and it is binding not only upon the parties but also on the Courts, who are bound to recognise and give effect to the usage (*z*).

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(*v*) *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339; *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 309, 311, 42 Cal. 384, 417-419, 25 I.C. 290, ('14) A.P.C. 1.

(*w*) *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 437-438, 3 I.C. 765; *Authikesavalu* v. *Ramanujam* (1909) 32 Mad. 512, 519-520, 3 I.C. 541; *Brindabun* v. *Chundra* (1886) 12 Cal. 140, 143. Also see *Sitabai* v. *Vithabai* ('59) A.B. 508.

(*x*) *Adm.-Gen. of Madras* v. *Anandachari* (1886) 9 Mad. 466, 470; *Dadaji* v. *Rukmabai* (1886) 10 Bom. 301, 311; *Emperor* v. *Munshi Ram* (1936) 58 All. 402, 158 I.C. 1007, ('36) A.A. 11.

(*y*) *Kally Churn* v. *Dukhee* (1880) 5 Cal. 692; *Hurry Churn* v. *Nimai* (1884) 10 Cal. 138; *Rampiyar* v. *Deva Rama* (1923) 1 Rang. 129, 76 I.C. 475, ('23) A.R. 202.

(*z*) *Deivanai* v. *Chidambaram,* ('54) A.M. 657, (1955) 1 M.L.J. 120; *Rakappa* v. *Chokalingam* (1963) 2 Mad. L.J. 550, ('64) A.M. 126 [Nattukotta Chettys-saptapadi not essential].

*Marriage of widows.*—According to the Hindu law, it is sometimes said that no religious ceremonies are necessary in the case of marriage of widows. See the Hindu Widows' Remarriage Act, 1856, s. 6. As to religious ceremonies in case of such marriages see undermentioned cases (*a*).

*Betrothal.*—Betrothal precedes marriage; but unlike marriage it is revocable, so that a girl betrothed to one person may be validly given in marriage to another person though in such a case a suit may be brought for damage against the father or other guardian of the girl who brought about the contract of marriage. Betrothal is no more than a *promise* to marry. In the case of minors, the promise is given by the father or other legal guardian. Where there is a breach of the promise, the appropriate remedy is not specific performance, but damages (*b*). When the plaintiff bridegroom dies pending a suit for damages, his legal representative can only recover the out of pocket expenses incurred during betrothal (*c*).

**438. Presumption as to legality of marriage.**—Where it is proved that a marriage was performed in fact, the Court will presume that it is valid in law (*d*), and that the necessary ceremonies have been performed (*e*). A Hindu marriage is recognised as a valid marriage in English law (*f*).

*Presumption as to marriage and legitimacy.*—There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognized by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied (*g*). Similarly the fact that a woman was living under the control and protection of a man who generally lived with her and acknowledged her children raises a strong presumption that she is the wife of that man. But this presumption may be rebutted by proof of facts showing that no marriage could have taken place (*h*).

**439. Special Marriage Act, 1954.**—It is provided by the Special Marriage Act, 1954 (which repeals the Special Marriage Act, 1872) that a marriage may be celebrated before a Registrar between any two persons.

The marriage under the Special Marriage Act, 1954, of any member of an undivided family shall be deemed to effect his severance from such family. Further, a person marrying under the Special Marriage Act, 1954, shall have the same rights and be subject to the same disabilities (*i*) in regard to any right of succession to any property, as a person to whom the Caste Disabilities Removal Act, 1850, applies. Also the succession to the property of any such person, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1925. No such person shall have any right of adoption, but his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject. See the Special Marriage Act, 1954, ss. 19-21.

**440. Marriage expenses.**—In the case of a joint family governed by the Mitakshara law, the joint family property is liable, while the family is still

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(*a*) *Deivanani* v. *Chidambaram, supra; Mahila Gumano* v. *Ram Dayal* ('53) A.M.B. 159.

(*b*) *Purshotamdas* v. *Purshotamdas* (1897) 21 Bom. 23; *Rambhat* v. *Timmayya* (1892) 16 Bom. 673 [suit for restoration of presents]; *Jekisondas* v. *Ranchoddas* (1917) 41 Bom. 137, 38 I.C. 588, ('16) A.B. 51; *Khimji* v. *Narsi* (1915) 39 Bom. 682, 28 I.C. 408, ('15) A.B. 300 [procuring breach of promise of marriage]; *Khubchand* v. *Maniklal* ('53) A.M.B. 91.

(*c*) *Balubhai* v. *Nanabhai* (1920) 44 Bom. 446, 55 I.C. 614, ('20) A.B. 225.

(*d*) *Inderun* v. *Ramasawmy* (1869) 13 M.I.A. 141, 158; *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277, 279.

(*e*) *Mouji Lal* v. *Chandrabati* (1911) 38 Cal. 700, 38 I.A. 122, 11 I.C. 502; *Veerappa* v. *Michael* ('63) S.C. 933. *Brindabun* v. *Chundra* (1886) 12 Cal. 140; *Bai Diwali* v. *Moti* (1898) 22 Bom. 509; *Administrator-General of Madras* v. *Anandachari* (1886) 9 Mad. 466; *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L.R. 77, 162 I.C. 188, ('36) A.B. 138.

(*f*) *Srinivasan* v. *Srinivasan*, 73 Law Times 102.

(*g*) (1911) 38 Cal. 700, 38 I.A. 122, 11 I.C. 502, *supra; Subarna* v. *Arjuno* ('51) Orissa 337; *Sitabai* v. *Vithabai*, ('59) A.B. 508.

(*h*) *Chellammal* v. *Ranganathan* (1911) 34 Mad. 277, 12 I.C. 247; *Nagarajamma* v. *State Bank of India* ('62) A.A.P. 260. *Shivalingiah* v. *Chowdamma* ('56) A. Mysore 17; *Vishnu Namboodiri* v. *Kuttiparu Amma* ('57) Tra. Co. 85 (F.B.); *Thunthi* v. *Dhant Ram* ('53) Him. Pra. 66; *Anandi Lal* v. *Onkar* ('60) A. Raj. 251.

(*i*) Reference may made to *Girdharilal* v. *Fatechand* ('55) A.M.B. 148.

joint, for the legitimate marriage expenses of *male* members of the family (*k*), and also of the daughters of male members of the family (*l*).

The decision in *Subbayya* v. *Ananta*, 53 Mad. 84 implies that a father in possession of a joint family property is under a legal obligation to get his daughter married. It follows that if a father so in possession neglects his duty, the mother may perform it and recover the expenses from her husband. When there is no joint family property in the hands of the father there is no legal obligation on his part to marry his daughter and bear the expenses of marriage. It is doubtful also whether the marriage of an infant girl could be brought under the head of "necessaries" within the meaning of sec. 68, Indian Contract Act (*m*). On the other hand the proposition of law laid down in *Sundari Ammal* v. *Subramania Ayyar*, 26 Mad. 505 that "under the Hindu law, a father is under no legal obligation to get his daughter married", appears to have been stated too broadly. The obligation may not exist when the father is not a member of a joint family and has no ancestral property.

The texts enjoin the payment of expenses of *sanskaras* or sacraments out of the family property. Marriage is a *sanskara*, and its expenses, therefore, are to be provided for out of the joint family property. A debt contracted for the marriage of a coparcener or the daughter of a deceased coparcener in a joint Hindu family is a debt contracted for a family purpose, and, therefore, for the benefit of the family. See §§ 234 and 427.

As to expenses of marriage after the institution of a suit for partition, see § 304(2). As to the power of a widow to provide for the marriage expenses of her daughter out of her husband's estate, see § 181B(iv).

**441. Divorce.**—(1) Divorce is not known to the general Hindu law. The reason is that a marriage, from the Hindu point of view, creates an indissoluble tie between the husband and the wife. Neither party, therefore, to a marriage can divorce the other unless divorce is allowed by custom (*n*).

There is no rule of Hindu law which forbids the subsistence of a marriage one of the parties to which is a non-Hindu. The law does not refuse to recognise a conjugal union merely by reason of a difference of religion (*o*).

(2) Change of religion or loss of caste does not operate as a dissolution of marriage, nor does the adultery of either party, nor even the fact that the wife has deserted her husband and become a prostitute (*p*).

(3) As to change of religion, it is now provided by the Native Converts' Marriage Dissolution Act, 1866, that where a Hindu becomes a convert to Christianity, *and* in consequence of such conversion, the husband or wife of the convert *deserts* or *repudiates* the convert, the Court may, on a petition presented by the convert, pass a *decree* dissolving the marriage, and the

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(*k*) *Sundrabai* v. *Shivnarayana* (1908) 32 Bom. 81; *Bhagirathi* v. *Jokhu Ram* (1910) 32 All. 575, 6 I.C. 465; *Gopalakrishnam* v. *Venkatanarasa* (1914) 37 Mad. 273, 17 I.C. 308, ('14) Mad. 432 [F.B.] overruling *Govindarazulu* v. *Devarabhotla* (1904) 27 Mad. 206; *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I.C. 195; *Debi Lal* v. *Nand Kishore* (1922) 1 Pat. 266, 65 I.C. 315, ('22) A.P. 22.

(*l*) *Vaikuntam* v. *Kallapiran* (1900) 23 Mad. 512; *Vaikuntam* v. *Kallipiram* (1903) 26 Mad. 497; *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 11 I.C. 570; *Srinivasa* v. *Thiruvengadathaiyangar* (1915) 38 Mad. 556, 23 I.C. 264, ('14) A.M. 226 [unmarried sisters]; *Thiruvathammal* v. *Vagunathan* ('52) A.M. 479; *Alagammai* v. *Veerappa* ('56) A.M. 428.

(*m*) *Sadhu Laxmi* v. *Sadhu Suryanarayana* ('50) A.M. 274.

(*n*) *Kudomee* v. *Joteeram* (1878) 3 Cal. 305; *Sankaralingam* v. *Subban* (1894) 17 Mad. 479; *Tatayya* v. *Nakaraju* ('58) A.A.P. 611.

(*o*) *Chandramani Dubey* v. *Dubey* (1951) 2 All. 439, ('51) A.A. 529.

(*p*) *Government of Bombay* v. *Ganga* (1880) 4 Bom. 330; *Admn. General of Madras* v. *Anandachari* (1886) 9 Mad. 466; *Ram Kumari, In the matter of* (1891) 18 Cal. 264; *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171, 177; *Narain* v. *Trilok* (1907) 29 All. 4; *Chandramani Dubey* v. *Dubey, supra; Pakkiam* v. *Chelliah Pillai* (1923) 46 Mad. 839; 75 I.C. 17, ('24) A.M. 18 [F.B.]; *Gopal Krishna Kasaudhan* v. *Mst. Jaggo* (1936) 63 I.A. 295, 58 All. 397, 38 Bom. L.R. 751, 162 I.C. 993; *Banarsi Das* v. *Samat Prasad* (1936) 58 All. 1019, 164 I.C. 1047, ('36) A.A. 641; *Gul Mohammad* v. *King Emperor* (1947) Nag. 205.

parties may *then* marry again as if the prior marriage had been dissolved by death. Conversion does not operate *per se* as a dissolution of marriage (*q*).

(4) In many States, however, divorce is allowed on certain grounds as the result of legislation permitting divorce.

*Divorce by custom.*—It has been held in Bombay that a caste custom which permits a woman to desert her husband at her pleasure and marry again without his consent is void for immorality (*r*). And it has been doubted by the same Court whether the custom would be valid even if it allowed her to marry with his consent (*s*). The Madras High Court has held that a custom which permits a divorce by mutual agreement is not void for immorality (*t*). A similar custom recognising dissolution of marriage followed by marriage in *kudike* form has been accepted as valid in case of certain castes in Mysore (*u*). A custom granting divorce in the Pakhali community with the consent of the husband is valid (*v*).

It has been held in Bombay that a custom which permits a dissolution of the marriage tie by either husband or wife against the wish of the other, the sole condition attached being the payment of a sum of money fixed by the caste, is void as being opposed to public policy (*w*). Nor can a marriage be dissolved by a decision of the caste Panch (*x*).

*The Indian Divorce Act*, 1869.—This Act provides *inter alia* for dissolution of marriage, but it applies only to cases where "the petitioner or respondent professes the Christian religion" (s. 2 of the Act). Section 7 of the Act provides that the Court shall act and give relief on principles of the English Divorce Courts. There is a conflict of opinion whether the Indian Divorce Act, 1869, applies only to monogamous marriages such as a Christian marriage or also to polygamous marriages such as a Hindu marriage where one of the parties, being the petitioner, changes his religion for Christianity after the marriage. *A* and his wife *B*, both Hindus, marry according to the rites of Hindu law. *A* and *B* subsequently become Christians. *A* then applies to the Court for the dissolution of the marriage on the ground that his wife has, since the solemnization of the marriage, been guilty of adultery (s. 10 of the Act). Is *A* entitled to relief under the Act? It has been held by the Calcutta High Court that he is, the ground of the decision being that *A* professed the Christian religion at the time of presenting the petition and that fact was sufficient to give jurisdiction to the Court, under the Act, though the marriage was a Hindu marriage (*y*). On the other hand, it has been held by the Madras High Court, that having regard to s. 7, the Act applies to monogamous marriages only, and that the Court has no jurisdiction to entertain *A*'s petition under the Act (*z*).

*Conversion to Islam.*—It has been held by a single Judge of the Calcutta High Court, that when a Hindu wife embraces Islam the Hindu law ceases to have any control over her; the marriage becomes automatically dissolved and there is nothing in Hindu law which prevents the Court from giving a declaration to that effect (*a*). But see Mulla's Mahomedan Law, (1961) 15th Edition, sec. 20.

**442. Marital duties.**—(1) The wife is bound to live with her husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another wife, is void. Such an agreement is against public policy and contrary to the spirit

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(*q*) *Gobardhan* v. *Jasadamoni* (1891) 18 Cal. 252.

(*r*) *Narayan* v. *Laving* (1878) 2 Bom. 140.

(*s*) *Khemkor* v. *Umidshankar* (1873) 10 Bom. H.C. 381.

(*t*) *Sankaralingam* v. *Subban* (1894) 17 Mad. 479. Also see *Premanbai* v. *Channoolal* ('63) A.M.P. 57 [custom among Patruas of Madhya Pradesh permitting divorce by mutual consent held valid].

(*u*) *Shivalingiah* v. *Chowdamma* ('56) A. Mysore 17.

(*v*) *Jina Magan* v. *Bai Jethi* (1941) Bom. 535, 195 I.C. 841, ('41) A.B. 298.

(*w*) *Keshav* v. *Bai Gandi* (1915) 39 Bom. 538, 29 I.C. 952, ('15) A.B. 107, and see *Sudha* v. *Sankappa Rai* ('63) A. Mys. 245.

(*x*) *Bai Ganga* v. *Emperor* ('16) A.B. 97, (1917) 19 Bom. L.R. 56, 39 I.C. 308. But see *Nallathangal* v. *Naiuan Ambalam* (1960) 1 Mad. L.J. 134, ('60) A.M. 179.

(*y*) *Thapita* v. *Thapita* (1894) 17 Mad. 235; *Gobardhan* v. *Jasadamoni* (1891) 18 Cal. 252.

(*z*) (1894) 17 Mad. 235, supra. See also *Perianayakam* v. *Pottukanni* (1891) 14 Mad. 382.

(*a*) *Ayesha Bibi* v. *Subodh Ch. Chakravarty* ('49) A.C. 436.

of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife (*b*).

(2) The husband is bound to live with his wife and to maintain her.

**443. Guardianship of wife.**—(1) The husband is the lawful guardian of his minor wife (*c*) and is entitled to require her to live with him, however young she may be, unless there is a custom enabling the wife to live with her parents until she has arrived at puberty (*d*).

(2) After the husband's death, the guardianship of the wife, if she is a minor, devolves on the husband's relations in preference to her paternal relations (*e*). But if the husband's family be extinct, or contain no male, her father or the kin of her father are the guardians of the widow (*e*1).

It has been held in a Madras case (*f*) that in default of the husband no other person is entitled to act as guardian *de jure* of the minor wife.

A co-widow is not the natural guardian of her minor co-widow (*g*).

The infancy of the wife is no ground for depriving the husband of his right to demand that his wife shall reside in the same house as himself though it might be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family (*h*). See the Guardians and Wards Act, 1890, sec. 19.

**444. Restitution of conjugal rights.**—(1) Either party to a marriage may sue the other for restitution of conjugal rights (*i*). The Court may refuse to pass a decree for restitution of conjugal rights against the wife, if the husband is suffering from a loathsome disease, such as leprosy or syphilis (*j*), or if he keeps a concubine in the house, or is guilty of cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion (*k*), or if he adopts another religion (*l*). But the mere fact of the husband marrying a second wife (*m*), or mere infidelity on the part of the husband (*n*), or the fact that the wife is a minor (*o*) [§ 443], is not by itself sufficient to disentitle the husband from claiming restitution of conjugal rights.

Under sec. 18(2)(d) of the Hindu Adoptions and Maintenance Act 78 of 1956, and sec. 488(3) of the Criminal Procedure Code, the taking of a second wife by a husband would constitute a ground for claiming separate residence and maintenance by the wife. It follows therefore that now the husband's claim for restitution of conjugal rights can justly be refused, if he has taken a second wife.

(2) In a suit for restitution of conjugal rights by a Hindu husband, the husband is not necessarily entitled to a decree in the absence of a plea of

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(*b*) *Sitaram* v. *Aheeree* (1873) 11 Beng. L.R. 129, *Tekait* v. *Basanta* (1901) 28 Cal. 751.

(*c*) *Dhuronidhur, in the matter of* (1890) 17 Cal. 298.

(*d*) *Arumuga* v. *Viraraghava* (1901) 24 Mad. 255.

(*e*) *Khudiram* v. *Bonwari Lal* (1889) 16 Cal. 584.

(*e*1) *Annapurnamma* v. *Ramanjaneyaratnam* ('59) A.A.P. 40, 46.

(*f*) *Ethilavulu* v. *Pethakkal* ('50) A.M. 390.

(*g*) *Kasubai* v. *Chandrabhaga* (1947) Nag. 455.

(*h*) *Kateeram* v. *Musammut Gendhenee* (1875) 23 W.R. 178; *Surjyamoni* v. *Kali Kanta* (1901) 28 Cal. 37; *Navnitlal* v. *Purshotam* (1926) 50 Bom. 268, 94 I.C. 11, ('26) A.B. 228.

(*i*) *Tekait* v. *Basanta* (1901) 28 Cal. 751; *Dadaji* v. *Rukmabai* (1886) 10 Bom. 301.

(*j*) *Bai Premkuvar* v. *Bhika* (1868) 5 Bom. H.C.A.C. 209.

(*k*) *Dular Koer* v. *Dwarka Nath* (1905) 34 Cal. 971; *Yamunabai* v. *Narayan* (1876) 1 Bom. 164.

(*l*) *Paigi* v. *Sheonarain* (1886) 8 All. 78.

(*m*) *Motilal* v. *Bai Chanchal* (1902) 4 Bom. L.R. 107.

(*n*) *Binda* v. *Kaunsilia* (1891) 13 All. 126, 164.

(*o*) (1901) 28 Cal. 37, *supra*; (1886) 10 Bom. 301, *supra*.

cruelty by the wife. Where the wife has pleaded that she was deserted or neglected (*q*) by her husband and that the suit is not *bona fide*, she should be allowed to lead evidence so that the Court may be in a position to judge whether the relief sought for by the husband should be granted or not, and if so on what conditions, if any (*r*).

In a suit by the husband for restitution of conjugal rights the cause of action arises where the husband lives (*s*).

It has been held by the High Court of Calcutta (*t*), and following it, by the High Court of Rangoon (*u*), that the presumption that the requisite ceremonies have been performed [§ 438] applies only to cases involving questions of inheritance so as to avoid illegitimacy, and that no such presumption arises in a suit for restitution of conjugal rights. In such a suit, where the validity of the marriage is disputed, the Court must find specifically whether the requisite ceremonies were performed.

(*q*) *Ude Singh* v. *Mst. Daulat Kaur* (1935) 16 Lah. 892, 158 I.C. 223, ('35) A.L. 386.

(*r*) *Bai Jivi* v. *Narsingh* (1927) 51 Bom. 329, 101 I.C. 403, ('27) A.B. 264.

(*s*) *Venugopal Naidu* v. *Lakshmi Ammal* (1936) 59 Mad. 392, 161 I.C. 485, ('36) A.M. 288.

(*t*) *Suriyamoni* v. *Kali Kanta* (1901) 28 Cal. 37, 50.

(*u*) *Rampiyar* v. *Deva Rama* (1923) 1 Rang. 129, 76 I.C. 475, ('23) A.R. 202.

# CHAPTER XXIII

# ADOPTION

## LAW PRIOR TO HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

*Note.*—Material and important alterations and modifications in the law relating to adoptions have been brought about by various legislations enumerated in the Hindu Adoptions and Maintenance Act, 1956. Corresponding applications have been given in that Act. Adoptions made after the commencement of that Act must be in accordance with the provisions contained in it and any adoption made in contravention of those provisions will be void. Validity of adoptions previously made is not affected in any manner. The notes in the following paragraphs of this Chapter state the law prior to the coming into operation of that Act.

Contents

1. Who may adopt—§§ 669-672.
2. Who may give in adoption—§§ 673-673A.
3. Who may be adopted—§§ 680-687.
4. Ceremonies relating to adoption—§§ 688-693.
5. Results of adoption—§§ 694-696.
6. Disowning of notice on adoption—§§ 697-698.
7. Alternatives made prior to adoption—§§ 699-699A.
8. Registration prior to adoption—§ 699AA.
9. Effects of invalid adoptions—§ 699-699A.
10. Mode of proof and registration—§§ 699-699A.
11. Simultaneous adoptions—§ 699.
12. Obvious adoptions—§ 699A.
13. Customary adoption in the Punjab—§ 699B.

**665. Adoption in other systems of law.**—Adoption is not recognised by the Mahommedan law (*a*), nor is it recognised by the Parsi law. It is recognised by the Hindu law, but even in that system of law there may be a family (*aa*) or caste (*b*) custom prohibiting adoption, and if such custom is proved, effect will be given to it by the Courts.

**666. Different forms of adoption.**—The ancient Hindu law recognised five kinds of adopted sons. The modern Hindu law recognises only two, namely, the dattaka and the kritrima. The dattaka form is in use all over India. The kritrima form is prevalent in Mithila and the adjoining districts.

The ancient Hindu law recognised twelve kinds of sons, of whom five were adopted sons. Of these twelve only three are now recognised, namely, sons by appointment, sons given in adoption, and kritrima or sons made. The effects of the chapter deals with dattaka adoption, kritrima adoption, and customary adoption in the Punjab.

For dvyamushyayana see § 688 *infra*. For custom of gods dattaka see the undermentioned case (*c*).

For kritrima adoption see § 699 *infra*.

For Hindu adoption see § 699A *infra*.

For customary adoption in the Punjab see § 699B *infra*.

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(*a*) Mohammedan adoption v. Mohammad Ismail (1906) 28 All. 466, 469.

(*aa*) Punnamma v. Sreenivasa (1965) 1 Cut. 466, 58 L.W. 115.

(*b*) Pandhari v. Bai Hirabai (1965) 67 Bom. 466, 68 L.W. 1216.

(*c*) Tukaram v. Bhalchandra Ashraf (1965) A.P.C. 1966, 68 Bom. L.R. 476.

**447. Object of adoption.**—The objects of adoption are twofold: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name (*y*).

The Supreme Court, agreeing with earlier decisions of the Privy Council, has expressed the view that the validity of an adoption is to be determined by spiritual rather than temporal considerations and that devolution of property is only of secondary importance (*y*1).

When a Hindu gives a boy in adoption, his act is, according to the Hindu Shastras, in the nature of a sacred gift voluntarily made. It is on that account that Manu requires the gift to be "confirmed by pouring water." A daughter *given* in marriage, which is called *kanyadan* and a son *given* in adoption, which is called *putradan*, stand in this respect on the same footing. Both are gifts for religious and secular purposes (*z*).

**448. Requirements of a valid adoption.**—No adoption is valid unless—

(1) the person adopting is lawfully capable of taking in adoption [§§ 449-473];

(2) the person giving in adoption is lawfully capable of giving in adoption [§§ 474-479];

(3) the person adopted is lawfully capable of being taken in adoption [§§ 480-487];

(4) the adoption is completed by an actual giving and taking [§ 489]; and

(5) the ceremony called *datta homam* (oblation to fire) has been performed. It is, however, doubtful whether the *datta homam* ceremony is essential in all cases to the validity of adoption [§ 490].

## I.—PERSONS WHO MAY LAWFULLY TAKE IN ADOPTION

**449. Who may adopt.**—Every male may adopt provided he is otherwise competent to do so [§ 450]. A wife also can adopt to her husband, but no other female can adopt to any other male; thus a mother cannot adopt to her son, nor a sister to her brother. A wife cannot adopt during her husband's lifetime except with his express consent (*a*). After his death, she may adopt, in certain parts of India, only if he has expressly authorized her to adopt, and in other parts of India, even without such authority [§ 452]. But in no case can a wife or a widow adopt a son to *herself;* the adoption must be made *to her husband.* An adoption by a woman of a son to *herself* is invalid and it confers no legal rights upon the person adopted (*b*).

It will be seen that adoption can be made by the wife to the husband. It is true that if the husband had made an adoption during his lifetime his wife would have joined him. The wife in such a case is described as *pratigrihitrimata* (adopted mother).

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(*y*) *Sitaram* v. *Harihar* (1911) 35 Bom. 169, 179, 180, 8 I.C. 625; *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 154, 39 Bom. 441, 470, 29 I.C. 639, ('15) A.P.C. 7; *Lal Hukum Tej Pratap Singh* v. *Collector of Etah* (1952) 1 All. 60, ('53) A.A. 766.

(*y*1) *Chandrasekhara* v. *Kulandaivelu* ('63) A.S.C. 185, 193.

(*z*) 35 Bom. 169, 179, 180, 8 I.C. 625, *supra.*

(*a*) *Narayan* v. *Nana* (1870) 7 Bom. H.C.A.C. 153.

(*b*) *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869) 12 M.I.A. 350, 356; *Narendra* v. *Dina Nath* (1909) 36 Cal. 824, 3 I.C. 996.

Such an adoption though in an academic sense may perhaps be called joint adoption is not an adoption by the wife to herself but the adoption is to the husband (*b*1).

It will also be seen from the above that a Hindu may either himself adopt, or delegate the power to adopt to his wife. But he cannot delegate the power to any other person. Though a Hindu widow cannot under Hindu law adopt to herself, yet when she is domiciled in French India, she can, under French law, which as the law of domicile determines her capacity to adopt a son, as well as the status of the adopter, adopt a son to herself, and the son so adopted can succeed to her estate (*c*). As to *kritrima* son see § 515. By a special custom proved to exist amongst a particular community an adoption can be made to a person after his and his widow's death by the father or other agnates of the adoptive father (*d*).

**450. Adoption by male.**—(1) Subject to the provisions of any law for the time being in force, every male Hindu, who is of sound mind (*e*), and has attained the age of discretion, even though he may be a minor (*f*), may lawfully take a son in adoption, provided he has no son, grandson, or great-grandson, natural or adopted (*g*), living at the time of adoption.

The High Court of Bombay has held that a Hindu, who has a son, grandson or great-grandson living at the time, cannot adopt even if the son, grandson or great-grandson, is disqualified from inheriting on any of the grounds mentioned in § 98(1) above (*h*), *e.g.* if he is a congential idiot (*i*). The High Court of Madras has dissented from that view and held that he can adopt (*j*). Even according to the Madras view, such an adoption would, since the Hindu Inheritance (Removal of Disabilities) Act, 1928, be invalid, unless the son, grandson, or great-grandson was a lunatic or idiot from birth. See § 98(2).

(2) The fact that the adopter is a bachelor (*k*), or a widower (*l*) or that his wife does not consent to the adoption (*m*), or that she is at the time of adoption pregnant to his knowledge (*n*), does not prevent him from taking a son in adoption.

*Illustration*

*A*, who has an adopted son *B*, adopts *C*. The adoption is not valid, for a Hindu cannot have two adopted sons at the same time (*o*).

*Minor.*—Under the Indian Majority Act, 1875, minority extends to the end of the eighteenth year, except in cases where a guardian has been appointed by a Court of Justice, or where the minor is under the jurisdiction of the Court of Wards, in which cases it lasts till the end of the twenty-first year. The Indian Majority Act, 1875, does not apply to Hindus in matters of adoption. Therefore, even a minor may adopt or authorise his widow to adopt, provided he has attained the age of discretion, that is, has completed the age of fifteen years (*p*).

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(*b*1) *Kasturi* v. *Ponnammal* ('61) A.S.C. 1302.

(*c*) *C. S. Nataraja Pillai* v. *C. S. Subbaraya Chettiar* ('50) A.P.C. 34.

(*d*) *Kasiviswanathan* v. *Somasundaram*, 51 C.W.N. 374 (P.C.).

(*e*) *Tayammaul* v. *Sashachalla* (1865) 10 M.I.A. 429, pp. 434-435; *Seshamma* v. *Padmanabha Rao* (1917) 40 Mad. 660, 33 I.C. 578, ('17) A.M. 265.

(*f*) *Rajendro Narain* v. *Saroda* (1871) 15 W.R. 548; *Jumoona Dassya* v. *Bamasoondari* (1876) 1 Cal. 289, pp. 295-96, 3 I.A. 72, pp. 83-84; *Patel Manilal* (1891) 15 Bom. 565; *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 928-29, 40 I.C. 518, ('18) A.M. 1072; *Kashinath Balkrishna* v. *Anant Murlidhar* (1942) Bom. 782, 203 I.C. 352, ('42) A.B. 284.

(*g*) *Gopee Lall* v. *Chundraolee* (1872) I.A. Sup. Vol. 131.

(*h*) *Bharmappa* v. *Ujjangauda* (1922) 46 Bom. 455, 65 I.C. 216, ('22) A.B. 173.

(*i*) *Krishnaji Hanmant* v. *Raghavendra Keshav* (1942) Bom. 486, 201 I.C. 401, ('42) A.B. 178.

(*j*) *Nagammal* v. *Sankarappa* (1931) 54 Mad. 576, 131 I.C. 9, ('31) A.M. 264.

(*k*) *Gopal* v. *Narayan* (1888) 12 Bom. 329; *Durga Das* v. *Santosh* (1945) 1 Cal. 17.

(*l*) *Chandvasekharudu* v. *Bramhanna* (1869) 4 Mad. H.C. 270.

(*m*) *Rungama* v. *Atchama* (1846) 4 M.I.A. 1.

(*n*) In *Guramma* v. *Mallappa* (1964) A.S.C. 510, 66 Bom. L.R. 284, recently decided by the Supreme Court, the whole question was examined. *Nagabhushanam* v. *Seshammagaru* (1881) 3 Mad. 180; *Daulat Ram* v. *Ram Lal* (1907) 29 All. 310; *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105.

(*o*) (1846) 4 M.I.A. 1, *supra*; *Mohesh* v. *Taruck* (1893) 20 Cal. 487, 20 I.A. 30.

(*p*) *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 928-29, 931-33, 40 I.C. 518, ('18) A.M. 1072.

*Consent of Court of Wards.*—There are local Acts which constitute Courts of Wards. These Acts contain provisions prohibiting a ward of the Court from adopting without the consent of the Court.

*Illegitimate son.*—The existence of an illegitimate son is no bar to an adoption (*q*).

*Illatom adoption.*—See the under-mentioned case (*r*).

*Deformity.*—A person who has become blind after he was born is not disqualified from taking a son in adoption (*s*). Nor is a person who is suffering from leprosy which is not of a virulent form (*t*). Reference may be made to the Hindu Inheritance (Removal of Disabilities) Act, 1928, which it is submitted could have bearing on the question.

**451. Adoption by wife.**—A wife cannot adopt a son to her husband during her husband's lifetime except with his express consent (*u*).

**452. Adoption by widow.**—The law as to adoption by a widow is different in different States (*v*):—

(1) In Mithila a widow cannot adopt at all, not even if she has the express authority of her husband.

(2) In Bengal (*v*1), Benares (*w*) and Madras a widow may adopt under an authority from her husband in that behalf. Such authority may be express or implied. It cannot be implied from the mere absence of a prohibition to adopt (*x*).

(3) In the Madras State a widow may also adopt without her husband's authority, if where the husband was separate at the time of his death, she obtains the consent of his *sapindas,* and where he was joint, she obtains the consent of his undivided coparceners. This subject is considered more fully in § 462 below.

Where the husband had given authority to adopt no question of consent of *sapindas* can arise (*x*1).

(4) In the Bombay State a widow may adopt even without any authority. See § 463 below.

In all parts of India except Madras and Punjab, the Jains observe the custom by which a widow is entitled to adopt to her husband without his authority. The rule is so well known and so well established by judicial decisions that it is no longer necessary to plead and prove it in any part of India except Madras and Punjab (*y*). Such custom prevails amongst the Agarwals of Marwar who generally adhere to Jainism (*z*) In *Munnalal* v. *Rajkumar* (*z*1) the Supreme Court pointed out that this custom has become

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(*q*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*r*) *Nalluri* v. *Kamepalli* (1919) 46 I.A. 168, 42 Mad. 805, 51 I.C. 1, ('19) A.P.C. 162.

(*s*) *Fakirnath* v. *Krushanchandra* ('54) A. Orissa 176.

(*t*) *Malojirao* v. *Tarabai* ('56) A.B. 397.

(*u*) *Narayan* v. *Nana* (1870) 7 B.H.C.A.C. 153.

(*v*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 435-36.

(*v*1) *Biswanath* v. *Dhapu* ('66) A.C. 13 [Proof of authority—facts to be considered].

(*w*) *Babu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I.C. 379, ('29) A.B. 57.

(*x*) *Balasubrahmanya Pandya Thalaivar* v. *Subbayya Thevar* (1938) 65 I.A. 93, (1938) Mad. 551, 40 Bom. L.R. 704, 72 I.C. 724, ('38) A.P.C. 34.

(*x*1) *Vallabhalalji* v. *Mahalaxmi Bahuji* ('62) A.S.C. 356, 64 Bom. L.R. 433.

(*y*) *Prem Raja* v. *Mulchand Karwar* (1947) 74 I.A. 254; *Mangibai* v. *Suganchand* (1948) A.P.C. 177, 53 C.W.N. 112; *Laxmibai* v. *Pushpabai* ('53) M.B. 193.

(*z*) *Govindram* v. *Sheoprasad* (1948) Nag. 98.

(*z*1) ('62) A.S.C. 1493.

a part of the law applicable to Jains in India (except in Madras and Punjab) by a long and uninterrupted course of acceptance and held that it governed Digamber Jains of the Porval sect residing in Madhya Pradesh.

In Mysore the law in respect of the authority of a widow to adopt under Mysore Act 10 of 1933 was in line with the law in the Bombay State (*z2*).

Among the Raghubansi Rajputs who immigrated from Ayodhya to Chindwara a widow may adopt without authority of her husband (*a*).

The difference of opinion between the various schools of Hindu law noted above arises from different interpretations put upon a text of Vasistha, which says: "Nor let a woman give or accept a son, unless with the assent of her lord." All the schools accept the above text as authoritative, but the Mithila school takes it to mean that the assent of the husband must be given *at the time of the adoption*, and, therefore, a widow cannot adopt at all. The Benares and Bengal schools interpret the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death. The Bombay school explains the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. According to this school the assent of the husband is presumed, so that a widow may adopt even to her deceased minor husband (*b*). The law in Madras stands intermediate between the law in Bengal and the law in Bombay. According to the Dravida (Madras) school, the word "husband," or "lord" in the above text is merely illustrative, and means the guardians of the widow for the time being, so that the assent of the husband's *sapindas* who are the widow's guardians after her husband's death is sufficient to enable her to adopt; but she cannot adopt without their assent even if he was separate at the time of his death.

*Adoption by Jain widow.*—A Jain widow cannot adopt a son to her husband without the authority of her husband or the consent of his *sapindas* (*c*), in the absence of proof of custom to the contrary (*d*). But the custom is so universal and so well recognised in judicial decisions, that except in Madras and Punjab, the onus of proof no longer lies on those who assert it but upon those who assert an exception to it (*e*).

### *ADOPTION BY WIDOW UNDER EXPRESS AUTHORITY FROM HER HUSBAND*

**453. Who may give authority to adopt.**—Every Hindu of sound mind who has attained the age of discretion (*f*) may authorize his wife (except in Mithila) to adopt a son to him after his death, even if he has not attained the age of majority (*g*).

The authority to adopt may be given by the husband, even if he was a member of a Mitakshara joint family at the time of his death (*h*). Thus if *A* and *B* are members of a Mitakshara joint family, either of them may authorize his wife to adopt a son to him after his death. As to adoption by a minor, see notes to § 450 above.

**454. Authority to widow to adopt.**—(1) *Authority can be given to widow alone.*—The authority to adopt can be given to the widow alone, and not to any other person, nor can it be given to the widow conjointly with another (*i*).

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(*z2*) *Eramma* v. *Muddappa* ('66) A.S.C. 1137.

(*a*) *Mst. Kesarbai* v. *Indarsingh* (1945) Nag. 1, 71 I.A. 190.

(*b*) *Patel Vandravan* v. *Patel Manilal* (1891) 15 Bom. 565.

(*c*) *Peria Ammani* v. *Krishnasami* (1893) 16 Mad. 182; *Gettappa* v. *Eramma* (1927) 50 Mad. 228, 97 I.C. 503, ('27) A.M. 228.

(*d*) *Lakshmi Chand* v. *Gatto Bai* (1886) 8 All. 319; *Manohar Lal* v. *Banarsi Das* (1907) 29 All. 495; *Asharfi Kunwar* v. *Rup Chand* (1908) 30 All. 197; *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 379.

(*e*) See foot note (*y*) on previous page.

(*f*) Reference may be made to *Aravamudha Iyengar* v. *Ramaswami* (1953) Mad. 123, ('52) A.M. 245.

(*g*) *Patel Vandravan* v. *Patel Manilal* (1891) 15 Bom. 565.

(*h*) See *Bachoo* v. *Mankorebai* (1907) 31 Bom. 373, 34 I.A. 107.

(*i*) *Amrito Lal* v. *Surnomoye* (1900) 27 Cal. 996, 27 I.A. 128; *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H.C. 241 [Jains]. As to effect of provisions of s. 37 of the P. Court of Wards Act see *Thakurji* v. *Parmeshwar Dayal* ('60) A. All. 339.

(2) *Joint authority to widow and another.*—Where the authority to adopt is given to the widow conjointly with another person, the authority is void and an adoption made in pursuance of such authority is invalid (*j*).

(3) *Authority to widow to adopt with consent of a specified person.*—But though a Hindu cannot join any other person with his wife in making an adoption, he may direct his wife to adopt with the consent of a specified person, or he may direct her not to adopt without the consent of a specified person. Where the direction is to adopt with the consent of a specified person, and it appears from the context and surrounding circumstances that the consent was to be a condition precedent, as where the wife is very young and the paramount intention shown by the document giving authority to adopt is not to obtain the spiritual benefits arising from the adoption but to have a son to inherit, an adoption made without the consent of the person named is invalid, whether such person be alive or dead at the time of adoption (*k*).

Where the boy to be adopted was to be chosen by four executors and one of the executors selected the boy after consulting the co-executors who did not express their disapproval either before or at the time of adoption, the adoption was held to be valid (*l*). Where the direction is that she should not adopt without the consent of a specified person, an adoption made without such consent is invalid in every case whether such person be alive or dead at the time of adoption (*m*). But where she is merely directed to consult or take the advice of certain persons before making an adoption, such direction is merely recommendatory and not mandatory, and an adoption made without consulting such persons is not invalid (*n*).

*Illustrations*

(a) *A* by his will *authorizes his wife and his executors to* adopt a son to him. If an adoption is made in pursuance of such authority by *A*'s widow and his executors, the adoption is invalid. The adoption will also be invalid, even if it is made by the widow alone, for the authority to adopt is not given to her singly, but to her conjointly with others.

(b) A Hindu by his will appoints five persons as executors and trustees, and authorizes his widow to make an adoption *with the consent* of those persons. Four of the trustees prove the will and undertake the trust, but the fifth declines to do so. An adoption by the widow with the consent of the four who prove the will is valid: *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A.PC. 7.

(c) *A* by his will authorises his wife to adopt a son and directs that she must adopt only a boy approved by five persons named as trustees. One of them declined to act and three others died. Adoption by the widow with the consent of the remaining trustee is valid (*o*).

**455. Authority to co-widows.**—(1) Where there are two or more widows, and the authority to adopt is given to *one of them only,* she may adopt without consulting the other widows, and she alone, it seems, can adopt (*p*).

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(*j*) *Amrito Lal* v. *Surnomoye* (1900) 27 Cal. 996, 27 I.A. 128.

(*k*) *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 10 Pat. 187, 127 I.C. 743, ('30) A.P.C. 242, reversing s.c. in (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51; *Radha Madhab Jiu* v. *Rajendra Prasad Bose* (1933) 12 Pat. 727, 149 I.C. 890, ('33) A.P. 250.

(*l*) *Rattan Lal* v. *Baij Nath* (1938) Lah. 1 (P.C.) 169 I.C. 902, ('37) A.P.C. 292.

(*m*) *Rangubai* v. *Bhagirthibai* (1878) 2 Bom. 377, (1900) 27 Cal. 996, 1002, 27 I.A. 128, 132 supra; *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A.P.C. 7.

(*n*) *Surendra Nandan* v. *Sailaja* (1891) 18 Cal. 385, cited with approval in *Suryanarayana* v. *Venkataramana* (1906) 29 Mad. 382, 33 I.A. 145; *Om Prakash Goela* v. *Mt. Chandar Kala* (1950) A.E.P. 35.

(*o*) *Kotturuswami* v. *Veeravva* (1959) A.S.C. 577.

(*p*) Strange's Hindu Law, vol. ii, 91; Mayne's Hindu Law, 118.

(2) In *Narasimha* v. *Parthasarathy* (*q*) a case from Madras, their Lordships of the Privy Council left it an open question, whether if a power to adopt is given to two or more widows *jointly*, such power would be valid, but they held that even if it were so, it must be exercised by them all and that it could not be exercised after the death of any one of them.

In that case their Lordships observed that such a power might be supported by custom, and that there were indications in the cases cited before them that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the senior widow. It has since been held by the High Court of Madras that where a joint power of adoption is given to two widows, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior widow who alone has the preferential right to adopt, the junior widow being considered only as his step-mother. The decision proceeds on what is called "the genius of the Hindu law" and "the custom and consciousness of the community at large at any rate in South India" (*r*). Where a deed conferred on both the widows authority to adopt and further provided that if any one was not willing to adopt, the other may do so, it was held that the authority was valid (*s*).

(3) Where the authority to adopt is given to the widows *severally*, the senior widow has the prior right to exercise the power of adoption. The junior widow has no right to adopt unless the senior widow refuses to do so (*t*). A widow cannot adopt when her co-widow has validly adopted and the adopted son is living (*u*). See §§ 462(8), 463(4), and 470.

*Illustration*

A Hindu testator, having two wives, directed by his will as follows: "You" (meaning his two wives) "should adopt a boy who is our *sonnihita* whenever it strikes you that our *Samastanam* should continue. In all matters both should act without quarrelling." Both wives survived the testator. After the death of one of the widows the other adopted a son to the testator. *Held* by the Privy Council that the power to adopt was *joint*, and that it could not be validly exercised by one widow after the death of the other, and that the adoption was therefore invalid: *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 41 I.A. 51, 29 I.C. 166.

**456. Form of authority.**—(1) The authority to adopt may be given verbally (*v*) or in writing. If it is in writing, it must be registered, unless the authority is given under a will (*w*).

(2) If the authority is contained in a will, the will must be executed in accordance with the formalities required by the Indian Succession Act, 1925, s. 63. Although a will made by an undivided member of a joint Mitakshara family, cannot take effect on the testator's interest on the joint estate, yet a power of adoption contained in a testamentary document properly executed would be a perfectly operative provision (*x*).

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(*q*) (1914) 37 Mad. 199, 220-221, 41 I.A. 51, 69-70, 23 I.C. 166; *Lachhmi* v. *Musammut Parbati* (1920) 42 All. 266, 54 I.C. 910, ('20) A.A. 166. See also *Sarada Prosad* v. *Rama Pati* (1912) 17 C.W.N. 319, 16 I.C. 817.

(*r*) *Tiruvengala* v. *Butchayya* (1929) 52 Mad. 373, 113 I.C. 347, ('29) A.M. 11.

(*s*) *Raja Ram* v. *Joti Prasad* (1943) All. 747, 209 I.C. 169, ('43) A.A. 319.

(*t*) *Bijoy* v. *Ranjit* (1911) 38 Cal. 694, 12 I.C. 460; *Mondakini Dasi* v. *Adinath Dey* (1891) 18 Cal. 69; *Ranjit Lal* v. *Bijoy Krishna* (1912) 39 Cal. 582, 14 I.C. 17.

(*u*) *Shivappa Rudrappa* v. *Rudrava Chanbasappa* (1933) 57 Bom. 1, 142 I.C. 164, ('32) A.B. 410.

(*v*) Oral authority must be strictly proved, *Ramnath* v. *Ramgopal* (1951) Nag. 294, ('51) A.N. 434; *Sumantrabai* v. *Rishabhkumar* (1953) Nag. 69, ('52) A.N. 295.

(*w*) *Mutasaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55. Registration Act, 1908, s. 17(3). See *Rawat* v. *Beni Bahadur* (1926) 1 Luck. 403, 93 I.C. 567, ('26) A.P.C. 97.

(*x*) *Om Prakash Goela* v. *Mt. Chandar Kala* ('50) A.E.P. 35; whether a document is to be read as a will or a mere authority to adopt must be a matter of construction.

(3) *Minor's will.*—If an authority to adopt is given by a minor by a writing purporting to be a will, the document must be registered. The reason is that a minor cannot make a will (*y*), and the writing can only be treated as non-testamentary, in which case it must be registered as required by law (*z*).

**457. Conditional authority.**—The authority to adopt may be conditional, but the condition must not be illegal. An authority to adopt in the event of a disagreement between the widow and the natural born son, even if the son should then be living, is invalid (*a*); the reason is that a Hindu cannot adopt while he has a son living [§ 450]. But an authority to adopt in the event of the natural born son dying under age and unmarried is valid (*b*).

**458. Authority must be strictly followed.**—The authority to adopt must be strictly obeyed (*c*). The duty of the widow is to obey such directions as her husband may have given as to the way in which she should exercise the power of adoption to him (*d*) or as to the boy to be adopted (*e*). Where the husband directed that the widow should adopt a boy from his family or of his gotra the adoption of any other boy is invalid (*f*). Thus where the authority to the widow is to adopt within a specified period, she cannot adopt after the expiration of that period (*g*).

Where the widow is authorized by her husband to adopt, "If no male or female child should be born to him," she cannot adopt if a daughter is born to him, although she may be born after his death (*h*). It has been held by the High Court of Bombay that where the widow is authorized by her husband to adopt a boy named by him, and she adopts the boy, she is not precluded from adopting another boy after the death of the adopted boy, unless there is a direction prohibiting her from adopting any other boy. Such a direction to operate as a prohibition against the widow adopting any boy, except the boy named by him, must be explicitly made and clearly intended by the husband to limit the discretion of the widow for all time and on every occasion; otherwise after his death his widow might validly make an adoption to him (*i*).

*Illustrations*

(a) *A* authorised his wife, who was then pregnant, to adopt, in case "the *son* that might be born" dies. *A* dies, and after his death the widow is delivered of a *daughter*. The authority to adopt cannot be validly exercised (*j*).

(b) *A* authorizes his widow to adopt "one of the sons" of *B*. The authority to adopt will be deemed to have been strictly pursued if any one of *B*'s sons is adopted, whether he was in existence at the date of the authority or was born thereafter. Such an authority does not limit the widow's choice to a son of *B* who was in existence at the date of the authority: *Mutasaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55.

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(*y*) Indian Succession Act, 1925, s. 59.

(*z*) *Vijayaratnam* v. *Sudarsana* (1925) 48 Mad. 614, 52 I.A. 305, 89 I.C. 733, ('25) A.P.C. 196.

(*a*) *Solukhna* v. *Ramdolal* (1811) 1 Beng. S.D. 324 (2nd ed., 434).

(*b*) *Vellanki* v. *Venkata Rama* (1876) 1 Mad. 174, 4 I.A. 1.

(*c*) *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869) 12 M.I.A. 350, 356, 2 Beng. L.R. (P.C.) 101, 12 W.R. (P.C.) 1; *Surendro Keshab* v. *Doorgasoondery* (1892) 19 I.A. 108, 122, 19 Cal. 513; *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 303, 10 Pat. 187, 196, 127 I.C. 743, ('30) A.P.C. 242.

(*d*) *Sitabai* v. *Bapu* (1920) 47 I.A. 202, 205, 47 Cal. 1012, 1018, 57 I.C. 1, ('21) A.P.C. 88; *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 522, 49 Cal. 1, 12, 64 I.C. 536, ('22) A.P.C. 216. See *Rajendra Prasad* v. *Gopal Prasad* (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51.

(*e*) *Kalawati Devi* v. *Dharam Prakash* (1933) 55 All. 78, 60 I.A. 90, 142 I.C. 1, ('33) A.P.C. 71; *Rajgopalachari* v. *Venkat Chudamma* ('36) A.M. Hyd. 153.

(*f*) *Sundarasivudu* v. *Adinarayana* (1940) Mad. 233, 189 I.C. 303, ('39) A.M. 909.

(*g*) *Mutasaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55.

(*h*) *Bhagwat Koer* v. *Dhanukhdhari* (1919) 46 I.A. 259, 47 Cal. 466, 53 I.C. 347, ('19) A.P.C. 75.

(*i*) *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.P.C. 216; *Lakshmibai* v. *Rajaji* (1898) 22 Bom. 996.

(*j*) *Mohendrololl* v. *Rookiney Dabee* (1864) 1 Coryton 42.

(c) *A* directs by his will that his widow *W* should "so far as possible adopt *S*, the second son of my elder brother: if he cannot be obtained, any other boy should be adopted with the advice of the trustees." In consequence of ill-feelings arising between *W* and *S* and his family, *W* adopts, with the consent of the trustees, her sister's son. The adoption is invalid. The words, "so far as possible," mean that unless there are conditions outside the will preventing the possibility of the adoption, the widow when she does adopt, is to exercise her power in favour of *S*. The boy could be obtained and mere ill-feeling between *W* and *S* and his family could not justify *W* in disobeying the mandatory directions of her husband: *Sitabai* v. *Bapu* (1920) 47 I.A. 202, 47 Cal. 1012, 57 I.C. 1, (21) A.P.C. 88.

**459. Exercise of authority to adopt discretionary: no limit of time.**—A widow who is authorised by her husband to adopt may or may not adopt at her discretion. She is under no legal obligation to adopt (*j*1), even if she has been expressly directed by her husband to do so. Her rights to the husband's estate are not in any way affected by her omission or refusal to adopt (*k*). Nor is there any limit to the time during which she may act upon the authority given to her [§ 471(4)]. See, however, §§ 471-472.

As the widow is under no obligation to make an adoption she can postpone making an adoption till the boy indicated by her husband whom she may not like is no longer available, and an adoption of another boy after the one selected by her husband ceases to be available is not invalid on that ground (*l*).

**459A. Agreement not to adopt is contrary to public policy.**—An agreement by a widow with a reversioner or any other person not to adopt a son to her husband, or which imposes on her power to adopt a restraint absolute or partial, is void as opposed to public policy and is not binding on her even if there is valuable consideration for the agreement. Such an agreement is also repugnant to Hindu law (*l*1).

**460. Revocation of power to adopt.**—(1) An authority to adopt may be revoked either expressly or impliedly.

(2) If the authority is contained in a will to which the provisions of the Indian Succession Act, 1925, apply, it can only be revoked in the manner provided by sec. 70 of that Act.

*Illustration*

A Hindu disposes of his ancestral property by a will made in 1889. At the date of the will he was the sole surviving coparcener with regard to that property, and as such entitled to dispose of the property by will [§ 255]. The will contains an authority to the widow to adopt *V* if he did not adopt him in his lifetime, and, in the event of *V*'s death in the wife's lifetime, to adopt *P*. The testator adopts *V* in 1890, the legal result of which is that he admits *V* as a coparcener in the family. He *then* makes another will which contains a disposition of property inconsistent with the first will but contains no express revocation of the earlier will nor of the authority to adopt therein contained. The testator dies leaving his widow and *V*. *V* dies next without issue. After *V*'s death the widow adopts *P*. The adoption of *P* is valid, for though the second will is invalid in so far as it purports to dispose of the coparcenary property [the testator not then

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(*j*1) *Chandrasekhara* v. *Kulandaivelu* ('63) A.S.C. 185, 192.

(*k*) *Mutasaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55; *Shamachaboo* v. *Dwarkadas* (1888) 12 Bom. 202; *Uma Sundari* v. *Sourobinee* (1881) 7 Cal. 288; *Narayana Ayyangar* v. *Vengu Ammal* (1938) Mad. 621.

(*l*) *Vanka Lakshminarayana* v. *Mangalappalli* ('50) A.M. 601, (1950) 1 Mad. L.J. 537; *Sri Hari Rao* v. *Venkaiah* (1953) Mad. 624, ('53) A.M. 661.

(*l*1) *Punjabrao* v. *Sheshrao* ('62) A.B. 175.

being the sole coparcener], it does not revoke the authority to adopt contained in the first will: *Venkatanarayana* v. *Subbammal* (1916) 43 I.A. 20, 39 Mad. 107, 32 I.C. 373, ('15) A.P.C. 37.

*Note.*—As to the termination of a widow's power to adopt, even under the authority of her husband, see §§ 471 and 472.

Having noted the peculiar features of an adoption by a widow under an express authority from her husband, we proceed to deal with adoption by a widow *without* such authority. This is possible only in the Madras and Bombay States.

## ADOPTION BY WIDOW WITHOUT HUSBAND'S AUTHORITY

**461. Adoption by widow without husband's authority.**—The only parts of India where a widow may adopt without an express authority from her husband are the Madras and Bombay States.

**462. In Madras.**—In the Madras State, a widow may adopt without authority from her husband, subject to the following conditions [§ 452 (3)]:—

(1) She cannot adopt, if there is an express or implied prohibition from her husband. A prohibition ought not to be inferred from the mere fact that the husband and wife were living separate (*m*). See § 463(1).

(2) If the husband was *separated* at the time of his death, she must obtain the consent of her father-in-law, and his consent as the head of the family is sufficient. If the father-in-law is then dead, she must obtain the consent of her husband's sapindas, but need not obtain the consent of the daughter's son (*n*) even though he be the next heir (*o*). But the consent necessary to validate the adoption is not the consent of every sapinda, however remote (*p*). The starting point relating to the doctrine of consent of the sapindas was first enunciated by the Privy Council in the case of *Collector of Madura* popularly known as the *Ramnad case* (*p*). It was developed by decisions of the Privy Council and the Madras High Court and culminated in the decision of the Supreme Court in *Tahsil Naidu* v. *Kulla Naidu* (*p*1). The consent required is that of a substantial majority of the nearest sapindas who are capable of forming an intelligent and honest judgment in the matter (*q*). For instance, where the consent of the nearest divided sapindas was sought on the ground that the only undivided sapinda was insane and some of them refused to consent alleging that he was sane, while he was really insane, it was held that their refusal may be ignored (*r*). Where the nearest sapindas have capriciously withheld their consent, all that is necessary is a preponderance of opinion among the reversioners in favour of the adoption. There need be no family council in the order of the degree of relationship nor is it necessary that all of them should be consulted. The widow need not consult

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(*m*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397 [known as the *Ramnad* case]; *Muthusami* v. *Pulavaratal* (1922) 45 Mad. 266, 66 I.C. 504, ('22) A.M. 106.

(*n*) *Seshamma* v. *Narasimharao* (1940) Mad. 454, 188 I.C. 250, ('40) A.M. 356.

(*o*) *Ghanta China* v. *Moparthi*, 51 C.W.N. 875 (P.C.).

(*p*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397; *Viswasundara* v. *Somasundra* (1920) 43 Mad. 876, 59 I.C. 609, ('20) A.M. 451 [consent of daughter's son not necessary].

(*p*1) See f.n. (*t*1) below.

(*q*) *Adusumilli* v. *Adusumilli* (1920) 47 I.A. 99, 43 Mad. 650, 56 I.C. 391, ('20) A.P.C. 4; *Venkatakrishnamma* v. *Annapurnamma* (1900) 23 Mad. 486.

(*r*) *Chellathammal* alias *Ammamuthammal* v. *Kalitheertha Pillai* (1943) Mad. 107, 202 I.C. 747, ('42) A.M. 606.

her step-daughter (*s*). The absence of consent on the part of the nearest sapindas cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives (*t*). This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a person who being dumb is partially incapacitated (*t*1) or a lunatic is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, or refuses his consent without exercising an honest judgment in breach of his duty (*u*), his dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. Save in exceptional cases such as those mentioned above, the consent of the nearest sapindas must be asked (*v*), and if it is not asked, it is no excuse to say that they would certainly have refused (*w*). A widow who has not been authorised by her husband has to consult all the nearest sapindas. Where out of five such sapindas she had approached only three of them and obtained their consent it was held, in a very recent decision, that it was not enough to validate the adoption (*w*1). In short, "there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband" (*x*). The assent of the sapindas is necessary because of the supposed incapacity of the widow for independent action, and not by reason of the effect of adoption upon the proprietory rights of the coparceners or reversioners; property considerations are no more paramount in the case of an undivided family than in the case of a divided family (*y*). In the absence of agnate reversioners, the widow can adopt with the consent of the nearest cognate reversioner, *e.g.*, the father's sister's son (*z*). But the consent of cognates will be sufficient only when there are no agnate reversioners (*a*). It has been held in Rangoon that, if there are no sapindas, the widow has an unrestricted power to adopt (*b*). But this view seems to be opposed to principle and authority (*c*).

In *Tahsil Naidu* v. *Kulla Naidu* (*c*1) the Supreme Court recently held that a Hindu widow, even if she happens to be the nearest sapinda, would not

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(*s*) *Brahma Sastri* v. *Sumitramma* (1934) 57 Mad. 411, 151 I.C. 200, ('34) A.M. 191; *Subba Rao* v. *Venkata Satyanarayana* (1953) 2 M.L.J. 97, ('53) A.M. 755.

(*t*) *Veera* v. *Balasurya* (1918) 45 I.A. 265, 41 Mad. 998, 48 I.C. 706, ('18) A.P.C. 97.

(*t*1) ('70) A.S.C. 1673.

(*u*) *Chandrashekhara* v. *Kudandaivelu* ('56) A.M. 370; *Narasimham* v. *Venkata Narasimha Rao* ('63) A.A.P. 78; *Kotial* v. *Sitaramayya* ('60) A.A.P. 578; *Somiah* v. *Rattamma* ('59) A.A.P. 244; *Subbayya* v. *Ramakoteswara Rao* ('58) A.A.P. 479.

(*v*) *Adusumilli* v. *Adusumilli* (1920) 47 I.A. 99, 102, 43 Mad. 650, 654, 56 I.C. 391, ('20) A.P.C. 4.

(*w*) *Venkamma* v. *Subrahmaniam* (1907) 34 I.A. 22, 30 Mad. 50, 53, affimg. (1903) 26 Mad. 627.

(*w*1) *C. S. V. Sarma* v. *C. Ramalakshmamma* ('72) A.A.P. 270.

(*x*) *Vellanki* v. *Venkata Rama* (1876) 1 Mad. 174, 190-191, 4 I.A. 11; *Subba Rao* v. *Satyanarayana* ('53) A.M. 755, (1953) 2 M.L.J. 97.

(*y*) *Chandrasekhara* v. *Kulandaivelu* ('63) A.S.C. 185, 194. *Venneti Sundara Rama Rao* v. *Satyanarayanamurthi* (1949) 2 M.L.J. 199, ('50) A.M. 74, (1950) Mad. 461.

(*z*) *Kesar Singh* v. *Secretary of State* (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.

(*a*) *Chandrappa* v. *Gyanamma* ('53) Hyd. 275 (F.B.).

(*b*) *Patnaloo Appalswamy* v. *E. Moosalaya* (1934) 12 Rang. 22, 147 I.C. 716, ('33) A.R. 334.

(*c*) *Balasubrahmanya Pandya Thalaivar* v. *Subbayya Thevar*, (1938) 65 I.A. 93, (1938) Mad. 551, 40 Bom. L.R. 704. 172 I.C. 724, ('38) A.P.C. 34.

(*c*1) See f.n. (*t*1) above.

be a competent adviser and, consequently, there is no requirement that her consent must be obtained for validating the adoption. The consent must be obtained from the nearest male sapindas. This conclusion was founded on the principle that if a widow cannot exercise an independent judgment in the matter of making an adoption herself it would follow that she would not be able to exercise an independent judgment in the matter of giving consent to adoption by another widow.

Where the nearest sapinda consents to an adoption but dies before the adoption, the adoption is nevertheless valid, provided there has been no material change of circumstances during the interval and there are no other grounds on which the adoption when actually made could be objected to by the then nearest sapindas. A widow may adopt with the authority of the nearest sapinda though no particular boy was mentioned, within a reasonable period and when the circumstances have not materially changed (*d*). The requirement of consent is not a matter of form but of substance (*e*). Where a Hindu dies leaving a widow and a son, the widow, of course, cannot adopt to her husband while the son is living—not even with his consent. But the son may consent to an adoption by the widow (his own mother) by his will, and such consent will validate an adoption made after his death. The fact that the son could have no interest in the estate after his death does not vitiate the consent. Nor is the adoption vitiated by the fact that the consent of sapindas living at the time of adoption has not been obtained (*f*). A sapinda having duly given his consent cannot arbitrarily or capriciously withdraw it (*g*).

12 M.I.A. 397—adoption with consent of all nearest sapindas held valid.

4 I.A. 1= 1 Mad. 174— " " " " " " "

45 I.A. 265 = 41 Mad. 998 = 48 I.C. 706 = ('18) A.P.C. 97—adoption made without consent of nearest sapindas held invalid.

47 I.A. 99 = 43 Mad. 650 = 56 I.C. 391 = ('20) A.P.C. 4—adoption with consent of 1 out of 6 sapindas, it not having been proved that the widow had applied for the consent of the rest except one, held invalid.

(3) If the husband was *joint* at the time of his death, the widow must obtain the consent of her father-in-law, and such consent is sufficient. If the father-in-law is then dead, the consent of *all* the husband's brothers or other coparceners in whom the interest of the deceased has vested by survivorship would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will (*h*).

Where the husband dies leaving undivided coparceners and divided sapindas, the widow should obtain the consent of the undivided coparceners. An adoption with the consent of divided sapindas, but without the consent of the undivided coparceners is, it seems, invalid (*i*). But when the undivided coparcener refused his assent because it

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(*d*) *Vasireddi Venkayya* v. *Gopu Sreeramulu* (1942) Mad. 163, ('41) A.M. 935 [F.B.]. The consent can be in general terms and it is not necessary that the person to be adopted should be specified, see f.n. (*c*1) above.

(*e*) *Bodo* v. *Dondo* ('52) Orissa 307, 311.

(*f*) *Annapurnamma* v. *Appayya* (1929) 52 Mad. 620, 119 I.C. 389, ('29) A.M. 577 [F.B.] overruling *Mami* v. *Subbarayar* (1913) 36 Mad. 145, 19 I.C. 663.

(*g*) *Sivasuryanarayana* v. *Audinarayana* (1937) Mad. 347 (F.B.), 166 I.C. 339, ('37) A.M. 110.

(*h*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 441-442. But see *Venkatakrishnamma* v. *Annapurnamma* (1900) 23 Mad. 486, 487-488, and *Narayanasami* v. *Mangammal* (1905) 28 Mad. 315, 319.

(*i*) *Sri Raghunada* v. *Brozo Kishoro* (1876) 1 Mad. 69, 3 I.A. 154.

might injuriously affect his coparcenary rights, or for other improper reasons, such refusal might be disregarded by the widow; and in such circumstances an adoption made with the consent of the divided paternal grandfather of the widow's husband has been held to be valid (*j*). The widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane (*k*).

Though the husband was joint at the time of his death, and the coparceners afterwards separate, the widow can adopt with their consent. In this case the widow was in enjoyment of her father's property as heir and the father's reversioners questioned the validity of the adoption (*l*).

(4) The scope, nature and manner of the exercise of the power of sapindas to give consent to adoption by a widow was reviewed by the Supreme Court in *Chandrasekhara* v. *Kulandaivelu* (*l*1). It was held that a sapinda has no right to refuse to give his consent or impose a condition that the widow should take a sapinda in preference to a non-sapinda in adoption. Such a condition would be entirely extraneous to the question of selection.

(5) Where the consent is obtained by the widow by a misrepresentation, as, for instance, that her husband had authorized her to adopt, but no such authority was given in fact, the adoption is invalid (*m*).

(6) Where the consent is given by the husband's kinsmen from interested motives, the adoption is invalid (*n*). It is also invalid where the consent is purchased, that is obtained by the widow in exchange for a sum of money or other valuable consideration (*o*). But there is nothing improper in a coparcener making it a condition of his consent that his own share should not be reduced by the adoption (*p*).

(7) Where the consent of the husband's kinsmen has been obtained, the widow's power to adopt is co-extensive with that of the husband. She may, therefore, adopt even an only son (which, though irreligious, is not illegal), just as much as her husband could have done (*q*) [§ 481].

(8) An adoption made by the senior widow with the consent of the sapindas is valid, though made without the consent of the junior widow (*r*). But an adoption made by a junior widow without the consent of the senior widow is invalid though made with the consent of her husband's sapindas (*s*).

(9) As to widow's motive in making an adoption, see the undermentioned case (*s*1) and § 469 *infra*.

**463. In Bombay.**—In the Bombay State a widow may adopt without authority from her husband, subject to the following conditions [§ 452 (4)]:—

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(*f*) *Venneti Sundara Rama Rao* v. *Satyanarayanamurthi* (50) A.M. 74, (1949) 2 M.L.J. 199.

(*k*) *Chellathammal* alias *Ammamuthummal* v. *Kalitheertha Pillai* (1943) Mad. 107, 202 I.C. 747, ('42) A.M. 606.

(*l*) *Panyam* v. *Ramalakshmamma* (1932) 55 Mad. 581, 138 I.C. 170, ('32) A.M. 227.

(*l*1) ('63) A.S.C. 185.

(*m*) *Ganesa* v. *Gopala* (1880) 2 Mad. 270, 7 I.A. 173; *Venkamma* v. *Subrahmaniam* (1907) 30 Mad. 50, 34 I.A. 22; *Aravamudha Iyengar* v. *Ramaswami* (1953) Mad. 123, ('52) A.M. 215. Reference may be made to *Gopalaswami* v. *Siddammal* ('58) A.M. 488.

(*n*) (1880) 2 Mad. 270, 7 I.A. 173, *supra*.

(*o*) *Danakoti* v. *Balsundara* (1913) 36 Mad. 19, 18 I.C. 980, explaining *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 443.

(*p*) *Srinivasa* v. *Rangasami* (1907) 30 Mad. 450.

(*q*) *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1899) 22 Mad. 398, at p. 408, 26 I.A. 113 at p. 128.

(*r*) (1905) 28 Mad. 315, *supra*; *K. Varadamma* v. *Kanchi Shankara Reddi* ('57) Andh. Pra. 933.

(*s*) *Raiah Venkatappa* v. *Benga Rao* (1916) 39 Mad. 772, 30 I.C. 106, ('16) A.M. 919; *Muthusami* v. *Pulavaratal* (1922) 45 Mad. 266, 66 I.C. 504, ('22) A.M. 106.

(*s*1) *Tahsil Naidu* v. *Kulla Naidu* ('70) A.S.C. 1673, 1677.

(1) She cannot adopt, if there be an express or implied prohibition from her husband (*t*). A mere refusal by her husband to adopt does not of itself amount to such a prohibition (*u*). Further, she cannot dispute an adoption made by her husband (*v*), nor can she adopt during the lifetime of a son adopted by her husband, though the validity of the adoption by her husband is doubtful (*w*). The power of a widow to adopt after her husband's death is subject only to such restrictions if any as he may have imposed upon her (*x*).

As a Hindu widow in Bombay has an inherent power to adopt, a prohibition or restriction, by the husband must be explicit. Where the husband prohibited the adoption of a son of *V* or *K*, but recommended that the son of one of his nephews should be adopted and the parents of the nephews were all dead, it was held that the adoption of a son of a nephew was valid (*y*). The statement by the testator who gave all his property for charity that he is not going to adopt and that he is not going to give authority to his wife to adopt does not amount to an implied prohibition by him of an adoption by the widow in respect of watan property. The adoption by the widow after his death (which in Bombay requires no authority) is valid as regards that property (*z*). See § 462(1).

The law in respect of authority of a widow in Mysore State was in line with the law in Bombay State (*z*1).

(2) If the husband was *separate* at the time of his death, and the widow has succeeded to his estate as his heir, she may take a son in adoption without the consent of her husband's sapindas (*a*).

(3) The law relating to the power (to adopt) of a widow, where husband was *joint* at the time of his death, has been the subject of fluctuations. Four distinct landmarks may be recognised.

(i) (1879-1921). In 1879, a Full Bench of the Bombay High Court held (*b*) that such a widow cannot adopt, when she has not the authority of her husband or the consent of his undivided coparceners. In 1891, it was held that the consent of the father-in-law at the time of adoption is sufficient (*c*).

(ii) (1921-1925). In the case of *Yadao* v. *Namdeo* (*d*), which went up on appeal to the Judicial Committee from the Madhya Pradesh, the parties were Hindus to whom the Hindu law applicable to Hindus of the Mahratta country of the State of Bombay applied. The facts were that one Pundlik, his cousin Namdeo, and Namdeo's sons Rambhau and Pandurang were members of a joint family. Pundlik died childless in 1905. Soon after, Namdeo gave his son Pandurang in adoption to Pundlik's widow. The adoption was evidenced by a deed. Pandurang died unmarried in 1907 and the widow adopted a stranger without the consent of Namdeo. The Judicial Commissioner of Nagpur held that Pandurang and Namdeo's family were undivided at the time of Pandurang's death and that the adoption, having been made without the consent of Namdeo and his son, was invalid. The Judicial Committee reversed the decision and held that the adoption was valid.

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(*t*) *Gopal* v. *Vishnu* (1899) 23 Bom. 250, 256; *Lakshmibai* v. *Saraswatibai* (1899) 23 Bom. 789, 795-797; *Malgauda* v. *Babaji* (1913) 37 Bom. 107, 17 I.C. 746.

(*u*) *Sitabai* v. *Govindrao* (1927) 51 Bom. 217, 101 I.C. 46, ('27) A.B. 151; *Ishwar Dadu* v. *Gajabai* (1926) 50 Bom. 468, 537, 96 I.C. 712, ('26) A.B. 435 [F.B.]. See *Bayabai* v. *Bala* (1870) 7 Bom. H.C. App. I discussed in *Sitabai's* case.

(*v*) *Chimabai* v. *Mallappa* (1922) 46 Bom. 946, 67 I.C. 654, ('22) A.B. 397.

(*w*) *Bhau* v. *Narasagouda* (1922) 46 Bom. 400, 64 I.C. 614, ('22) A.B. 300, affirmg. *Bhujangouda* v. *Babu* (1920) 44 Bom. 627, 57 I.C. 573, ('20) A.B. 115.

(*x*) *Jagannath Rao Dani* v. *Rambharosa* (1933) 60 I.A. 49, 141 I.C. 520, ('33) A.P.C. 33.

(*y*) *Damodar Vishnu* v. *Shriram Laxman* (1911) Bom. 170, 193 I.C. 413, ('41) A. Bom. 56.

(*z*) *Vithagouda* v. *Secretary of State* (1932) 34 Bom. L.R. 818, 140 I.C. 242, ('32) A.B. 442.

(*z*1) *Eramma* v. *Muddappa* ('66) A.S.C. 1137.

(*a*) *Rakhmabai* v. *Radhabai* (1868) 5 Bom. H.C.A.C. 181; *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, at p. 436; *Punjabai* v. *Shamrao* (1954) Nag. 805, ('55) A.N. 293 (parties governed by Bombay Law).

(*b*) *Ramji* v. *Ghamau* (1879) 6 Bom. 498 [F.B.]; *Dinkar* v. *Ganesh* (1879) 6 Bom. 505 [F.B.].

(*c*) *Vithoba* v. *Bapu* (1891) 15 Bom. 110; *Lakshmibai* v. *Vishnu* (1905) 29 Bom. 410 [consent of father-in-law cannot operate after his death].

(*d*) (1921) 48 I.A. 313, 49 Cal. 1, 64 I.C. 536, ('22) A.P.C. 216.

They observed: "Their Lordships find as a fact and hold in law that on the date of that deed Namdeo and his son Rambhau had separated from Pandurang, and had ceased to be members with Pandurang of the joint family, although no partition of the family property had been effected." Later on, they also observed referring to the decision in *Bayabai* v. *Bala* (*e*). "There is nothing in the judgment of Westropp, J., which confined his observations as to the power of a Hindu widow in the Mahratta country of the Bombay State and in Gujarat with the consent of relations to cases in which the widow was the widow of a separated husband; his observations appear to their Lordships to have been general and to apply to either class of cases."

(iii) (1925-1932). In *Ishwar Dadu* v. *Gajabai* (*f*) decided by the Bombay High Court in 1925, it was contended, on the basis of the above observations of the Judicial Committee, that the decision in *Ramji* v. *Ghamau* (*g*) and the decisions that followed it were overruled by the Judicial Committee. The question was referred to a Full Bench. The Full Bench held, by a majority of four against one, that the observations of the Judicial Committee were *obiter* and that the earlier decisions of the Bombay High Court beginning with *Ramji* v. *Ghamau* (*g*) were not overruled. In a later case where the coparcener was still in his mother's womb at the date of adoption, it was held that the adoption was invalid (*h*).

(iv) (After November, 1932). The facts of an appeal which arose from the Dharwar District of Bombay and which was decided by the Judicial Committee in 1932 were these. *N*, *J* and *K* were three brothers of whom *N* and *J* were undivided and *K* was divided from them. *K* died in 1932 leaving a son *G*. *J* died in 1913 leaving his widow *B*. *N* died in 1915 leaving his son *D*. In 1919 *D* died leaving his son *D.T.* who was born in 1918. During the lifetime of *D.T.*, *J*'s widow, *B*, adopted Narayan in 1919. Afterwards, in 1920 *D.T.* died. *G* brought the suit questioning the validity of Narayan's adoption. The High Court of Bombay, following the Full Bench judgment in *Ishwar Dadu's* case (*i*) held that the adoption was invalid as the joint family had not ceased and *B* could not adopt without the consent of the sole coparcener (*D.T.*). The Judicial Committee held that *Ramji* v. *Ghamau* (*j*) was overruled by *Yadao's case* (*k*) and that the decision in *Ishwar Dadu's case* (*i*) was erroneous and reversing the High Court's judgment held that the adoption was valid (*l*). The rule was regarded as firmly established in a later decision of the Judicial Committee from Bombay (*m*).

The subject-matter of §§ 462 and 463 should be carefully distinguished from that of §§ 471 and 472. The former sections deal with the question whether the widow can have a power to adopt when the husband has not given an authority; whereas the latter deal with the question as to how a widow's authority (whether from the husband, or sapindas or inherent as in Bombay) may terminate on the happening of certain events. The latter sections are not confined to Madras and Bombay, but apply to the whole of India.

(4) *Case of two widows.*—Where there are two or more widows, the senior widow may adopt without the consent of the junior widow or widows (*n*); but the junior widow cannot adopt without the consent of the senior widow, unless she has an express authority to adopt from her husband (*o*). Where the senior widow relinquished her right of adoption in favour of the junior widow for consideration, an adoption by her on the ground that the junior widow has not exercised the right is invalid (*p*).

(*e*) (1870) 7 Bom. H.C. Appx. 1.

(*f*) (1926) 50 Bom. 468, 96 I.C. 712, ('26) A.B. 435 [F.B.].

(*g*) (1879) 6 Bom. 498.

(*h*) *Bala Anna* v. *Akubai* (1926) 50 Bom. 722, 99 I.C. 417, ('26) A.B. 584.

(*i*) (1926) 50 Bom. 468, 96 I.C. 712, ('26) A.B. 435 [F.B.].

(*j*) (1879) 6 Bom. 498.

(*k*) (1921) 48 I.A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.P.C. 216.

(*l*) *Bhimabai* v. *Gurunathgauda* (1933) 57 Bom. 157, 60 I.A. 25, 141 I.C. 9, ('33) A.P.C. 1.

(*m*) *Vijayasangji* v. *Shivasangji* (1935) 62 I.A. 161, 59 Bom. 360, 155 I.C. 493, ('35) A.P.C. 95; *Dhandi Duganoo* v. *Rama Bala* (1936) 60 Bom. 83, 38 Bom. L.R. 94, 161 I.C. 849, ('36) A.B. 132; *Balu Sakharam* v. *Lahoo Sambhaji* (1937) Bom. 508 [F.B.], 39 Bom. L.R. 382, 170 I.C. 393, ('37) A.B. 279; *Punjabai* v. *Shamrao* (1954) Nag. 805, ('55) A.N. 293 (parties governed by Bombay law).

(*n*) *Rakhmabai* v. *Radhabai* (1868) 5 B.H.C. A. C. 181; *Basappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I.C. 736; *Amava* v. *Mahadgauda* (1898) 22 Bom. 416; *Dundoobai Anandrao* v. *Vithalrao Anandrao* (1936) 60 Bom. 498, 38 Bom. L.R. 193, 162 I.C. 780, ('36) A.B. 182.

(*o*) *Basappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I.C. 736; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160.

(*p*) *Sadashiv Waman* v. *Reshma* (1938) Bom. 84, 39 Bom. L.R. 1115, 173 I.C. 509, ('38) A.B. 1.

If the husband was joint with his father at the time of his death, the junior widow may adopt with the consent of her husband's father, and such adoption is valid even if it is made without the consent of the senior widow (*q*).

As to the termination of the senior widow's power to adopt, when the junior widow has a son who dies and is succeeded by the junior widow as his heir, see § 472.

The primary object of adoption being religious and not secular the validity of adoption must be considered as at the date of adoption. In a case decided by the Bombay High Court it was held that the adoption by a senior widow when the junior widow was pregnant is valid (*r*).

## *GENERAL RULES AS TO ADOPTION BY WIDOWS*

**464. Extent of widow's power to adopt.**—A widow has no larger powers of adoption than what her husband would have, if alive (*s*).

Thus a widow cannot adopt so long as there is a son, grandson or great-grandson natural or adopted, of her husband, in existence. See § 463(1).

**465. Minor widow.**—A minor widow may adopt in the same circumstances as an adult widow, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted (*t*).

According to Bengal writers the age of discretion is reached at the beginning of the sixteenth year; according to Benares writers, at the end of the sixteenth year. The former view was taken in a Madras case (*u*). All authorities agree in holding that the widow must have attained competence for independent judgment. But no such judgment is required when the boy to be adopted is named by the husband in the authority to adopt. In such a case she can adopt though she has not attained the age of discretion (*v*).

**466. Unchaste widow.**—(1) An unchaste widow living in concubinage is incompetent to adopt a son, as she is incapable of performing the religious ceremonies (*w*).

(2) There is no such disability in the case of a Sudra widow as no religious ceremonies are essential in the case of Shudras (*x*). It has been held by the Bombay High Court, that even amongst regenerate classes, a widow though unchaste or otherwise impure can make a valid adoption provided she performs herself the physical act of taking the boy in adoption and delegates to somebody else the performance of religious ceremonies which are duly performed by the latter (*y*).

**467. Remarriage of widow.**—A widow cannot, after remarriage, adopt a son to her first husband (*z*).

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(*q*) *Dnyanu* v. *Tanu* (1920) 44 Bom. 508, 57 I.C. 113.

(*r*) *Melappa* v. *Guramma* ('56) A.B. 129.

(*s*) *Gopee Loll* v. *Chundraolee* (1873) 11 Beng. L.R. 391, (1872) I.A. Sup. Vol. 131.

(*t*) *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 40 I.C. 518 [12 years old—cannot adopt]; *Basappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I.C. 736 [15 years old—can adopt]; *Murgeppa* v. *Kalawa* (1920) 44 Bom. 327, 55 I.C. 361 [12 years old—cannot adopt]; *Parratava* v. *Fakirnaik* (1922) 46 Bom. 307, 64 I.C. 899, ('22) A.B. 105 [12½ years old—cannot adopt]. Also see *Paryanibai* v. *Bajirao* ('63) A.B. 25, (1961) Bom. 963, 64 Bom. L.R. 86.

(*u*) (1917) 40 Mad. 925, 929, 40 I.C. 518, *supra*.

(*v*) *Mondakini* v. *Adinath* (1891) 18 Cal. 69.

(*w*) *Sayamalal* v. *Saudamini* (1870) 5 Beng. L.R. 362.

(*x*) *Basvant* v. *Mallappa* (1921) 45 Bom. 459, 59 I.C. 800, ('21) A.B. 301; *Annapurnamma* v. *Manikyamma* (1946) Mad. 755; *Bhimabai* v. *Dattatraya* ('56) A.N. 231; *Deorao* v. *Raibhan* (1954) Nag. 558, ('54) A.N. 257.

(*y*) *Partap* v. *Bai Suraj* (1946) Bom. 1; *Govind* v. *Godubai* (1946) A.B. 439.

(*z*) *Panchappa* v. *Sangambasawa* (1900) 24 Bom. 89, 94; *Faikirappa* v. *Savtrewa* (1921) 23 Bom. L.R. 482, 62 I.C. 318, ('21) A.B. 1 [F.B.]. *Kishni* v. *Ratna* ('64) A.A. 17.

**468. Successive adoptions.**—A widow may adopt several sons in succession one after the death of another, unless there is a specific limitation placed on her power to adopt (*a*).

*Illustration*

*A* authorises his wife *B* to adopt a son to him after his death. *B* adopts *C*. *C* then dies unmarried. *B* may adopt another son to *A*. The authority to adopt is not exhausted on the adoption of *C*.

In the above case it was argued that by the adoption of the first adopted son, all the spiritual benefit to be derived from the act was secured to the deceased, and that the adoption of a second boy was, therefore, supererogatory. But this contention was rejected by the Privy Council. As to simultaneous adoptions, see § 485 below.

**469. Motive of adoption.**—The motive of a widow in making an adoption is not material upon the question of its validity (*b*). The Court can enquire into the motives of the husband's sapindas in giving [§ 462(6)] or refusing consent to an adoption to a widow (*c*).

Money paid to a widow to induce her to adopt a son is in the nature of a bribe, which is condemned by smriti writers as an illegal payment (*d*).

**470. Co-widows.**—Where a Hindu dies leaving two or more widows, the adoption by the widows, where an express authority is left by the husband to adopt, is governed by the rules laid down in § 455 above. Where no such authority is given, the adoption by the widows in Madras is governed by the rule laid down in § 462(8) and in Bombay by the rule laid down in § 463(3).

The only schools which allow an adoption by a widow without her husband's authority are the Dravida (Madras) school and the Maharashtra (Bombay) school.

## *TERMINATION OF WIDOW'S POWER TO ADOPT*

**471. Generally.**—(1) A widow's power to adopt continues all her lifetime—

(i) in all cases where husband has died without leaving any son [see *explanation I* and ills. (a) to (c)];

(ii) in cases where her husband has left a son, if the son dies leaving her (his mother) as his nearest heir (*e*) [see ills. (d) and (e); also see *explanation* I and illus. (*g*)].

In the first case, the widow succeeds to the estate as her husband's heir; in the second case, she succeeds to the estate as the heir of her son (*i.e.*, as

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(*a*) *Suryanarayana* v. *Venkataramana* (1906) 29 Mad. 382, 33 I.A. 145; *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.P.C. 216.

(*b*) *Ramchandra* v. *Mulji* (1898) 22 Bom. 558 [F.B.]; *Mahableshwar* v. *Durgabai* (1898) 22 Bom. 199. See also *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 485-486, 72 I.C. 230, ('23) A.P. 423; *Kandulapati Kanakaratnam* v. *Kandulpati Narasimha Rao* (1942) Mad. 173, 198 I.C. 236, ('41) A.M. 937 [F.B.]; *Vanka Lakshminarayana* v. *Mangalappalli* ('50) A.M. 601, (1950) 1 M.L.J. 537; *Govinda* v. *Shenfad* (1949) Nag. 416; *Ganu* v. *Shivram* (1954) Nag. 646, ('54) A.M. 353; *Ramamma* v. *Lakshminarasimham* ('53) A.M. 676; *Venkalakshmi Ammal* v. *Jagannathan* ('63) A.M. 316.

(*c*) *Vellanki* v. *Venkata* (1876) 1 Mad. 174, 190-191, 4 I.A. 1, 14; *Krishnayya Rao* v. *Raja of Pittapur* (1928) 51 Mad. 893, 116 I.C. 673, ('28) A.M. 994 [F.B.].

(*d*) *Shri Sitaram* v. *Harihar* (1911) 35 Bom. 169, 8 I.C. 625.

(*e*) *Verabhai* v. *Bai Hiraba* (1903) 30 I.A 234, 27 Bom. 492; *Gavdappa* v. *Girimallappa* (1895) 19 Bom. 331; *Mallappa* v. *Hanmappa* (1920) 44 Bom. 297, 55 I.C. 814; *Sahebrao* v. *Rangrao* ('62) A.B. 1, (1961) Bom. 768, 63 Bom. L.R. 411.

his mother). In either case, the estate vests in her, in the one case immediately on the death of her husband, in the other case, immediately on the death of her son. By adoption she divests no estate except her own. But vesting or divesting is no longer of importance. See *Amarendra Mansingh's* case (*f*) and the decision of the Supreme Court in *Gurunath* v. *Kamalabai* (*g*). See also the Hindu Women's Rights to Property Act, 1937, under which it seems the adopted son will now take a moiety of the interest which vests in the adopting widow.

In the second case, the mere fact that the son had attained majority (which would be at the age of eighteen), or had attained ceremonial competence (which would be at the age of fifteen), does not extinguish the widow's power to adopt to her husband (*h*).

(2) (a) If the son dies leaving a son or a wife, the widow's power to adopt comes to an end *at his death*, and she cannot thereafter exercise it, though she may have been expressly authorized by her husband to adopt in the event of the son's death. The reason is that the estate then vests in an heir of the deceased son and the widow cannot adopt to her husband so as to divest the estate taken by that heir (*i*) [ills. (f) and (g)]. In *Amarendra Mansingh's* case the true reason is said to be that "where the duty of providing for the continuance of the line which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone" (*j*) [ills. (f), (h), (i) and (j)].

In *Gurunath* v. *Kamalabai* (*k*) the Supreme Court cited with approval the following observations of Chandavarkar J. in a Bombay decision: "When a son dies before attaining full legal competence and does not leave either a widow or a son or an adopted son then the power of the mother which was in abeyance during his lifetime revives but the moment he hands over that torch to another, the mother can no longer take it."

(b) If the son dies leaving a daughter, it has been held in Bombay that the adoption is valid (*l*).

(c) If the son is a step-son of the widow having the power to adopt and dies leaving his own mother (or, the mother having predeceased him, grandmother) it was held (before *Amarendra Mansingh's* case) that the adoption was invalid (*m*). But as the son's mother or grandmother cannot discharge

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(*f*) (1933) 60 I.A. 242, 12 Pat. 642, ('33) A.P.C. 155.

(*g*) (1955) 1 S.C.R. 1135, 57 Bom. L.R. 694, ('55) A.S.C. 206.

(*h*) *Tripuramba* v. *Venkataratnam* (1923) 46 Mad. 423, 72 I.C. 517, ('23) A.M. 278; explaining *Madana Mohana* v. *Purushothama* (1918) 45 I.A. 156, 41 Mad. 855, 46 I.C. 481; *Venkappa* v. *Jivaji* (1901) 25 Bom. 306; *Suryanarayana* v. *Venkataramana* (1906) 33 I.A. 145, 154, 29 Mad. 382, 389-390; *Verabhai* v. *Bai Hiraba, supra; Anjirabai* v. *Pandurang* (1924) 48 Bom. 492, 80 I.C. 185, ('24) A.B. 441, *Shashankabhooshan Chaudhuri* v. *Brajendranarayan Mandal* (1936) 63 Cal. 385, 159 I.C. 437, ('35) A.C. 716.

(*i*) *Mst. Bhoobun Moyee* v. *Ram Kishore* (1865) 10 M.I.A. 279; *Padma Kumari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I.A. 229; *Thayammal* v. *Venkatarama* (1887) 10 Mad. 205, 14 I.A. 67; *Tarachurn* v. *Sureshchunder* (1890) 17 Cal. 122, 16 I.A. 166; *Amava* v. *Mahadgauda* (1898) 22 Bom. 416; *Ramkrishna* v. *Shamrao* (1902) 26 Bom. 526 [F.B.]; *Anandibai* v. *Kashibai* (1904) 28 Bom. 461; *Faizuddin* v. *Tincowri* (1895) 22 Cal. 565; *Draupadi* v. *Sambari* ('58) A. Orissa 242; *Neelawwa* v. *Kallappa* ('72) A. Mys. 218; *Venkalalakshmi Ammal* v. *Jagannathan* ('63) A.M. 316 (son predeceasing father).

(*j*) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.P.C. 155.

(*k*) (1955) 1 S.C.R. 1135, 55 Bom. L.R. 694, ('55) A.S.C. 206.

(*l*) *Chanbasappa* v. *Madivalappa* (1937) Bom. 642, 39 Bom. L.R. 591, 170 I.C. 999, ('37) A.B. 337.

(*m*) *Anandibai* v. *Kasibai* (1904) 28 Bom. 461; *Faizuddin* v. *Tincowri* (1895) 22 Cal. 565; *Drobomoyee* v. *Shama Churn* (1886) 12 Cal. 246.

the duty of providing for the continuance of the line, these decisions cannot be supported and must be deemed to be overruled (*n*).

(3) The Bombay and Calcutta High Courts held in the cases noted below that the power to adopt once it comes to an end becomes extinguished for ever, and it does not revive even when, on the death of the son's nearer heirs, the estate reverts to the widow and becomes vested in her (*o*). But the Nagpur High Court took the view that on the remarriage of the son's widow the property came back to the mother and then the mother could adopt—the power being only suspended and not extinguished (*p*). Similarly, the Chief Court of Oudh held that the power of the widow to adopt which is suspended during the lifetime of an unmarried son revives if the son marries and dies leaving a widow who too dies issueless and without making an adoption (*q*). The question came up for consideration before the Supreme Court in *Gurunath* v. *Kamalabai* [1955] 1 S.C.R. 1135 where after a review of the leading decisions on the subject the Court affirmed and restated the following propositions:

(i) That the interposition of a grandson, or the son's widow, competent to continue the line by adoption brings the mother's power of adoption to an end;

(ii) That the power to adopt does not depend upon any question of vesting or divesting of property; and

(iii) That a mother's authority to adopt is not extinguished by the mere fact that her son had attained ceremonial competence.

The Supreme Court observed in this case that the Nagpur and Oudh decisions referred to above were based on an erroneous apprehension of the true reasons for the rule.

(4) Subject to the above provisions a widow may adopt at any time she pleases, unless there is a direction to the contrary (*r*). Thus, in one case an adoption made by a widow seventy-one years after her husband's death was upheld (*s*). In a recent decision it was held by the High Court of Madras that an adoption by a widow was not invalidated by the fact that the adoptee was not the boy directed by her father-in-law or the fact that it was made many years after the requisite consent was obtained (*s*1).

As to reopening of partition see §§ 336-339.

(5) The provisions of this section apply to all cases governed by the Dayabhaga law, whether the husband was divided or undivided at the time of his death, and to those cases governed by the Mitakshara law where the husband was divided at the time of his death. The next section applies to

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(*n*) *Maruti* v. *Ganu* (1947) Bom. 677.

(*o*) *Krishnarav* v. *Shankarrav* (1893) 17 Bom. 164; *Ramkrishna* v. *Shamrao* (1902) 26 Bom. 526; *Shamrao* v. *Bhimrao* (1949) Bom. 296, ('49) A.B. 311; *Manikyamala* v. *Nande Kumar* (1906) 33 Cal. 1306.

(*p*) *Bapuji* v. *Gangaram* (1941) Nag. 178, 195 I.C. 282, ('41) A.N. 116—followed in *Govinda* v. *Shenfad* (1949) Nag. 416.

(*q*) *Prem Jagat Kuer* v. *Harihar*, 21 Luck. 1.

(*r*) *Girioica* v. *Bhimaji* (1885) 9 Bom. 58; *Mutasaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55.

(*s*) *Raje* v. *Jayavantrav* (1867) 4 Bom. H.C.A.C. 191; *Hari Rao* v. *Venkaiah* (1953) Mad. 624, ('53) A.M. 661.

(*s*1) *C. V. C. Chetty* v. *P. L. D. Chetty* ('72) A.M. 233.

cases governed by the Mitakshara law, where the husband was undivided at the time of his death.

*Explanation I.*—"Son" in this section means a son, grandson, or great-grandson, natural or adopted.

*Explanation II.*—A son adopted by a widow to her husband after his death is a son left by the husband within the meaning of sub-section (1), cl. (ii) [see ill. (d)].

(6) §§ 471 and 502 may be read together.

(a) *A* dies leaving a widow as his only heir. The widow may adopt a son to *A*. [Sub-§ (1), cl. (i)].

(b) *A* dies leaving a widow and a daughter. The widow may adopt a son to *A*. It does not matter that *A* has left a daughter. The daughter is not entitled to succeed until after the widow, and she has no voice in the matter of the adoption. [Sub-§ (1), cl. (i)].

(c) *A* dies leaving two widows in whom his property vests as his heirs. The widow having authority to adopt or, in Bombay, the senior widow without any authority adopts without the consent of the co-widow. The adoption is valid (*t*).

(d) *A* dies leaving a widow *W* and a son. On *A*'s death, the son succeeds to the estate. The son then dies unmarried. On his death, *W* succeeds to his estate as his heir (*i.e.*, as his mother). *W* may adopt a son either under an authority from *A* (*u*) or in Madras, with the consent of *A*'s *sapindas* (*v*), or in Bombay, without any authority.

In the above case, if the adopted son dies unmarried, *W* may again adopt with proper authority, if necessary, or in Bombay without authority (*w*).

(e) *A* dies leaving a widow and two sons. The sons die unmarried. The mother's power to adopt does not come to an end and she can adopt.

(f) If in the above case one son dies married, then a few days later his widow dies and then the second son dies, the mother's authority to adopt is terminated and she cannot adopt (*x*). [Sub-§ (2)].

(g) *A* dies leaving a widow and a grandson *B*. On *A*'s death, *B* succeeds to the estate as *A*'s grandson. *B* then dies without leaving any wife or children. On *B*'s death, the widow succeeds to the estate as *B*'s grandmother. The widow may adopt a son to her husband *A*: *Narhar* v. *Balwant* (1924) 48 Bom. 559, 80 I.C. 435, ('24) A.B. 437. But if *B* dies leaving a wife or child, the widow's power to adopt comes to an end. [Sub-§ (1), cl. (ii)—also Expln. I].

(h) *A* dies leaving a widow and a son *B*. On *A*'s death the estate vests in *B*. *B* dies leaving his wife *C* who succeeds to the estate. *A*'s widow then adopts a son to *A* during the lifetime of *C*.

(i) under the authority of husband—*Chunderbulle's case* (*y*).

(ii) (in Madras) with the assent of *A*'s *sapindas*—*Thayammal* v. *Venkatrama* (*z*).

(iii) (in Bombay) under her inherent power—*Keshav* v. *Govind* (*a*).

In all the above cases, the adoption is invalid.

Even if *B* is an adopted son, the same result follows (*b*).

The result will be the same whether the widow adopts before or after the death of *C* (*c*).

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(*t*) *Mondakini* v. *Adinath* (1891) 18 Cal. 69; *Rakmabai* v. *Radhabai* (1868) 5 Bom. H.C.A.C. 181.

(*u*) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.P.C. 155.

(*v*) *Vellanki* v. *Venkata Rama* (1876) 1 Mad. 174, 190-191, 4 I.A. 1, 14.

(*w*) *Ram Soondur* v. *Surbanee Dossee* (1874) 22 W.R. 121.

(*x*) *Shamrao* v. *Bhimrao* (1949) Bom. 296, ('49) A.B. 311. Some earlier decisions to the contrary are not good law and must be deemed to have been overruled.

(*y*) *Bhoobun Moye* v. *Ram Kishore* (1865) 10 M.I.A. 279; *Padma Kumari* v. *Court of Wards* (1882) 8 I.A. 229, 8 Cal. 302.

(*z*) (1887) 10 Mad. 205, 14 I.A. 67.

(*a*) (1885) 9 Bom. 94.

(*b*) *Madana Mohan* v. *Purushothama* (1918) 45 I.A. 156, 41 Mad. 855, 46 I.C. 481.

(*c*) *Krishnarav* v. *Shankarrav* (1893) 17 Bom. 164; *Manikyamala* v. *Nanda Kumar* (1906) 33 Cal. 1306; *Shamrao* v. *Bhimrao* (1949) Bom. 296.

(i) *A* dies leaving two widows *R* and *G* and a son *D* by the latter. *D* dies leaving a widow *S* and a son *J*. *S* dies shortly after and after some years *J* dies. After about thirty years *G* adopts the plaintiff. The adoption is invalid [Sub-§ (3)]: *Gurunath* v. *Kamalabai* (1955) 1 S.C.R. 1135, 57 Bom. L.R. 694, ('55) A.SC. 206.

(j) *A* dies leaving a widow *W* and a son *B*. On *A*'s death, *B* succeeds to the estate. *B* then dies leaving a son *C*. On *B*'s death, *C* succeeds to the estate as *B*'s son. *C* dies unmarried leaving *W*, his grandmother, as his next heir. On *C*'s death his estate vests in *W* as his heir. *W* then adopts a son to *A*. The adoption is not valid for the reasons stated in ill. (*f*). *Ramkrishna* v. *Shamrao* (1902) 26 Bom. 526, approved in *Madana Mohana* v. *Purushothama* (1918) 45 I.A. 156, 41 Mad. 855, 46 I.C. 481, cited in illustration (*h*) above. In this case also it is clear that the widow would not, by adoption, divest any estate but her own. [Sub-§ (3)].

The subject-matter of this section is closely connected with another subject, namely, divesting of estate by adoption, as to which see § 502. As to adoption by a widow with the consent of the person in whom the estate is vested, see § 503 below.

**472. Is there a limit to the power of the widow to adopt when the husband was a member of the joint family at the time of his death?**—(1) So long as there is a male member in the coparcenary, the power to adopt does not terminate and the adoption is valid [Ills. (a), (b) and (c)].

(2) It was at one time supposed that where the last surviving coparcener died and the property passed to his heir, such as a widow or collateral, the power of the widow of a predeceased coparcener was at an end (*d*). But such cases were overruled by the decision of the Privy Council in *Anant* v. *Shankar* (*e*) which was reaffirmed in *Neelangouda* v. *Ujjangouda* (*f*). It is now firmly established that the rights of the adopted son relate back to the date of the adoptive father's death and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of the latter's death. If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second and enabling the adopted son to claim a share in the family properties (*g*).

This principle of relation back is subject to the exception that any lawful alienation effected by a male or female heir since the death of the adoptive father and before the date of adoption would be binding on the adopted son (*h*). See "Alienations made prior to adoption" §§ 507-509 *post*.

The principle of relation back is also subject to another limitation or exception which is to the effect that if property by inheritance goes to a collateral and a son is adopted after the death of the collateral, the adoption does not divest the property which has vested in the heir of the collateral.

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(*d*) *Chandra* v. *Gojarabai* (1890) 14 Bom. 463; *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju* (1910) 33 Mad. 228.

(*e*) (1944) Bom. 116, 70 I.A. 232, ('43) A.P.C. 196.

(*f*) (1948) 50 Bom. L.R. 682, ('48) A.P.C. 165.

(*g*) *Tatya Shantappa* v. *Ratnabai* (1949) F.C.R. F.L.J. 123, ('49) A.F.C. 101; *Ramchandra* v. *Ramkrishna* (1952) 54 Bom. L.R. 636, ('52) A.B. 463. These decisions, however, should be read along with the recent decision of the Supreme Court referred to in f.n. (*l1*) below.

(*h*) *Jivaji* v. *Hanmant* (1950) Bom. 510, 52 Bom. L.R. 527, ('50) A.B. 360 (F.B.); *Vishnu Pandu* v. *Mahadu* (1950) Bom. 487, 52 Bom. L.R. 599, ('51) A.B. 170. (A surrender by a widow in favour of the reversioner would not rank as an alienation). See § 509A.

This limitation is also stated to be that the principle of relation back applies only when the claim is made in respect of the estate or interest of the adoptive father and does not apply when the claim relates to the estate of a collateral. There was some conflict of opinion as to the precise scope of this limitation. After a review of cases the Supreme Court, in *Srinivas* v. *Narayan* (*i*) approved the view taken by the Bombay High Court in *Jivaji* v. *Hanmant* (*j*) and dissented from the contrary view taken by the Privy Council in *Anant* v. *Shankar* (*k*) on this point.

"Collateral" means descended from the same stock but not in the same line (*l*).

### (3) §§ 471 and 472 may be read with § 502 which deals with "divesting".

In *Shrinivas* v. *Narayan* the Supreme Court observed: "It (the view expressed in *Anant* v. *Shankar* on this point) is not in consonance with the principle well established in Indian jurisprudence that an inheritance could not be in abeyance, and that *the relation back of the right of an adopted son is only quoad the estate of the adoptive father.* Moreover, the law as laid down therein leads to results which are highly inconvenient. When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus, transferees from limited owners whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened—in this case it was 41 years thereafter—and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. We must hesitate to subscribe to a view of the law which leads to consequences so inconvenient. The claim of the appellant to divest a vested estate results on a legal fiction, and legal fictions should not be extended so as to lead to unjust results. We are of opinion that the decision in *Anant* v. *Shankar* in so far as it relates to properties inherited from collaterals is not sound."

In *Krishnamurthi* v. *Dhruwaraj* (*l*) the Supreme Court summarized the principles deducible from its decision in *Shrinivas* v. *Narayan*:

(i) An adopted son is entitled to take in defeasance of the rights acquired prior to his adoption on the ground that in the eye of the law his adoption relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in the position of a posthumous son.

(ii) As a preferential heir, an adopted son (a) divests his mother of the estate of his adoptive father; (b) divests his adoptive mother of the estate she gets as an heir of her son who died after the death of her husband.

(iii) A coparcenary continues to subsist so long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption; and if the widow made an adoption, the rights of the adopted son are the same as if he had been in

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(*i*) (1955) S.C.R. 1, 57 Bom. L.R. 678, ('54) A.S.C. 379. Also see *Ramanna* v. *Sambamoorthy* ('61) A.A.P. 361; *Ganeshrao* v. *Ramchandra* ('58) A.B. 141; *Somasekharappa* v. *Basappa* ('61) A. Mys. 141 [transferee from heir of last surviving coparcener]; *Jhunparibahu* v. *Phoolchandra* ('58) A.M.P. 261. *Pardhasaradhi* v. *Srinivasa* ('59) A.A. P. 512.

(*j*) (1950) Bom. 510, 52 Bom. L.R. 527, ('50) A.B. 360 (F.B.); *Dattatraya* v. *Vaman* (1950) Bom. 358, 52 Bom. L.R. 283. Similar view was taken in *Raju* v. *Lakshmi* (1955) Mad. 247, ('54) A. Mad. 705. Also see *Ramakrishnayya* v. *Narasaya* ('57) Andh. Pra. 109.

(*k*) (1943) 70 I.A. 232.

(*l*) ('62) A.S.C. 39.

existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last coparcener.

(iv) The principle of relation back applies only when the claim made by the adopted son relates to the estate of his adoptive father. The estate may be definite and ascertained, as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. This principle of relation back, however, does not appl. when the claim made by the adopted son relates to the estate of a collateral. With respect to the estate of a collateral, the governing principle is that inheritance can never be in abeyance, and that once it devolves on a person who is the nearest heir under the law it is thereafter nor liable to be divested. In such a case the principle applicable is not that of relation back but that inheritance once vested cannot be divested.

(v) The estate continues to be the estate of the adoptive father in whosoever's hands it may be, that is, whether in the hands of one who is the absolute owner or one who is a limited owner. Any one who inherits the estate of the adoptive father is his heir, irrespective of the inheritance having passed through a number of persons, each being the heir of the previous owner.

Applying the principle enunciated in paragraph (iv) above it was held by the Supreme Court in a very recent decision that when the father of the adoptee had died many years before a partition between the adoptee's father's father and uncle the adoptee would not be entitled to more than one third share. This was on the ground that if his adoptive father had been alive at the date of the partition he could not have obtained more than one-third share. It was pointed out that the adopted son could ignore the partition effected prior to his adoption by relying on the doctrine of relation back but where succession to the property of a person other than the adoptive father was involved the severence in status effected by the partition between the adoptee's father's father and uncle could not be ignored (*l*1).

*Illustrations*

(a) *A* and *B* are undivided brothers governed by the Mitakshara law. *A* dies leaving authority to his widow to adopt a son to him. On *A*'s death his undivided half share in the coparcenary property passes to *B*, the surviving coparcener. While *B* is still alive, *A*'s widow adopts a son to *A*. The effect of the adoption is that a coparcenary interest is created in the joint property co-extensive with that which *A* had in the property (that is, one-half), and it vests in the adopted son (*m*).

(b) *A* and *B*, two brothers, are members of a joint family. *A* dies leaving a widow who is pregnant at the time of his death. *B* then dies leaving a will whereby he authorizes his widow to adopt a son to him. The day next after *B*'s death, *A*'s widow is delivered of a son. After three months *B*'s widow adopts a son to *B*. The adoption is valid, and *A*'s son and the adopted son will take the property as coparceners (*n*). See ill. (b) to § 497.

(c) Where one branch of a joint family divided amongst themselves, and the widow of another branch of the family (being its sole surviving member) made an adoption, it was held that the adoption was valid and the adopted boy was entitled to reopen the partition as a step towards getting his own share (*o*).

The Nagpur High Court has held that adoptions by two widows of the members of the joint family after the death of all the male members are valid (*p*).

(cc) One *Krishnappa* had five sons to wit *Keshav, Anappa, Bimrao, Apparao* and *Madhav. Krishnappa* died first, and his two sons, *Bimrao* and *Apparao,* died without male issue. Some time afterwards while the family was still joint, the three remaining brothers

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(*l*1) *Govind Hanumantha* v. *Nagappa* ('72) A.S.C. 1401, over-ruling, to this extent, *Ramchandra* v. *Ramkrishna* ('52) A.B. 463.

(*m*) *Surendra Nandan* v. *Sailaja, supra.*

(*n*) *Bachoo* v. *Mankorebai, supra.*

(*o*) *Bajirao* v. *Ramkrishna* (1941) Nag. 707, 198 I.C. 581, ('42) A.N. 19.

(*p*) *Mst. Draupadi* v. *Vikram* (1939) Nag. 88.

then divided the joint property among themselves. On *Keshav's* death, his son *Vishnu* became entitled to his one-third share. *Anappa* died in 1901 leaving him surviving his widow *Tungabai*. On *Vishnu's* death in 1918, his share in the watan property, although *Keshav* had a daughter, went to the nearest male heir who was at that time *Hanmant* a collateral of *Keshav*. In 1922 *Tungabai* adopted *Jivaji* as son to her husband. *Hanmant* then filed a suit against *Jivaji* claiming to recover certain properties of *Vishnu* which were in possession of *Jivaji*. It was held that *Jivaji* could not claim against *Hanmant* the separate property of *Vishnu*, which devolved on *Hanmant* in 1918. This was a case in which the adopted son laid a claim to the properties, not on the ground that they belonged to the joint family into which he had been adopted but that they belonged to a collateral (*Vishnu* also was in position of a collateral) to whom he was entitled to succeed as a preferential heir. As already pointed out the Supreme Court approved of this decision on the ground that the relation back of the right of an adopted son did not touch property inherited from a collateral [*Jivaji* v. *Hanmant supra*].

(ccc) *S* and *K* two brothers were members of a joint family. *K* died in 1897 leaving his widow *R*. *S* died in 1899 leaving his son *G* who died in 1901 leaving his widow *L*. In 1901 *L* adopted *D* who died in 1935 leaving three sons Defendants 1 to 3 and his widow Defendant 4. In 1944 *R* adopted the Plaintiff and soon thereafter the Plaintiff sued the Defendants for partition claiming a half share in the family property. The main dispute related to certain properties which had been inherited by *D* in 1903 from Swamirao a collateral who represented one of the two branches of a Kulkarni Watan family. *S* and *K* represented the other branch of that family. It was held that the Plaintiff was not entitled to any claim to the properties inherited by *D* from the collateral Swamirao [*Srinivas* v. *Narayan supra*].

(cccc) *B* died in 1882 pre-deceasing his father *N* and leaving behind his widow *T*. *N* died in 1892 leaving behind *K*, who succeeded to his property as full owner. *K* died in 1933 and her son *V* who had succeeded to her property also died in 1934 leaving behind two sons, the appellants. *T* adopted *D*, the respondent in 1945. *D* thereupon brought a suit for recovery of the property from the appellants on the basis that his adoption had the effect of divesting them of the property. It was held that *D* was entitled to succeed. The title of *K* the daughter of *N* as also the title of the appellants was defeasible on the adoption of a son by *T*. The fact that *K* inherited the property of her father absolutely did not change the character of the property from coparcenary property to self acquired property of *K* so long as *T* existed and was capable of adopting a son to her husband *B*. This was not a case of an adopted son claiming to divest the heir of a collateral of property belonging to the collateral. The adopted son was claiming property which originally belonged to the adoptive father [*Krishnamurthi* v. *Dhruwaraj supra*].

(d) *A*, the zamindar of the impartible estate of Chinnakimidy in Madras, died leaving his brother *R* and a widow *K*. The widow adopted *B* under the authority of her husband. The adoption is valid though the zamindary was not vested in her. The result of the adoption is that a new coparcener is introduced into the senior line. The adopted son divests *R* and becomes zamindar. The last result is a special result on account of the impartibility of the estate (*r*).

(e) *B*, the zamindar of Dompara Raj in Orissa who had previously in 1898 given to his widow an authority to adopt, died in 1903. In 1902 a son *C* was born to him. *C* succeeded his father and died in 1922 unmarried. *B*'s widow then adopted. At the time of *C*'s death, there was junior branch in whom the zamindary was vested. The Judicial Committee reversing the judgment of the Patna High Court, held that the adoption was valid (*s*).

(f) *C*, the talukdar of the impartible estate of Ahima in Bombay, died in 1899 leaving his brother *B*, his son *D* and his widow *K*. In 1915, *D* was given away in adoption and then *K* adopted *M* in 1917. The Judicial Committee reversing the judgment of the High Court held that the adoption was valid (*t*).

(g) *K*, a junior member of the family of the Thakore of Gumph in Bombay, while in possession of a village granted to his ancestors, a *jivai* grant for maintenance on condition that it should revert to the Thakore on failure of the male line, died in 1903 leaving a widow *D*. *D* adopted *P* in 1904. Reversing the judgment of the High Court, the Judicial Committee held that the adoption was valid and that the Thakore was not entitled to the village. They considered the case to be similar to the Berhampore case thus implying

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(r) *Raghunada* v. *Brozokishoro* (1876) 1 Mad. 69, 3 I.A. 154.

(s) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.P.C. 155.

(t) *Vijaysangji* v. *Shivasangji* (1935) 37 Bom. L.R. 562, 155 I.C. 438, ('35) A.PC. 95, reversing the judgment of the High Court.

that the village held in *jivai* grant must be regarded as the joint family property of both the branches though in actual enjoyment of the junior branch (*u*).

*Watan property.*—*A*, a watandar in Bombay, died leaving a widow. She adopted a son *C*. *C* then died and the watan devolved on a collateral *G*. *G* then gave his son *S* in adoption to the widow. *S* died leaving daughters. The widow then made a third adoption. It was held that the widow's power to adopt was not extinguished by reason of the watan vesting in *G* or by reason of *S*'s leaving daughters (*v*). In the light of *Bimabai's* case (*w*) and this decision, the decision in *Bhimabai* v. *Tayappa* (1913) 37 Bom. 598 must be regarded as overruled.

*A* Hindu died leaving his widow *G* and son *K*. *K* then died and the watan property of the family passed to a remote collateral *S*. The widow *G*, then adopted a son. The Privy Council held that the adoption was valid and divested *S* of the watan properties (*x*) overruling the full bench decision of the Bombay High Court (*y*).

A similar decision had been previously arrived at by the Bombay High Court (*z*).

*Taluqdar: Oudh Estates Act.*—The position assigned to the widow of a talukdar in the matter of adoption is peculiar. The doctrine of relation back is not applicable to an adoption made by the widow of a taluqdar governed by the Act (*z*1).

**473. Adoption by widow succeeding as gotraja sapinda in Bombay.**—An adoption by a widow which is *prima facie* valid cannot be affected by the fact that certain property has devolved upon her as gotraja sapinda of the last male holder. It was held in a number of cases that in such circumstances though the adoption is valid it cannot affect the course of devolution of the property which she obtained as gotraja sapinda (*a*). These cases must be held to have been undoubtedly overruled by the decision of the Privy Council in *Anant* v. *Shankar* (*b*). The position now is that if the widow who succeeds as gotraja sapinda is a member of the joint family, an adoption by her would have the effect of displacing any title based merely on inheritance from the last surviving coparcener and conferring it on the adopted son (*c*).

*Illustration*

On the death of *A*, the last surviving male coparcener of a joint family, the property devolved on *W* who was *A*'s grandfather's brother's widow, or a gotraja sapinda. *W* then adopted *M*. It was held that the adoption was valid and would confer on the adopted son the right to the property which was held by *A* (*c*).

## II.—PERSONS LAWFULLY CAPABLE OF GIVING IN ADOPTION

**474. Who may give in adoption.**—The only persons who can lawfully give a boy in adoption are his father and his mother (*d*).

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(*u*) *Pratapsingh* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457.

(*v*) *Chanbasappa* v. *Madiwalappa* (1937) Bom. 642, 39 Bom. L.R. 591, 170 I.C. 999, ('37) A.B. 337.

(*w*) (1933) 57 Bom. 137, 60 I.A. 25, 141 I.C. 9, ('33) A.PC. 1.

(*x*) *Anant Bhikappa* v. *Shankar Ramchandra* (1944) Bom. 116, 70 I.A. 232, (1943) A.PC. 196. See *Shripatrao* v. *Parvatibai* (1949) Bom. 1; *Ramchandra Balaji* v. *Shankar Apparao* (1945) Bom. 353.

(*y*) *Balu Sakharam* v. *Lahoo Sambhaji* (1937) Bom. 508 [F.B.], ('37) A.B. 279. The cases of *Tejrani* v. *Sarupchand* (1920) 44 Bom. 483, 55 I.C. 96 and *Irappa Lokappa* v. *Rachayya Madiwalayya* (1940) Bom. 42, 187 I.C. 504, 41 Bom. L.R. 1300, ('40) A.B. 118 must be regarded as overruled.

(*z*) *Lingappa* alias *Rayappa* v. *Kadappa Bapurao* (1940) Bom. 721, 191 I.C. 504, ('41) A.B. 345.

(*z*1) *Mohan Singh* v. *Pasupatinath* ('69) A.S.C. 135.

(*a*) *Krishnaji Raghunath* v. *Rajaram Trimbak* (1938) Bom. 679, ('38) A.B. 383 [F.B.]; *Madhavsang Haribhai* v. *Dipsang Jijibhai* (1942) Bom. 812, 202 I.C. 648, 44 Bom. L.R. 661 ('42) A. Bom. 280.

(*b*) 70 I.A. 232.

(*c*) *Bai Faiba* v. *Chudasma* (1948) Bom. 845; *Ganapati Maruti* v. *Anandrao* (1954) 56 Bom. L.R. 317, ('54) A.B. 384.

(*d*) *Putlabai* v. *Mahadu* (1909) 33 Bom. 107, 1 I.C. 659.

Thus one *brother* cannot give another brother in adoption. Similarly a *stepmother* cannot give her stepson in adoption (*e*). Nor can a *grandfather* give his grandson in adoption. A woman is incompetent to give in adoption her illegitimate son, born of adulterous intercourse (*f*).

**475. Right of father.**—The primary right to give in adoption is that of the father (*g*).

**476. Right of mother.**—The mother cannot give her son in adoption, while the father is alive and capable of consenting, without his permission. But she may do so, if he has become incapable of giving his consent, *e.g.*, by reason of lunacy or if he has renounced worldly affairs and entered a religious order, or after his death, provided there be no express or implied prohibition from him (*h*).

It was held by the High Court of Bombay that a widow has no power after her remarriage to give in adoption her son by her first husband, unless she has been expressly authorized by him to do so (*i*). In a later case, the same High Court expressed the opinion that remarriage did not deprive a widow of her right to give such son in adoption (*j*). Agreeing with a Full Bench decision (*j*1) of the same High Court the High Court of Allahabad has held that a widow is not entitled to give in adoption her son by her first husband after her remarriage (*j*2).

**477. Delegation of power.**—The power to give a boy in adoption belongs exclusively to his parents, and it can be exercised by them alone. Neither parents, therefore, can delegate that power to another person (*k*). But the *physical act* of giving the son in adoption may be delegated to another, as such an act involves no exercise of discretion (*k*1).

**478. Renunciation of Hindu religion.**—A Hindu father, who has become a convert to Mahomedanism, does not, by reason of his conversion, lose his power of giving his son, who has remained a Hindu, in adoption. But since the *physical act* of giving a son in adoption is accompanied by religious ceremonies, such act must be delegated to another person who is a Hindu (*l*).

This decision is based on the provisions of the Caste Disabilities Removal Act, 1850.

A Brahmo can give his Brahmo son in adoption. A Brahmo does *not cease* to be a Hindu by becoming a member of the Brahmo Samaj (*m*).

**479. Mental capacity.**—The person giving in adoption must have attained the age of discretion, and must be of sound mind (*n*).

**479A. Consent of Government.**—It is not necessary to validate an adoption that the consent of the Government should have been obtained (*o*).

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(*e*) *Haribhau* v. *Agabrao* (1946) Nag. 978.

(*f*) *Tirkangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L.R. 992, ('44) A.B. 40; *Apya Shetthaya* v. *Rammanakka Apya* (1941) Bom. 350, 196 I.C. 42, ('41) A.B. 222, 43 Bom. L.R. 314.

(*g*) See *Narayanasami* v. *Kuppusami* (1888) 11 Mad. 43 at p. 47.

(*h*) *Jogesh Chandra* v. *Nrityakali* (1903) 30 Cal. 956; *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 72 I.C. 230, ('23) A.P. 423; *Shivprasad* v. *Natwarlal* (1949) Bom. 318; *Nago* v. *Sukya* ('53) A.N. 239.

(*i*) *Panchappa* v. *Sanganbasawa* (1900) 24 Bom. 89.

(*j*) *Putalbai* v. *Mahadu* (1909) 33 Bom. 107, 1 I.C. 657.

(*j*1) See § 467 *supra*.

(*j*2) *Kishni* v. *Ratna* ('64) A.A. 17.

(*k*) *Bashetiappa* v. *Shivlingappa* (1873) 10 B.H.C. 268.

(*k*1) See *Lakshman Singh* v. *Rup Kanwar* ('61) A.S.C. 1878. Also see *Ganga* v. *Krishna Rao* ('65) A.M. 191 [mother present]; *Jamnabai* v. *Raychand* (1883) 7 Bom. 225; *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

(*l*) *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

(*m*) *Kusum Kumari* v. *Satya Ranjan* (1903) 30 Cal. 999.

(*n*) *Bireswar* v. *Ardha Chander* (1892) 19 Cal. 452, 461, 19 I.A. 101, 105, 106.

(*o*) *Ramchandra* v. *Nanji* (1871) 7 Bom. H.C. (A.C.) 26; *Narhar* v. *Narayan* (1877) 1 Bom. 607.

## III.—PERSONS WHO MAY BE LAWFULLY TAKEN IN ADOPTION

**480. Who may be adopted.**—Subject to the following rules, any person who is a Hindu (*p*), may be taken or given in adoption:—

(1) the person to be adopted must be a male (*q*);

(2) he must belong to the same caste as his adopting father; thus a Brahman cannot adopt a Kshatriya, a Vaishya or a Shudra; it is not necessary that he should belong to the same sub-division of the caste (*r*);

(3) he must not be a boy whose mother the adopting father could not have legally married (*s*); but this rule has been restricted in many recent cases to the daughter's son, sister's son, and mother's sister's son (*t*). This prohibition, however, does not apply to Shudras (*u*). Even as to the three upper classes, it has been held that an adoption though prohibited under this rule, may be valid, if sanctioned by custom (See '*custom*' below).

In *Abhiraj Kuer* v. *Debendra Singh* (*u*1) the Supreme Court held that a wife's sister's daughter's son can be validly adopted to a person governed by the Benaras School and that the text of Nanda Pandita "*viruddha sambandha putro varjaneeyah*" is merely recommendatory.

(3A) A deaf and dumb person cannot be adopted (*v*). A person who had become a sanyasi but has renounced the order can be taken in adoption (*w*).

(4) there is a difference of opinion between the schools as to the age when a boy may be adopted:—

(i) in Bengal, Benares, Bihar and Orissa, the adoption must be before *upanayana*, that is before the boy is invested with the sacred thread (*x*); it is immaterial that the adopted boy is older than the adopter (*y*).

(ii) the above rule applies also in the Madras State; but if the person to be adopted is of the same gotra as the adopter, the adop-

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(*p*) See §§ 6 and (1903) 30 Cal. 999, *supra*.

(*q*) *Gangabai* v. *Anant* (1889) 13 Bom. 690, *Ganguly* v. *Sarkar* ('61) A.M.P. 173.

(*r*) *Shib Deo* v. *Ram Prasad* (1924) 46 All. 637, 87 I.C. 938, ('25) A.A. 79.

(*s*) *Minakshi* v. *Ramanada* (1888) 11 Mad. 49; *Bhagwan Singh* v. *Bhagwan Singh* (1899) 21 All. 412, 418, 26 I.A. 153, 160; *Hari Das Chatterji* v. *Manmatha Nath Maulik* (1937) 2 Cal. 265, 160 I.C. 332, ('36) A.C. 1; *Priyanath* v. *Indumati* ('71) A. Orissa 211.

(*t*) *Ramchandra* v. *Gopal* (1908) 32 Bom. 619; *Ramkrishna* v. *Chimnaji* (1913) 15 Bom. L.R. 824, 21 I.C. 34; *Chandi Charan* v. *Nabagopal* ('57) A.P. 365. See 'Relationship of adoptive father to natural mother, at p. 550, *infra*.

(*u*) See § 635 (1), *Raj Coomar* v. *Bissessur* (1884) 10 Cal. 688; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364; *Kahandas* v. *Jivan* (1923) 25 Bom. L.R. 510, 73 I.C. 1023, ('23) A.B. 427; *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I.C. 497, ('28) A.B. 295, *Bhagwan Singh* v. *Bhagwan Singh* (1898) 21 All. 412, 418, 26 I.A. 153, 160; *Chinna* v. *Pedda* (1876) 1 Mad. 62; *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497; *Hanumaiah* v. *Mallayya* ('59) A.A.P. 177.

(*u*1) ('62) A.S.C. 351.

(*v*) *Surendra Narayan Sarbhadhikari* v. *Bhola Nath Ray Chaudhuri* (1944) 1 Cal. 139.

(*w*) *Gulabrao* v. *Nagorao* (1952) Nag. 591, ('52) A.N. 102.

(*x*) *Ganga Sahai* v. *Lekhraj* (1887) 9 All. 253, 328; *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 72 I.C. 230, ('23) A.P. 423; *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I.C. 289, ('27) A.P. 61; *Gundicha* v. *Eswara* ('65) A. Orissa 96; *Sura Bala Debi* v. *Sudhir Kumar Mukherji* (1944) 1 Cal. 566; *Deoki Nandan* v. *Madanlal* ('58) A.A.P. 693, (1957) A.P. 607, *Sukdeo* v. *Kapil Deo* ('60) A.C. 597 (Benares School).

(*y*) (1926) 5 Pat. 777, 101 I.C. 289, ('27) A.P. 61 *supra*.

tion may be made even after *upanayana*, provided it is made *before marriage* (*z*). In one case the Bombay High Court decided that among the Lingayits of North Kanara a married man cannot be adopted as the law of the Madras State is applicable to them (*a*); but in a subsequent case the same Court held that among the *Gaud* Saraswat Brahmins and Daivadnya Brahmans of North Canara a married man can be adopted as they are governed by the Bombay law (*b*);

(iii) in the Bombay State, a person may be adopted at any age, though he may be older than the adopter and though he may be married and have children (*c*). The adoption is not invalid although it took place after the thread ceremony of the boy was performed (*d*).

(5) It has been held in Madras (*e*), Mysore (*f*), Nagpur (*g*) and Allahabad (*h*) that the adoption of a married person is not valid even among Shudras. The adoption of an illegitimate son of a Shudra is not valid (*h*1).

*Relationship of adoptive father to natural mother;* [Sub-§ (3)].—The rule laid down in sub-§ (3) refers to the relationship of the parties *prior* to marriage (*i*). It is founded upon the fiction "that the adopting father has begotten the boy upon his natural mother; therefore it is necessary that she should be a person who might lawfully have been his wife." For this reason a man cannot adopt his daughter's son, or his sister's son, or his mother's sister's son, for he cannot marry his daughter, his sister, or his mother's sister; such an adoption cannot be validated by the application of the doctrine of *factum valet* (*j*). If the prohibition referred to above were to be interpreted literally, there would be many other relations incapable of being adopted. But this prohibition has been confined in recent cases to the specific cases of the daughter's son, sister's son, and mother's sister's son, and it has been held that it does not extend to other relations. It has thus been held that a Hindu may adopt his half-brother (*k*), his brother's son's son (*l*), his paternal uncle's son (*m*), father's first cousin (*n*), his wife's brother (*o*), his wife's brother's son (*p*), his wife's sister's son (*q*), his father's sister's son (*r*), or his daughter's husband (*s*). In a Patna case, where a widow was authorised by her husband to take his stepbrother in adoption, with liberty to her to adopt another boy if there was "any obstacle to take the stepbrother in adoption according to the Shastras," it was held that the "Shastras"

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(*z*) *Viraragava* v. *Ramalinga* (1886) 9 Mad. 148 [F.B.]; *Pichuvayyan* v. *Subbayyan* (1890) 13 Mad. 128.

(*a*) *Dattatraya Maruti* v. *Laxman* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260.

(*b*) *Shantaram* v. *Mahableshwar* (1947) Bom. 798.

(*c*) *Balabai* v. *Mahadu* (1924) 48 Bom. 387, 80 I.C. 529, ('24) A.B. 349. See also *Dharma* v. *Ramkrishna* (1886) 10 Bom. 80; *Gopal* v. *Vishnu* (1899) 23 Bom. 250.

(*d*) *Champabai* v. *Raghunath Rao* (1946) Nag. 217.

(*e*) *Vyithilinga* v. *Vijayathammal* (1883) 6 Mad. 43; *Pichuvayyan* v. *Subbayyan* (1890) 13 Mad. 128, 129; *Lingayya* v. *Chengalammal* (1925) 48 Mad. 407, 89 I.C. 923, ('25) A.M. 272; *Muthuswami Thevar* v. *Chidambara Thevar* (1949) 75 I.A. 293, ('49) A.P.C. 18, (1949) Mad. 604.

(*f*) *Nanjegowda* v. *Channamma* ('52) A. Mysore 40.

(*g*) *Himoti Bai* v. *Manoharsingh* (1945) Nag. 425. But see *Vishwasrao* v. *Sahebrao* ('58) A.B. 375, (1958) Bom. 531, 60 Bom. L.R. 413.

(*h*) *Jhunka* v. *Nathu* (1913) 35 All. 263, 18 I.C. 960.

(*h*1) *Tatayya* v. *Nakaraju* ('58) A.A.P. 611.

(*i*) *Sriramulu* v. *Ramayya* (1881) 3 Mad. 15.

(*j*) *Bhagwan Singh* v. *Bhagwan Singh* (1899) 21 All. 412, 26 I.A. 153; *Walbai* v. *Heerbai* (1910) 34 Bom. 491, 4 I.C. 277 [mother's sister's son cannot be adopted, though he may also happen to be father's brother's son]; *Ishwari Prasad* v. *Rai Hari Prasad* (1927) 6 Pat. 506, 106 I.C. 620, ('27) A.P. 145.

(*k*) *Gajanan* v. *Kashinath* (1915) 39 Bom. 410, 28 I.C. 978, ('15) A.B. 99.

(*l*) *Haran Chunder* v. *Hurro* (1881) 6 Cal. 41.

(*m*) *Virayya* v. *Hanumanta* (1891) 14 Mad. 459.

(*n*) *Mallappa* v. *Gangava* (1919) 43 Bom. 209, 49 I.C. 517, ('19) A.B. 85.

(*o*) *Ruee Bhudr* v. *Roopshunkur* (1823) 2 Bor. R. 656; *Champabai* v. *Raghunath Rao* (1946) Nag. 217.

(*p*) *Sriramulu* v. *Ramayya* (1881) 3 Mad. 15.

(*q*) *Ragavendra* v. *Jayaram* (1897) 20 Mad. 283; *Saraswati* v. *Debendra* ('56) A.P. 340 (wife's sister's daughter's son).

(*r*) *Ramkrishna* v. *Chimnaji* (1913) 15 Bom. L.R. 824, 21 I.C. 34.

(*s*) *Sitabai* v. *Parvatibai* (1922) 47 Bom. 35, 69 I.C. 172, ('22) A.B. 239.

included the Dattaka Mimansa, and since the Dattaka Mimansa prohibited the adoption of a stepbrother, the widow was justified in not adopting him and in adopting another boy, even though adoption of a stepbrother was sanctioned by judicial decisions (*t*). In a recent case the Allahabad High Court has held that the adoption of a father's brother's daughter's son is prohibited and therefore invalid (*t*1).

A widow adopting to her husband has no larger power than the husband had to adopt. Thus she cannot adopt her husband's daughter's son or his sister's son or his mother's sister's son, these being persons whom the husband himself could not have adopted. At the same time her power of adoption is not less extensive than that of her husband. Thus she may adopt her husband's brother as the husband himself could have done (*u*). Similarly she may adopt her own brother's son as the husband himself could have done. The adoption is not invalid on the ground that she could not have been lawfully married to her own brother. The rule that no one can be adopted as a son, whose mother the adopter could not have legally married does not apply *e converso* (*v*).

*Custom.*—An adoption, though prohibited by the rule laid down in sub-§ (3), may be valid, if recognized by custom. Thus the adoption of a daughter's son, though prohibited by this rule, has been held to be valid among the Deshastha Smartha Brahmans of the Southern Mahratta Country (*w*). The adoption of a daughter's son is also recognized by custom among Telugu Brahmans in the Madras State (*x*), and among Khatris of Amritsar (*y*); also the adoption of a brother's daughter's son, a daughter's son and a sister's son among Tamil Brahmins (*z*); of a brother's daughter's son among South Kanara Rajputs (*a*); and of a sister's son among the Bhora Brahmans of Uttar Pradesh (*b*). By reason of custom prevailing in the Madras State, the adoption by a Kshatriya whose gotra is the same as that of the natural mother of the adopted boy is not invalid (*c*). Similarly the adoption of a sister's son amongst *Vaishyas* is allowed by custom (*d*); and of a brother's son amongst Marwari Jains who have migrated from certain places (*e*). In the Punjab generally a daughter's son and a sister's son have by custom been considered to be worthy objects of adoption (*e*1).

The basis of the rule being that marriage between agnates is prohibited, wherever the basis is ignored in the most prominent cases, namely, the sister's son and the daughter's son, it is submitted that the rule must be regarded as destroyed by the exceptions, in all cases where the adopted boy's mother is an agnate of the adopter.

*Factum valet.*—See notes under the same head to § 434 above.

**481. Only son.**—An only son may be given and taken in adoption (*f*).

*Factum Valet.*—See notes under the same head to § 434 above.

**482. Orphan.**—The adoption of an orphan is not valid (*g*), except by custom (*h*).

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(*t*) *Rajendra Prasad* v. *Gopal Prasad* (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51.

(*t*1) *Babu Ram* v. *Kishen Dei* ('63) A. All. 509, (1963) All. 102.

(*u*) *Shripad* v. *Vithal* (1925) 49 Bom. 615, 89 I.C. 197, ('25) A.B. 399.

(*v*) *Bai Nani* v. *Chunilal* (1898) 22 Bom. 973; *Jai Singh* v. *Bijai Pal* (1905) 27 All. 417; *Puttu Lal* v. *Parbati Kunwar* (1915) 42 I.A. 155, 37 All. 359, 29 I.C. 617, ('15) A.P.C. 15.

(*w*) *Sundrabai* v. *Hanmant Gurnath* (1932) 56 Bom. 298, 140 I.C. 235, ('32) A.B. 398.

(*x*) *Viswasundara* v. *Somasundara* (1920) 43 Mad. 876, 59 I.C. 609, ('20) A.M. 451. Also see *K. S. Gopalachariar* v. *Krishnamachariar* ('55) A.M. 559, (1955) 1 M.L.J. 523.

(*y*) *Parma Nand* v. *Shiv Charan* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147; *Roshan Lal* v. *Samar Nath* (1938) Lah. 173, ('37) A.L. 626.

(*z*) *Vayidinada* v. *Appu* (1886) 9 Mad. 44.

(*a*) *Sooratha* v. *Kanaka* (1920) 43 Mad. 867, 59 I.C. 585, ('20) A.M. 648.

(*b*) *Chain Sukh Ram* v. *Parbati* (1892) 14 All. 53.

(*c*) *Simhadari* v. *Satyanarayana* (1946) Mad. 475.

(*d*) *Navaneethammal* v. *Kamalammal* (1947) Mad. 510.

(*e*) *Mt. Gigi* v. *Mt. Panna* ('56) A. Assam 100.

(*e*1) *Deoki Nandan* v. *Rikhi Ram* ('60) A. Punj. 542.

(*f*) *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1899) 22 Mad. 398, 26 I.A. 113; *Vyas* v. *Vyas* (1900) 24 Bom. 367; *Krishna* v. *Paramshri* (1901) 25 Bom. 537.

(*g*) *Bashetiappa* v. *Shivlingappa* (1873) 10 Bom. H.C. 268; *Vaithilingam* v. *Natesa* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460; *Mareyya* v. *Ramalakshmi* (1921) 44 Mad. 260, 60 I.C. 141, ('21) A.M. 351.

(*h*) *Ramkishore* v. *Jainarayan* (1921) 48 I.A. 405, 49 Cal. 120, 64 I.C. 782, ('22) A.P.C. 2 [Dhusars of the Punjab]; *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 61 I.C. 492, ('21) A.B. 147 [Jains of Idar State]; *Sukhbir* v. *Mangeisar* (1927) 49 All. 302, 100 I.C. 778, ('27) A.A. 252 [Jagir situated in Gwalior]; *Kunwar Basant Singh* v. *Kunwar Brij Raj Saran Singh* (1935) 62 I.A. 180, 57 All. 494, 37 Bom. L.R. 805, 156 I.C. 864, ('35) A.P.C. 132 [Jats of Ballabgarh].

The reason of the rule is that a boy can be given in adoption only by his father or his mother, which cannot be done in the case of an orphan. The doctrine of *factum valet* cannot be invoked to validate such an adoption (*i*).

**483. Stranger.**—A stranger may be adopted though there are near relations (*j*).

*Factum Valet.*—See Notes under the same head to § 434 above.

**484. Adoption of same boy by two persons.**—Two persons cannot adopt the same boy, even if the persons adopting are brothers. In such a case, the adoption by each of them is invalid (*k*).

**485. Simultaneous adoption.**—The simultaneous adoption of two or more persons is invalid as to all (*l*).

*Illustration*

*A* has two wives, *B* and *G*, but has no son. *A* being desirous to give a son to each of them authorizes them to adopt two sons simultaneously, one to be adopted by *B* and the other by *C*. The authority to adopt is invalid, and the adoptions (if any) made pursuant to such authority are also invalid.

Sastri G. Sarkar does not approve of these decisions, and observes in his work on Hindu law that notwithstanding these decisions such adoptions are made and recognized by Hindu society. As to successive adoptions, see § 468.

**486. Dvyamushyayana or son of two fathers.**—(1) Where a person gives his son to another under an *agreement* that he should be considered to be the son of both the natural and adoptive fathers, the son so given in adoption is called *"dvyamushyayana."* In this form of adoption it is essential to prove such an agreement and it should also be proved that there was the ceremony of giving and taking of the adoptive son (*l*1).

(2) A *dvyamushyayana* inherits both in his natural and adoptive families (*m*). In the case of a person adopted in the *nitya dvyamushyayana* form his sons born after the adoption are entitled to participate in the inheritance of the adopter (*n*).

As to succession to a Dvyamushyayana son, see § 43 (7).

(3) Where a person gives his only son in adoption to his *brother*, the adoption must be presumed to be in the *dvyamushyayana* form, unless a stipulation is proved that the adoption was to be in the ordinary form. In Bombay, however, it has been held that there is no such presumption, and that a person alleging that an adoption was in the *dvyamushyayana* form must prove that there was an *agreement* to that effect, even if the person adopted was the only son of a brother (*o*).

The proposition in sub-§ (3) is supported by certain observations in Mayne's Hindu Law, (1950) 11th Edition, sec. 209, Sarkar's Hindu Law, (1936) 7th Edition Page 291, Tagore Lectures for 1888 on Adoption, p. 302, Strange's Hindu Law, vol. 1, p. 86. In the

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(*i*) (1921) 44 Mad. 260, 60 I.C. 141, ('21) A.M. 331, *supra*.

(*j*) *Srimati Wooma* v. *Gokoolanund* (1878) 3 Cal. 587, 5 I.A. 40; *Dharma* v. *Ramkrishna* (1886) 10 Bom. 80.

(*k*) *Raj Coomar* v. *Bissessur* (1884) 10 Cal. 688, 696-97.

(*l*) *Akhoy Chunder* v. *Kala Pahar* (1886) 12 Cal. 406, 12 I.A. 198; *Surendro Keshub* v. *Doorgasoonder* (1892) 19 Cal. 513, 19 I.A. 108.

(*l*1) *Dhani Bai* v. *Neem Kanwar* ('72) Raj. 9.

(*m*) *Srimati Wooma* v. *Gokoolanund* (1878) 3 Cal. 587, 598, 5 I.A. 40, 50-51; *Krishna* v. *Paramshri* (1901) 25 Bom. 537; *Behari Lal* v. *Shib Lal* (1904) 26 All. 472.

(*n*) *Ganpatrao Shripatrao* v. *Balkrishna Gururao* (1942) Bom. 340, 201 I.C. 633, ('42) A.B. 193, 44 Bom. L.R. 333.

(*o*) *Laxmipatirao* v. *Venkatesh* (1917) 41 Bom. 315, 38 I.C. 552, ('16) A.B. 68; *Huchrao* v. *Bhimarao* (1918) 42 Bom. 277, 44 I.C. 851, ('17) A.B. 10.

Bombay State, however, where the Courts are guided in questions of adoption by the Mitakshara and the Vyavahara Mayukha supplemented by the Dattaka Mimansa and the Dattaka Chandrika, it has been held that in every case of a *dvyamushyayana* adoption, there must be an agreement to that effect, and that such agreement must be proved as much in the case of the adoption of an only son of a brother as in any other case.

(4) Where a *dvyamushyayana* dies his property is taken jointly and equally by the adoptive mother and natural mother. If, after this, the adoptive mother adopts another son the natural mother is not divested of the property inherited (*p*).

**487. Adoption of daughters by naikins (dancing girls).**—According to the Bombay and Calcutta decisions, the adoption of a daughter by a *naikin* or dancing girl is invalid notwithstanding a custom to the contrary, such custom being regarded as immoral (*q*). According to the Madras decisions, it is valid, provided the adoption is not made with the object of disposing of the girl for the purposes of prostitution (*r*). Even two girls may be adopted provided the practice is sanctioned by custom (*s*).

## IV. ACT OF ADOPTION AND CEREMONIES INCIDENTAL TO IT

**488. Ceremonies relating to adoption.**—(1) The ceremonies relating to an adoption are—

(a) the physical act of giving and receiving, with intent to transfer the boy from one family into another [§ 489];
(b) the *datta homam,* that is, oblations of clarified butter to fire [§ 490]; and
(c) other minor ceremonies, such as *putresti jag* (sacrifice for male issue).

(2) The physical act of giving and receiving is *essential* to the validity of an adoption [§ 489].

As to *datta homam* it is not settled whether its performance is *essential* to the validity of an adoption in every case [§ 490].

As to the other minor ceremonies, their performance is *not necessary* to the validity of an adoption (*t*).

(3) No religious ceremonies, not even *datta homam,* are necessary in the case of Shudras (*u*). Nor are any religious ceremonies necessary amongst Jains (*v*) or in the Punjab (*w*).

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(*p*) *Kantawa* v. *Sangangowda* (1942) Bom. 303, 20 I.C. 863, ('42) A.B. 143, 44 Bom. L.R. 269.

(*q*) *Mathura* v. *Esu* (1880) 4 Bom. 545; *Hira* v. *Radha* (1913) 37 Bom. 116, 17 I.C. 834; *Hencower* v. *Hanscower* (1818) 2 Mori Dig. 133; *Ghasiti* v. *Umrao Jan* (1893) 20 I.A. 193, 201-202. But see *Manjamma* v. *Sheshagirirao* (1902) 26 Bom. 491, 495, where the adoption was by a prostitute, who was not a *naikin* attached to any temple.

(*r*) *Venku* v. *Mahalinga* (1888) 11 Mad. 393; *Muttukannu* v. *Paramasami* (1889) 12 Mad. 214. But see *Guddati* v. *Ganapati* (1912) 23 Mad. L.J. 493, 17 I.C. 422; *Venkatachallamma* v. *Cheekati* (1953) Mad. 741, ('53) A.M. 571.

(*s*) *Gangamma* v. *Kuppammal* (1938) Mad. 789.

(*t*) *Sheolotan* v. *Bhirgun* (1917) 2 Pat. L.J. 481, 41 I.C. 375, ('17) A.P. 633; *Katki* v. *Lakpati* (1915) 20 C.W.N. 19, 27 I.C. 39, ('15) A.C. 214; *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 482, 72 I.C. 230, ('23) A.P. 423; *Asita Mohan* v. *Nirode Mohon* (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292 [*sudras*].

(*u*) *Shoshinath* v. *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 250, 255; *Indromoni* v. *Beharilal* (1880) 5 Cal. 770, 7 I.A. 24; *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 151, 39 Bom. 441, 446, 29 I.C. 639, ('15) A.P.C. 7, (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292, *supra* [*putresti jag* ceremony]; *Sundari* v. *Bhimraj,* 52 C.W.N. 339; *Deorao* v. *Raibhan* (1954) Nag. 558, ('54) A.N. 357; *Nago* v. *Sukya* ('53) A.N. 239.

(*v*) *Lakshmi Chand* v. *Gatto Bai* (1886) 8 All. 319. Also see *Gulab* v. *Devilal* ('51) A. Rajasthan 136.

(*w*) *Hem Singh* v. *Harnam Singh* ('54) A.S.C. 581; *Ajit Singh* v. *Fateh Singh* ('62) A.S.C. 412.

**489. Giving and receiving.**—(1) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is so not only in the case of the twice-born classes, but also in the case of Shudras (*x*). This ceremony is of the essence of adoptions, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by an *actual delivery* of the boy, does not operate as a valid adoption (*y*). To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another. No particular form is prescribed for the ceremony, but the law requires that the natural parent should hand over the adoptive boy and the adoptive parent should receive him. The nature of the ceremony may vary depending upon the circumstances of the case. But the ceremony of giving and taking should necessarily be there (*z*). In case of an old adoption strict proof of the performance of the ceremonies may not be available. An adoption acquiesced in and recognised for a number of years by the person making the adoption and a long course of recognition on the part of persons who would be expected to know of the fact and who were best acquainted with the circumstances, can give rise to the inference that the conditions relating to the adoption were fulfilled (*a*).

(2) Diverse circumstances may necessitate that the act of actual giving or taking should be delegated to a third person and therefore the parents after exercising their volition to give and take the boy in adoption can both or either of them delegate the physical act of handing over the boy or receiving him by way of adoption to a third party (*a*1). But the power (or right) to give a son in adoption cannot be delegated to any person (*b*). The delegation can only be of the physical act mentioned above. Accordingly the father or mother may authorize another person to perform the *physical* act of giving a son in adoption to a named person (*c*) and can delegate someone to accept the child in adoption on his or on her behalf (*d*) [§ 477].

**490. Datta homam.**—(1) Datta homam is not essential in the case of an adoption in the twice-born classes when the adopted son belongs to the same gotra as the adoptive father (*e*). There is a conflict of opinion whether

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(*x*) (1881) 6 Cal. 381, 7 I.A. 250, *supra*; *Ranganayakamma* v. *Alwar* (1890) 13 Mad. 214; *Bireswar* v. *Ardha* (1892) 19 Cal. 452, 19 I.A. 101; *Balak Ram* v. *Nanun Mal* (1930) 11 Lah. 503, 128 I.C. 532, ('30) A.L. 579.

(*y*) *Shoshinath* v. *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 250; *Sreenarain* v. *Sreemutty* (1873) 11 Beng. L.R. 171, I.A. Sup. Vol. 149. Reference, however, may be made to *Biradh Mal* v. *Prabhavati* 41 Bom. L.R. 1061, ('39) A.P.C. 152; *Bhajandas* v. *Nanuram* ('54) A. Rajasthan 17; *Ramprasad* v. *Pannalal* ('54) A. Rajasthan 36; *Ramji Das* v. *Mangal Sen* ('54) Pepsu 66; *Neelcwa* v. *Gurshiddappa* (1937) 39 Bom. L.R. 211, ('37) A.B. 169; *Permanand* v. *Laxminarain* ('55) M.B. 129.

(*z*) *Lakshman Singh* v. *Rup Kanwar*; (1962) S.C.J. 472; ('61) A.S.C. 1378; *Debi Prasad* v. *Tribeni Debi* ('70) A.S.C. 1286.

(*a*) *Debi Prasad* v. *Tribeni Debi* ('70) A.S.C. 1286; *Pannalal* v. *Chiman Parkas* ('47) A. Punj. 54, *Balinki* v. *Gopakrishna* ('64) A. Orissa 117.

(*a*1) *Lakshman Singh* v. *Rup Kanwar*, *supra*.

(*b*) *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H.C. 241; *Bashetiappa* v. *Shivlingappa* (1873) 10 Bom. H.C. 268.

(*c*) *Jamnabai* v. *Raychand* (1883) 7 Bom. 225; *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

(*d*) *Behara Vinyamma* v. *Ayyagari Veera Venkata Satya Suryaprakasa Rao* (1942) Mad. 608, ('42) A.M. 379; *Govindram* v. *Sheoprasad* (1948) Nag. 98.

(*e*) *Valubai* v. *Govind* (1900) 24 Bom. 218; *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A.P.C. [F.B.]; (1915) 20 C.W.N. 19, 27 I.C. 39, ('15) A.C. 214; *Vedavelli* v. *Mangamma* (1904) 27 Mad. 538, 539.

in other cases *datta homam* is necessary. In Madras it was held in *Singamma* v. *Venkatacharlu* (*f*), a case decided in 1868, that neither *datta homam* nor any other religious ceremony was necessary even among Brahmans. This decision was followed in a later case where the parties were Kshatriyas (*g*), and in another case in which the parties were Nambudri Brahmans (*h*). The ruling in *Singamma's* case was, however, doubted by the same High Court in the undermentioned cases (*i*). It is now held that *datta homam* is not necessary for the adoption of a daughter's son (*j*). In a Allahabad case, where the parties were Dakhani Brahmans, it was held that when the boy was the son of a daughter or of a brother, mere giving and taking was sufficient (*k*). In Bombay, it has been held that *datta homam* is necessary (*l*). The Judicial Committee has not expressed any definite opinion on the question, but there is some indication of an inclination towards the view that *datta homam* is necessary (*m*).

(2) The *datta homam* may be performed at any time after the physical act of giving and receiving: it may be performed even after the death of the adoptive father (*n*), or of the natural father of the boy (*o*).

(3) The ceremony of *datta homam* may be performed by the parties who give and receive the boy in adoption, or the performance thereof may be delegated by them to others (*p*).

*Datta homam.*—Datta homam is the sacrifice of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation (*q*).

*Pollution.*—It follows from sub-§ (3), that pollution on account of the death or birth of a relation does not invalidate an adoption made during the period of such pollution. The *secular* formalities of giving and receiving may be performed by the adopter, though he may be in a state of pollution, while the *religious* part of the ceremony may be delegated to a priest or to a relation free from impurity. Even the physical act of giving in adoption may be delegated to another person. But the *right* or the *power* to give in adoption can be exercised only by the father or the mother, and cannot be delegated to any person.

**491. Free consent.**—Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it seems, of the person adopted, if he is a major at the date of adoption (*r*).

Where the consent to an adoption is obtained by misrepresentation, coercion, fraud, undue influence, or mistake the consent is not free, and the adoption is voidable at the

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(*f*) (1868) 4 Mad. H.C.R. 165.

(*g*) *Chandramala* v. *Muktamala* (1883) 6 Mad. 20.

(*h*) *Shankaran* v. *Kesavan* (1892) 15 Mad. 6.

(*i*) *Venkata* v. *Subhadra* (1884) 7 Mad. 548; *Govindayyar* v. *Dorasami* (1888) 11 Mad. 5, 9-10 [F.B.]; *Ranganayakamma* v. *Alwar* (1890) 13 Mad. 214, 220 [Vaisyas]; *Subbarayar* v. *Subbammal* (1898) 21 Mad. 497.

(*j*) *Saminatha* v. *Vageesan* (1940) Mad. 98, 185 I.C. 37, ('39) A.M. 849.

(*k*) *Atmaram* v. *Madho Rao* (1884) 6 All. 276 [F.B.].

(*l*) *Govindprasad* v. *Rindabai* (1925) 49 Bom. 515, 87 I.C. 472, ('25) A.B. 289 [Kanoj Brahmans].

(*m*) *Shoshinath* v. *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 230, 255; *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (1915) 42 I.A. 135, 149-150, 39 Bom. 441, 29 I.C. 639, ('15) A.P.C. 7.

(*n*) (1898) 21 Mad. 497, *supra*; *Seetharamamma* v. *Suryanarayana* (1926) 49 Mad. 969, 67 I.C. 615, ('26) A.M. 1184; *China Ana Muthuyayyangar* v. *Thiruvengadammal* (1942) Mad. 682, 204 I.C. 393, ('42) A.M. 395.

(*o*) *Venkata* v. *Subhadra* (1884) 7 Mad. 548, 550.

(*p*) *Lakshmibai* v. *Ramchandra* (1898) 22 Bom. 590; *Santappayya* v. *Rangappayya* (1895) 18 Mad. 397.

(*q*) *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (1915) 42 I.A. 135, 148, 39 Bom. 441, 463, 29 I.C. 639, ('15) A.P.C. 7.

(*r*) Sircar's "Law of Adoption," 2nd Ed., pp. 279, 280; Strange's Hindu Law, vol. 1, p. 88.

option of the party whose consent was so obtained (*s*). But it may be ratified by such party, provided the ratification does not prejudice the rights of other persons (*t*).

**492. Consideration for adoption.**—An adoption is not invalid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law (*u*).

**493. Adoption cannot be cancelled: renunciation by adopted son of right of inheritance.**—A valid adoption once made cannot be cancelled by the adoptive father (*v*) or other parties thereto, nor can the adopted son renounce his status as such and return to his family of birth. But there is nothing to prevent him from renouncing his right of inheritance in the adoptive family, in which case the inheritance would go to the next heir (*w*).

## V.—RESULTS OF DATTAK ADOPTION

**494. Results of adoption.**—(1) Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. It confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, except in a few cases. Those cases relate to marriage and adoption, [sub-sec (3) below] and to the share on a partition between an a .opted and an after-born son (*x*) [§ 497].

(2) But while the adopted son acquires the rights of a son in the adoptive family, he loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. This follows from a text of Manu (IX verse 142) which is as follows:—

"An adopted son shall never take the family (name) and the *estate of his natural father;* the funeral cake follows the family (name) and the estate; the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

Adoption does not under the Bengal School of Hindu Law (Dayabhaga law) divest any property which has vested in the adopted son by inheritance, gift, or under any power of self-acquisition prior to his adoption (*y*).

As regards cases governed by the Mitakshara law, it has been held by the Madras High Court, that an adoption does not divest any property which has

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(*s*) *Bayabai* v. *Bala* (1870) 7 Bom. H.C. App. 1; *Ranganayakamma* v. *Alwar* (1890) 13 Mad. 214, 220-224; *Somasekhara* v. *Subhadramaji* (1882) 6 Bom. 524; *Sri Rajah Venkata* v. *Sri Rajah Rangayya* (1906) 29 Mad. 437; *Shri Sitaram* v. *Shri Harihar* (1911) 35 Bom. 169, 179-180, 8 I.C. 625. See also *Eshan Kishor* v. *Haris Chandra* (1874) 13 Beng. L.R. App. 42.

(*t*) *Sri Rajah Venkata* v. *Sri Rajah Rangayya* (1906) 29 Mad. 437; contra *Sattiraju* v. *Venkatsicami* (1917) 40 Mad. 925, 930, 936-937, 40 I.C. 518, ('18) A.M. 1072.

(*u*) *Murugappa* v. *Nagappa* (1906) 29 Mad. 161; *Narayan* v. *Gopalrao* (1922) 46 Bom. 908, 67 I.C. 850, ('22) A.B. 382.

(*v*) *Bhoopathi Nath Chakrabarti* v. *Basanta Kumaree Debee* ('36) A.C. 556; *Asa Bai* v. *Prabhu Lal* ('60) A. Raj. 304, 10 Raj. 194; *Deoki Nandan* v. *Rikhi Ram* ('60) A. Punj. 542.

(*w*) *Ruve Bhudr* v. *Roopshunkur* (1824) 2 Bor. Rep. 656; *Lakshmappa* v. *Ramaya* (1875) 12 Bom. H.C. (A.C.) 364, 388; *Mahadu* v. *Bayaji* (1895) 19 Bom. 239; *Lunkurn* v. *Birji* (1930) 57 Cal. 1322, 130 I.C. 250, ('31) A.C. 219; *Gulkandi* v. *Prahlad* ('68) A. Raj. 51.

(*x*) *Pratapsingh* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457, ('18) A.P.C. 192; *Nagindas* v. *Bachoo* (1916) 43 I.A. 56, 67-68, 40 Bom. 270, 287-288, 32 I.C. 403, ('15) A.P.C. 41; *Haribhau* v. *Hakim* (1951) A.N. 249, (1951) Nag. 99; *Kalagouda* v. *Annagouda* ('62) A. Mys. 65.

(*y*) *Behari Lal* v. *Kailas Chunder* (1896) 1 C.W.N. 121; *Shyamacharan* v. *Sricharan* (1929) 56 Cal. 1135, 120 I.C. 157, ('29) A.C. 337; *Rakhalraj* v. *Debendra* (1948) A.C. 356.

*vested* in the adopted son *previous* to the adoption; it has accordingly been held by that Court that where coparcenary property has already vested in a person as the sole surviving coparcener, and such person is subsequently adopted into another family, he does not, by adoption, lose his rights in that property (*z*). Following this decision it has been held by the Bombay High Court that a Hindu does not, on his adoption, lose the share which he has *already* obtained on partition from his natural father and brothers in his family of birth, the reason given being that such share cannot be said to be "the estate of his natural father" within the meaning of the above text (*a*). The same principle has been applied when the partition was between the grandfather and his son and grandsons and one of the grandsons who got a share on partition was subsequently adopted into another family (*b*). But it has been held by the same High Court that where property has vested in a person *as the heir of his father*, and such person is subsequently adopted into another family, he loses by adoption his rights in that property, that property being "the estate of his natural father" (*c*). This view has not been accepted by the Calcutta High Court which has all along take the view that a son given in adoption will not be divested of any property of which he had become owner by inheritance prior to his adoption (*d*). The Punjab High Court has taken the latter view (*e*).

(3) Though adoption has the effect of removing the adopted son from his natural family into the adoptive family, it does not sever the tie of blood between him and the members of his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees, nor can he adopt from that family a boy whom he could not have adopted if he had remained in that family (*f*).

(4) The only cases in which an adopted son is not entitled to the full rights of a natural-born son are—(1) where a son is born to the adoptive father after the adoption, and (2) where he has been adopted by a disqualified heir. The first of these cases is dealt with in § 497 below and the second in § 102 above.

(5) Where a married person is given in adoption and such person has a son at the date of adoption, the son does not like his father lose the gotra and right of inheritance in the family of his birth, and does not acquire the gotra and right of inheritance in the family into which his father is adopted. The wife passes with her husband into the adoptive family because according to the Shastras husband and wife form one body (*g*). In such a case if the husband dies the wife cannot adopt her son, because she has lost the power to give and she cannot be both giver and taker (*h*). But it has been held that when a married Hindu is given in adoption and at the time of adoption his

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(*z*) *Sri Rajah Venkata Narsimha* v. *Sri Rajah Rangayya* (1906) 29 Mad. 437.

(*a*) *Mahableshwar* v. *Subramanya* (1922) 47 Bom. 542, 72 I.C. 309, ('23) A.B. 297; *Manikbai* v. *Gokuldas* (1925) 49 Bom. 520, 87 I.C. 816, ('25) A.B. 363.

(*b*) *Bahinabai* v. *Kisanlal*, 51 Bom. L.R. 825, (1950) A.B. 47, (1949) Bom. 587.

(*c*) *Dattatraya* v. *Govind* (1916) 40 Bom. 429, 34 I.C. 423, ('16) A.B. 210.

(*d*) See *Rakhalraj* v. *Debendra* (1948) A.C. 356, 52 C.W.N. 771.

(*e*) *Har Lal* v. *Ganga Ram* ('51) A. Punj. 142. Also see *Rampal* v. *Bhagwandas* ('54) Ajmer 11.

(*f*) *Mootia* v. *Uppon* (1858) Mad. S.D. 117.

(*g*) *Kalgavda* v. *Somappa* (1909) 33 Bom. 669, 3 I.C. 809; *Babarao* v. *Baburao* ('56) A.N. 98; *Lekh Ram* v. *Kishno* ('51) A. Pepsu 99.

(*h*) *Sharat Chandra* v. *Shanta Bai* (1945) Nag. 544.

wife is pregnant, and a son is born to him, the son on his birth passes into the adoptive family and is entitled to inherit in that family, the reason given being that such a son is *born* into the adoptive family and should therefore be treated as a member of that family (*i*).

*Illustrations*

(a) *A* has two sons *B* and *C*. *A* gives *C* in adoption to *X*. *C* is not entitled to inherit to *A* as his son.

(b) *A* and *B*, two brothers, and their respective sons, *C* and *D*, are members of a joint family. *A* gives his son *C* in adoption to *X*. *C* loses all his rights as a coparcener in his natural family. The coparcenary which consisted of four members before the adoption will be reduced after *C*'s adoption to a coparcenary of three members only.

(c) *A* and his son *C* are members of an undivided family. *A* dies, and on his death *C* becomes entitled to the whole of the coparcenary property *as sole surviving coparcener*. *C*'s mother then gives *C* in adoption *to X*. *C* does not, by adoption, lose his rights in that property.

**495. Succession ex-parte paterna.**—Subject to the provisions of § 497, an adopted son is entitled to inherit in the adoptive family as fully as if he were a natural-born son, both in the paternal and in the maternal line. He is entitled to inherit to his adoptive father, and to the father and grandfather and other more distant lineal ancestors of the adoptive father. He is also entitled to inherit to the adoptive father's brothers, the adoptive father's brother's sons and other collateral relations (*j*). And conversely, the adoptive father and his relations are entitled to inherit to the adopted boy as if he were a son born in the adoptive family.

*A* adopts *H* in conjunction with his wife *B*. After *B*'s death *A* marries *C* by whom he has a son *G* born to him. After *C*'s death, *A* marries *D*, there is no issue of this marriage. *A* then dies leaving *H*, *G* and *D*. Subsequently *D* dies leaving *stridhana*. Who is entitled to *D*'s stridhana? *H* and *G* as the sapindas of *A* are entitled in equal shares (*k*) [§ 147].

**496. Succession ex-parte materna.**—(1) An adopted son is entitled to inherit to his adoptive mother and her relations, as, for instance, her father and brothers. And conversely, the adoptive mother and her relations are entitled to inherit to him (*l*).

(2) Even if the wife of the adopter was dead at the date of adoption, the adopted son becomes her son by virtue of the adoption, and is entitled as such to inherit to the relations in her father's family (*m*). But such an adopted son cannot divest the heirs of the deceased mother of property to which they had already succeeded before the adoption took place (*n*).

(3) Where a Hindu, having two or more wives, makes an adoption in conjunction with one of them specially selected for the purpose, the wife so selected ranks as the adoptive mother, and the other wives as mere step-

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(*i*) *Advi* v. *Fakirappa* (1918) 42 Bom. 547, 46 I.C. 644, ('18) A.B. 168.

(*j*) *Padma Kumari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I.A. 229; *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I.C. 209, ('27) A.P. 61 [Mithila].

(*k*) *Gangadhar* v. *Hira Lal* (1916) 43 Cal. 944, 34 I.C. 10, ('17) A.C. 575.

(*l*) *Kali Komul* v. *Uma Sunker* (1884) 10 Cal. 232, 10 I.A. 138; *Radha Prasad* v. *Ranee Mani* (1906) 33 Cal. 947; *Dattatraya* v. *Gangabai* (1922) 46 Bom. 54, 77 I.C. 17, ('22) A.B. 321; *Sountharapandian Ayyangar* v. *Periaveru Thevan* (1933) 56 Mad. 759, 145 I.C. 534, ('33) A.M. 550.

(*m*) *Sundaramma* v. *Venkatasubba* (1926) 49 Mad. 941, 97 I.C. 145, ('26) A.M. 1203.

(*n*) *Sivagami Achi* v. *Somasundaram* ('56) A.M. 323 overruling earlier decisions of the same High Court to the contrary. Also see *Ramakrishnayya* v. *Narasayya* ('57) Andh. Pra. 109.

mothers. The adopted son inherits only to the adoptive mother and to her relations, and she alone and her relations can inherit to him. The same principle applies when an adoption is made by one of several widows in pursuance of an authority left to her alone (*o*). In other cases, it is not settled whether the adopted son inherits to *all* the wives of the adoptive father and their relations (*p*). In a recent decision the High Court of Madras has held that even if two wives are associated in the adoption ceremony the senior wife by reason of the special status and priority given to her becomes the adoptive mother for tracing the line of succession *ex parte materna* from the adopted son (*p*1).

*Illustration*

*A*, who has two wives *B* and *C*, adopts a son *D* in conjunction with his wife *B*. *A* dies, and on his death *D* succeeds to his estate. *D* then dies unmarried. *B* is entitled to inherit to *D* as his mother to the entire exclusion of *C*: *Annapurni* v. *Forbes* (1900) 23 Mad. 1, 26 I.A. 246.

Where the adoptive father has remarried before adoption and has that wife living at the time of adoption, the deceased wife of the adoptive father cannot be designated or nominated as the adoptive mother of the adopted son (*q*).

**497. Son born after adoption.**—(1) The statement of law in the above sections that an adopted son is entitled to inherit just as if he were a natural-born son, is subject to the exception mentioned below:—

Where a son is born after adoption to the adoptive father, (a) the adopted son does not, on a partition between him and the after-born natural son, share *equally* with him as he would have done if he were a natural son, but he takes—

(1) in Bengal, one-third of the adoptive father's estate,

(2) In Benares, one-fourth of the estate (*q*1); and

(3) in the Bombay and Madras States, one-fifth of the estate (*r*); and

(b) if the estate is impartible, the aurasa son alone succeeds to it (*s*).

Except as aforesaid an adopted son is entitled to the same share as a legitimate son [ill. (b)].

(2) Among Shudras in Madras and Bengal, an adopted son shares equally with the after-born natural son (*t*); in Bombay, he takes one-fifth of the estate (*u*). In Central Provinces and Rajasthan where the Benares school prevails he takes one-fourth of the estate (*v*).

(3) The same rules apply on a partition in the lifetime of the father. Thus in Madras the father and the after-born natural son will each take four shares and the adopted son one share in the whole estate.

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(*o*) *Annapurni* v. *Forbes* (1899) 23 Mad. 1, 26 I.A. 246.

(*p*) Mayne's Hindu Law, s. 167.

(*p*1) *Venugopala Reddiar* v. *Krishnaswamy* ('71) A.M. 262.

(*q*) *Thriumaleshwara* v. *Ganapayya* ('53) A.M. 132, (1952) 2 M.L.J. 716.

(*q*1) A different view has been expressed in *Moti* v. *Lachman* ('60) A. Raj. 122, 10 Raj. 225.

(*r*) *Giriappa* v. *Ningappa* (1893) 17 Bom. 100; *Melappa* v. *Guramma* ('56) A.B. 129; *Ayyavu* v. *Niladatchi* (1862) 1 Mad. H.C. 45.

(*s*) *Sahebgouda* v. *Shiddangouda* (1939) Bom. 314.

(*t*) *Perrazu* v. *Subbarayadu* (1921) 48 I.A. 280, 44 Mad. 656, 61 I.C. 690, ('22) A.P.C. 71; *Asita* v. *Nirode* (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292.

(*u*) *Tukaram* v. *Ramchandra* (1925) 49 Bom. 672, 89 I.C. 984, ('25) A.B. 425. *Guramma* v. *Mallappa* (1964) A.S.C. 510, 66 Bom. L.R. 284.

(*v*) *Laxman* v. *Bayabai* (1955) Nag. 656, ('55) A.N. 241. *Anandi Lal* v. *Onkar* ('60) A. Raj. 251, 10 Raj. 160.

*Illustrations*

(a) *A*, a childless Hindu, adopts a son *B*. *A* son *C* is then born to *A*. *A* dies leaving property worth Rs. 3,000. In Bengal, *B* would take Rs. 1,000 and *C* Rs. 2,000. In Benares *B* would take Rs. 750, and *C* Rs. 2,250. In Bombay and Madras, *B* would take Rs. 600, and *C* Rs. 2,400.

(b) *A* and *B* are two brothers. *A* has a son *C*. *B*, who has no son, adopts *D*. The parties are all members of a joint family governed by the Mitakshara law. After the death of *A* and *B*, *D* sues *C* for a partition. *D* is entitled to a share *equal* to that taken by *C*, that is, *D*'s adoptive father's brother's son: *Nagindas* v. *Bachoo* (1915) 43 I.A. 56, 40 Bom. 270, 32 I.C. 403, ('15) A.P.C. 41, overruling the Calcutta and Bombay decisions noted below (*w*), where it was held that *D* was entitled not to a share equal to that taken by *C*, but to the smaller shares as if *C* was an after-born son.

**498. Rights of adopted son in separate property.—Power of adoptive father to dispose of separate property.**—(1) A Hindu adopting a son does not thereby deprive himself of the power he has to dispose of his separate property by gift or will. There is no implied contract on the part of the adoptive father, in consideration of the gift of his son by the natural father, that he will not dispose of his property by gift or will (*x*).

(2) An adopted son does not stand in a better position, with regard to the separate property of his adoptive father, than a natural born son; and there is nothing in the Hindu law to prevent a father from disposing of by will his separate property, and so defeating the rights by inheritance of his son (*y*). But where the boy is given in adoption under an express agreement that the adoptive father shall not dispose of his property to the prejudice of the adopted son, the adoptive father cannot dispose of the property to the boy's prejudice (*z*).

(3) An alienation by way of gift by the adoptive father of his separate property prior to the adoption is binding on the adopted son (*a*).

The will of a Hindu disposing of his separate property is not revoked by the subsequent adoption of a son by him (*b*).

Where a Hindu disposes of his separate property by will, and an adoption is made to him by his widow after his death, the disposition by will is not affected by the adoption, for the will speaks as at the death of the testator, and the property is carried before the adoption takes place (*c*). The same principle applies when the last surviving coparcener of a joint family makes a testamentary disposition of his property (*d*) or alienates the property in any way before the adoption takes place (*e*). The adopted son takes subject to the provisions of the will (*f*), or the previous alienations.

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(*w*) *Raghubanund Doss* v. *Sadhu Churn* (1878) 4 Cal. 425; *Bachoo* v. *Nagindas* (1914) 16 Bom. L.R. 263, 23 I.C. 912, ('14) A.B. 38. See also *Raja* v. *Subbaraya* (1888) 7 Mad. 523.

(*x*) *Sri Raja Ras Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83; *Surendra Nath* v. *Kala Chand* (1907) 12 C.W.N. 668; *Purshotam* v. *Vasudev* (1871) 8 Bom. H.C.O.C. 196.

(*y*) *Purshotam* v. *Vasudeo* (1871) 8 Bom. H.C.O.C. 196; *Subba Reddi* v. *Doraisami* (1907) 30 Mad. 869.

(*z*) *Surendroo Keshub* v. *Doorgasoondery* (1892) 19 Cal. 513, 536, 19 I.A. 108, 132; *Nanda Krishna* v. *Bhupendra* ('66) A.C. 181.

(*a*) See *Kaluanasundaram* v. *Karuppa* (1927) 54 I.A. 89, 50 Mad. 193, 100 I.C. 105, ('27) A.P.C. 42 [gift before adoption].

(*b*) See *Vinayak* v. *Govindrav* (1869) 6 Bom. H.C.A.C. 224, 229.

(*c*) *Krishnamurthi* v. *Krishnamurthi* (1927) 54 I.A. 248, 262, 50 Mad. 508, 518, 101 I.C. 779, ('27) A.P.C. 139; *Udhao* v. *Bhaskar* (1946) Nagpur 425; *Lalitha Kumari* v. *Raja of Vizianagram* ('54) A.M. 19; *Ramachandra* v. *Anasuyabai* ('69) A. Mys. 64; *Mahadeo* v. *Rameshwar* ('68) A.B. 323.

(*d*) *Narayan* v. *Padmanabh* (1950) Bom. 480, (1950) A.B. 319, 52 Bom. L.R. 313; *Vithalbai* v. *Shivabai*, 52 Bom. L.R. 301, (1950) A.B. 289; *Bhimaji* v. *Hanmanrao*, 52 Bom. L.R. 290, (1950) A.B. 271.

(*e*) *Prahlad* v. *Seth Gendalal* (1948) Nag. 271.

(*f*) *Venkatanarasimha* v. *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376; *Lakshminarasimham* v. *Rajeswari* ('55) Andh. Pra. 278.

This section applies also to property held by a father in Bengal, he having an absolute power to dispose of his property, whether ancestral or self-acquired [§ 274].

**499. Rights of adopted son in coparcenary property.**—(1) An alienation of coparcenary property, valid when it was made, is binding upon a son adopted after the date of alienation [§ 270(3)] (*g*). Also see § 336 for the rights of a son adopted after partition.

In States referred to in § 268, an alienation by a coparcener of his share in the coparcenary property made without legal necessity or in excess of his interest in the coparcenary property, is binding upon a coparcener adopted after the date of the alienation (*h*).

(2) Where an adoption is made by a member of a joint family governed by the Mitakshara law, the adopted son becomes a member of the coparcenary from the moment of his adoption, and the adoptive father has no power either by deed or will to interfere with the rights of survivorship of the adopted son in the coparcenary property. The same principle applies where an adoption is made by a sole surviving coparcener subject, however, to any agreement binding the adopted son such as is mentioned in § 368 above (*i*). See also § 500.

This section applies to *ancestral* property in cases governed by the Mitakshara law. Just as the father cannot by deed or will defeat the rights of survivorship of a natural born son, so he cannot defeat the rights of survivorship of an adopted son.

Where the last male owner makes a valid bequest of his property and also gives his widow power to adopt, the adopted son is bound by the disposition in the will. If, under the will, the widow is entitled to a life estate in the property and the adopted son to a vested remainder and to a certain sum for his maintenance, it is competent to him to convey his interest to the widow and thus enlarge the life estate into an absolute estate in consideration of the increase of the amount of maintenance (*j*).

Where a Hindu (*A*) adopted a son and by a registered deed of adoption provided that his wife should enjoy the property in her own right for her life, it was held that the deed did not affect the rights of a son adopted by the widow of *A*'s pre-deceased undivided brother, as it could not be regarded as a family arrangement as far as the second adopted son is concerned and he was entitled to his share (*k*).

**500. Agreements curtailing rights of adopted son.**—(1) Where the adopted son was a major at the time of the adoption, he may by an agreement with the adoptive father or the adopting widow made before the adoption, consent to a limitation of his rights in the property of his adoptive father (*l*).

(2) Where the adopted son is a minor, the question arises whether it is competent to his natural father to enter into an agreement with the adoptive father or the adopting widow limiting his son's rights in the property of the adoptive father. This question came up before the Judicial Committee in

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(*g*) *Veeranna* v. *Sayamma* (1929) 52 Mad. 398, 118 I.C. 821, ('29) A.M. 296; *Brij Raj Saran* v. *Alliance Bank of Simla* (1936) 17 Lah. 686, ('36) A.L. 946; *Puttappa* v. *Basappa* ('53) Mysore 113; *Ramachandra* v. *Anasuyabai supra.*

(*h*) *Basawantappa* v. *Mallappa* (1939) Bom. 245, ('39) A.B. 178.

(*i*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Venkatanarayana* v. *Subbammal* (1915) 43 I.A. 20, 39 Mad. 107, 32 I.C. 373, ('15) A.P.C. 37; *Parma Nand* v. *Shiv Charan Das* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147.

(*j*) *Basantkumar Basu* v. *Ramshankar Ray* (1932) 59 Cal. 859, 138 I.C. 882; ('32) A.C. 600; *Ramachandra* v. *Anasuyabai* ('69) A. Mys. 64.

(*k*) *Laxmibai* v. *Keshavrao* (1941) Bom. 306, 197 I.C. 192, 43 Bom. L.R. 214, ('41) A.B. 193.

(*l*) *Kashibai* v. *Tatya* (1916) 40 Bom. 668, 36 I.C. 546, ('16) A.B. 312; *Pandurang* v. *Narmadabai Ramkrishna* (1932) 56 Bom. 395, 140 I.C. 200, ('32) A.B. 571; *Punjabrao* v. *Sheshrao* ('62) A.B. 175, 62 Bom. L.R. 126.

*Krishnamurthi* v. *Krishnamurthi* (*m*) where it was held that having regard to a consensus of judicial decisions [excepting that in *Jagannadha* v. *Papamma* (1893) 16 Mad. 400], an arrangement made on the adoption of a minor whereby the widow of the adoptive father is to *enjoy his property during her life-time, or for a less period,* that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom (*n*). "As soon, however, as the arrangements go beyond that, *i.e.,* either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of Hindu law." An agreement or consent by the natural father is not effectual in law or by custom to validate *any other disposition* taking effect after the adoption and curtailing the rights of the adopted son in property in which he acquires a present and an immediate interest by virtue of the adoption.

The High Courts of Madras and Andhra Pradesh (*o*), however, have held that an agreement between the adopting mother and the natural father whereby a *portion* of her husband's estate is settled upon her for her absolute use and enjoyment with powers of alienation is valid and binding on the adopted son, if the agreement is fair, reasonable and beneficial to him.

(3) Though an agreement going beyond that sanctioned by custom does not bind the minor, it is not void, and it may be ratified by the adopted son on attaining majority, in which case he will be held bound by it (*p*).

*Illustrations*

(a) *A*, the sole surviving member of a joint Hindu family, makes a will whereby he bequeaths part of the joint *family property* to a son whom he is about to adopt, part to kindred and part to charity. Before the adoption takes place the natural father of the adopted boy executes a deed by which he consents to the provisions of the will. Immediately thereafter the testator adopts the son with all due ceremony. The will is not binding upon the adopted son: *Krishnamurthi* v. *Krishnamurthi* (1927) 54 I.A. 248, 50 Mad. 508, 101 I.C. 779, ('27) A.P.C. 139.

(b) A grant of an annual sum for the purpose of lighting lamps in a temple made by the adoptive father at the time of adoption out of *joint family property* does not bind the adopted son, though it may be made with the consent of the natural father, unless such grant is recognised by custom as a grant that can be properly made at the time of adoption: *Balkrishna* v. *Shri Uttar* (1919) 43 Bom. 542, 50 I.C. 912, ('19) A.B. 101.

(c) The following agreements are also invalid:—

(1) an agreement providing that the widow should have all the rights to which she would have been entitled in the absence of a son: *Purshottam* v. *Rakhmabai* (1914) 16 Bom. L.R. 57, 23 I.C. 599, ('14) A.B. 28.

(2) an agreement enabling the widow to make a gift of a part of her husband's property to her brother: *Venkappa* v. *Fakirgowda* (1906) 8 Bom. L.R. 346.

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(*m*) (1927) 54 I.A. 248, 50 Mad. 508, 101 I.C. 779, ('27) A.P.C. 139. See also *Bhasba Rabidat Singh* v. *Indar Kunwar* (1888) 16 I.A. 53, 59, 16 Cal. 556, 564; *Chitko* v. *Janaki* (1874) 11 Bom. H.C. 199; *Ravji* v. *Lakshmibai* (1887) 11 Bom. 381; *Lakshmi* v. *Subramanya* (1889) 12 Mad. 490; *Visalakshi* v. *Sivaramien* (1904) 27 Mad. 577; *Balwant Singh* v. *Joti Prasad* (1918) 40 All. 692, 47 I.C. 599, ('18) A.A. 115; *Durgi* v. *Kanhaiya Lal* (1927) 49 All. 579, 101 I.C. 678, ('27) A.A. 387.

(*n*) *Hemendranath* v. *Jnanendra* (1936) 63 Cal. 155, 159 I.C. 1101, ('35) A.C. 702; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I.C. 1047, ('36) A.A. 641.

(*o*) *Raju* v. *Nagammal* (1929) 52 Mad. 128, 113 I.C. 449, ('28) A.M. 1289. Reference may be made to *Venkatarao* v. *Venkateshwararao* ('56) A. Andh. Pra. 1. Also see *Purnananda* v. *Purnanadam* ('61) A.A.P. 435.

(*p*) *Ramasami* v. *Venkataramaiyan* (1879) 2 Mad. 91, 101, 6 I.A. 196, 208; *Kali Das* v. *Bijai Shanker* (1891) 13 All. 391, 393; *Subramania Chettiar* v. *Velayudam Chetiar* (1932) 55 Mad. 408, 135 I.C. 311, ('31) A.M. 808.

(3) an agreement enabling the widow to settle immovable property forming part of her husband's estate in favour of her daughter: *Vyasacharya* v. *Venkubai* (1913) 37 Bom. 251, 17 I.C. 741.

In *Krishnamurthi* v. *Krishnamurthi* referred to above, it was held by their Lordships of the Privy Council that the consent of the natural father *as such* cannot affect the rights of the boy, for those rights do not arise until after his rights as a natural father become non-existent. It was also held that the natural father cannot bind his son by his consent given as *guardian and manager* of the estate of his son, for "the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person." As to the doctrine of approbate and reprobate resorted to in some cases in support of the validity of the agreements now under consideration their Lordships said: "Next can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was." Their Lordships eventually held that the only ground on which even an agreement limiting the enjoyment by a widow of her husband's property during her lifetime could be upheld was that such an agreement was sanctioned by custom established by the consensus of judicial decisions.

## VI.—DIVESTING OF ESTATE ON ADOPTION BY WIDOW

*Preliminary note.*—The question of divesting of estate by adoption can only arise when the adoption is made by a widow after her husband's death. It can never arise when an adoption is made by a man in his lifetime; for, in that case, his estate vests, on his death, in the adopted son as his nearest heir, and it cannot vest in any other person. But when an adoption is made by a widow after her husband's death, it may be that his estate is, at the date of adoption, vested in the widow as his heir or it may be that it has passed to others and vested in them as in illustration (c) to § 502 below. The question then arises whether the adopted son is entitled to the estate of his adoptive father in *whosoever's hands* it may be at the date of adoption. The answer is in the negative; he is entitled to it in *certain cases only*, these being the cases set forth in § 502 below.

Again, if the adoptive father was a member of joint family governed by the Mitakshara law at the time of his death, it may be that his interest which passed to his coparceners by survivorship is still vested in them at the date of adoption by the widow, or it may be that it has passed from the sole surviving coparcener on his death to his heirs. In the former case the adoption vests in the adopted son the coparcenary interest of his adoptive father. As to the latter case there was a conflict of opinion. The subject is dealt with in § 506 below.

The subject-matter of § 502 is closely connected with that of § 471, namely, "Termination of widow's power to adopt." The two sections relate to the same subject in different forms.

**501. Vesting and divesting of estate.**—A valid adoption by a widow, if her husband was divided at the time of his death, may divest an estate of inheritance. It may, if her husband was a member of a joint family governed by the Mitakshara law, divest rights acquired by survivorship. The question what estate of *inheritance* is divested by adoption, is dealt with in §§ 502 and 503 below. The question in what cases adoption can divest rights acquired by *survivorship*, is dealt with in § 506 below. [Also now see notes to §§ 471 and 472.]

**501A. Vesting on adoption by widow.**—There can be divesting not only when adoption is made by a widow, but also when it is made by a widower after the death of his wife. In such cases the adopted son gets the stridhana property of his adoptive mother by divesting the person in whom it had vested in the meantime, *e.g.*, the mother or father of the deceased wife of the adopter (*q*).

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(*q*) *Subramanian* v. *Muthiah Chettiar* (1945) Mad. 638.

**502. Divesting of estate of inheritance.**—Where a widow adopts, one of the objects of adoption is to perpetuate the adoptive father's name by securing an heir (§ 447). It now remains to be seen how far this object is attained. §§ 471, 472 and this paragraph may be read together.

In the cases mentioned in § 471(1) the adoption is valid. The widow divests herself and the adopted son gets the property. [*Vide* ills. (a), (b), (c), (d), (e) and (g) of § 471.]

In the cases mentioned in § 472(2)(a) the adoption is invalid. No question of divesting the estate arises. [*Vide* ills. (f), (h), (i) and (j) of § 471.]

In the cases mentioned in § 471(2)(b) the adoption is valid and divests the property.

In the case mentioned in § 471(2)(c) the same result ought to follow.

But a valid adoption does not divest the estate of a person other than the adoptive father which had passed to his heir prior to his adoption, even if the adopted son might have succeeded to it if the adoption had been made earlier, *i.e.*, prior to the opening of the succession (*q*1). In *Ramchandra* v. *Balaji* (*r*) a Full Bench of the Bombay High Court held that if on the death of a sole surviving coparcener or the last male owner his property has devolved upon his heir by inheritance and on his death it has vested in his own heir, the subsequent adoption in the family of the sole surviving coparcener or the last male owner will not divest it from such heir. This decision was overruled by the Supreme Court in *Krishnamurthi* v. *Dhruwaraj* (*r*1).

*Illustrations*

(a) *A* dies leaving three widows, and *SW*, the widow of a predeceased son. On *A*'s death his estate vests in his widows. *SW* then adopts a son to her husband. The adoption does not divest the estate vested in *A*'s widows: *Dharnidhar* v. *Chinto* (1896) 20 Bom. 250.

(b) *A* dies leaving a widow *W* and a brother *B*. On *A*'s death his estate vests in *W* as his heir. *B* then dies leaving a widow *BW* with authority to her to adopt a son. On *B*'s death, his estate vests in *BW* as his heir. While *W* is still alive, *BW* adopts a son *X* to her husband *B*. The adoption is valid, but it will only divest the estate of *B* vested in *BW* so as to vest it in *X*; it cannot divest the estate of *A* vested in *W*.

(c) In the case put in ill. (b) *BW* adopts *X* *after* the death of *W*, and *after* the estate of *A* has passed on *W*'s death to *A*'s *sapindas*. The adoption will not divest the estate of *A* vested in his *sapindas*: *Kally Prosonno Ghose* v. *Gocool Chunder* (1877) 2 Cal. 295.

(d) *A* dies leaving a widow *W*, and two brothers *B* and *B1*. On *A*'s death his estate vests in *W* as his heir. *B* dies leaving a son *BS*. Then *B1* dies leaving a widow *B1W* with authority to her to adopt a son to him. While *W* is alive, *B1W* adopts a son *X* to her husband *B1*. The adoption is valid; it will divest the estate of *B1* vested in *B1W* and vest it in *X*, but it will not divest the estate of *A* vested in *W*. On *W*'s death, however, the heirs to the estate of *A* will be his brothers' sons *BS* and *X*, and they will inherit the property in equal shares. But if *B1W* adopts *X* after *W*'s death and *after* the estate of *A* has vested in *BS* as his brother's son, *X* cannot on his adoption, demand from *BS* half the property of *A*, not even if the adoption was delayed beyond *W*'s lifetime by the fraud of *BS*: *Bhubaneswari Debi* v. *Nilcomul* (1886) 12 Cal. 18, 12 I.A. 137. Reference was made to this case by the Supreme Court in *Shrinivas* v. *Narayan* (1954) A.S.C. 379, 57 Bom. L.R. 678, (1955) S.C.R. 1. Also see the Patna case cited below (*s*).

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(*q*1) *Shrinivas* v. *Narayan* (1955) S.C.R. 1, 57 Bom. L.R. 678, ('54) A.S.C. 379. Also see § 472 *ante*.

(*r*) (1955) 57 Bom. L.R. 491 (F.B.).

(*r*1) ('62) A.S.C. 59; (1961) 2 S.C.J. 582; 64 Bom. L.R. 165 (overruling 57 Bom. L.R. 491 (F.B.); See § 472, *supra*.

(*s*) *Chandrachoor Deb* v. *Bibhutibhushan Deva* (1944) 23 Pat. 763.

In a case decided by the Madras High Court the decision on the question of relation back and divesting of estate was founded on the theory of spiritual benefit (*s*1).

It is clear from §§ 471 and 472 that adoption made by the widow relates back to the death of the adoptive father. The rights of an adopted son are not affected by reason of the fact that the joint status of the family which he seeks to enter by virtue of his adoption has become terminated either by a prior partition between the surviving coparceners or by the death of the sole surviving coparcener. Reference may be made to the recent decision of the Supreme Court in *Govind Hanumantha* v. *Nagappa* (*s*2).

**503. Further case of divesting of estate in Bombay.**—It is clear from § 471 that the widow's power to adopt is at an end in some cases. If she does adopt in such a case, the adoption is invalid, and it does not divest the estate vested in another. It is now settled law that the power to adopt does not depend upon any question of vesting or divesting (*t*). It has, however, been held by the High Court of Bombay (*u*), that if the widow in such cases adopts with the consent of the person in whom the estate was vested, the adoption is not only valid, but it divests the estate vested in the consenting party. The High Court of Bombay stands alone in holding this view which cannot be supported. The High Court of Madras has expressly dissented from it (*v*).

**504. Stridhana not divested.**—Adoption by a widow does not divest her *stridhana* (*w*).

**505. Maintenance of widow on divesting of estate.**—Subject to any agreement that may have been made by the widow prior to adoption [§ 500], a widow whose estate is divested by adoption is entitled only to maintenance out of her husband's property (*x*).

In fact, her rights are reduced to what they would have been if the husband had left a son.

**506. Adoption by widow in a joint family.**—When a member of a joint family governed by the Mitakshara law dies and the widow validly adopts a son to him [§§ 462(2), 462(3), 472 and 473], a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son.

*Illustrations*

(a) In the ills. (a) and (b) to § 472 the adopted son becomes a member of the coparcenary and is entitled to the share of his adoptive father.

(b) In the ills. (d), (e) and (f) to § 472 the adopted son being in the senior line becomes entitled to zamindary, raj, or talukdary respectively by the rule of lineal primogeniture [§ 590] and thus divests the junior member of the family in whom the property has been vested in the interval between the death of the adoptive father and the adoption.

(c) In ill (g) to § 472 the adopted son *P* is entitled to *jivai* estate and divests the Thakore in whom it is vested subject to being divested by adoption.

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(*s*1) *Venkalakshmi Ammal* v. *Jagannathan* ('63) A.M. 316.

(*s*2) ('72) A.S.C. 1401 Reference has been made to this decision in § 472 *supra*.

(*t*) See § 471(3).

(*u*) *Babu* v. *Ratnoji* (1897) 21 Bom. 319; *Payapa* v. *Appanna* (1899) 23 Bom. 327; *Bhimappa* v. *Basawa* (1905) 29 Bom. 400; *Siddappa* v. *Ningangavda* (1914) 38 Bom. 724, 27 I.C. 51, ('14) A.B. 107. Reference may be made to *Vaman* v. *Venkaji* (1921) 45 Bom. 829; *Vasudeo* v. *Ramchandra* (1898) 22 Bom. 551, 555 (F.B.).

(*v*) *Annammah* v. *Mabbu Bali Reddy* (1875) 8 Mad. H.C. 108.

(*w*) West and Buhler, 4th ed., 1033.

(*x*) *Jamnabai* v. *Raychand* (1883) 7 Bom. 225; *Dalel* v. *Ambika* (1903) 25 All. 266.

The fact that only one member of the joint family survives at the time of adoption as in ills. (a) and (b), is no bar to an adoption in the joint family. The family continues to be joint so long as any widow remains in it with a power to adopt. *A* & *B*, two brothers, were members of joint family. *A* died leaving a widow. *B* afterwards adopted *D* and relinquished the property to *D*. *A*'s widow now adopted. It was held that the adoption was valid and that the adopted son could claim a repartition of the property in the hands of *D*, but was not entitled to the Watan that belonged to the family (*y*).

The joint family does not come to an end on the death of the last male coparcener. It continues to exist so long as a widow of a coparcener remains. If there is even one widow she can adopt, and the adopted son will divest the property, wherever it is vested at the time (*z*).

If there is more than one widow both can adopt; both adoptions are valid (*a*) except when the two widows are in the relation of mother-in-law and daughter-in-law. In the last case only the first adoption is valid.

## VII.—ALIENATIONS MADE PRIOR TO ADOPTION

**507. Adopted son's rights date from adoption.**—The rights of an adopted son arise for the first time on his adoption. He may, by virtue of his rights as adopted son, divest other persons in whom the property vested after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him (*b*). His right to impeach previous alienations would depend upon the capacity of the holder who made the alienation as well as on the nature of the action of alienation. When the holder was a male who had unfettered right of transfer, *e.g.*, the last surviving member of a joint family, the adopted son could not impeach the transfer (*c*). In case of females who had restricted rights of transfer even apart from any adoption, the transfer would be valid only when they are supported by legal necessity [§ 509].

The doctrine of relation back has no application to the case of any lawful alienation effected by a male or female heir since the death of the adoptive father and before the date of adoption [§ 472(2)]. This would seem to be well-settled law. A contrary view, however, has been taken in the undermentioned decisions of the Mysore High Court (*b*1). In a later decision the Bombay High Court has expressed disagreement with that view (*b*2) and held that a son adopted after the alienation by a sole surviving coparcener of the family would not be entitled to divest the alienee in whom property has vested in any such case.

**508. Alienations by adoptive father prior to adoption.**—An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural-born son would be [§ 498(3), § 499(1)].

**509. Alienations by widow before adoption.**—(1) The rights of an adopted son spring into existence *at the moment of adoption*, and displace the rights

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(*y*) *Ramchandra Balaji* v. *Sankar Apparao* (1945) Bom. 353.

(*z*) *Umabai* v. *Nani* (1936) 60 Bom. 102, 38 Bom. L.R. 100, 162 I.C. 133, ('36) A.B. 135.

(*a*) *Mst. Draupadi* v. *Vikram* (1939) Nag. 88.

(*b*) *Jivaji* v. *Hanmant*, 52 Bom. L.R. 527, (1950) A.B. 360; *Pralhad* v. *Seth Gendalal* (1948) Nag. 271.

(*c*) *Veeranna* v. *Sayamma*, 52 Mad. 398; *Pralhad* v. *Seth Gendalal* (1948) Nag. 271.

(*b*1) *Mahadevappa* v. *Chanabasappa* ('66) A. Mys. 15; *Nandappa* v. *Shidgouda* ('64) A. Mys. 217.

(*b*2) *Babgonda* v. *Anna Nemgonda* ('68) A.B. 8; *Mahadeo* v. *Rameshwar* ('68) A.B. 323.

of the widow and of all persons claiming under a title derived from her. The result of the adoption being to divest the widow's estate, the widow cannot after adoption alienate any portion of her husband's estate for any purpose whatever.

(2) As regards alienations made by the widow *before* the adoption, if they are made for a legal necessity [§§ 181A, 181B], or with the consent of the next reversioners [§ 183], the adopted son is as much bound by them as the reversioners would be (*d*). But if the alienation was made without legal necessity or without the consent of the reversioners, the alienation is valid to the extent only of the widow's interest in the estate *up to the date of adoption*. After adoption the alienee has no power to retain the property as against the adopted son unless the claim of the adopted son has become barred by limitation. The rights of the adopted son do not await the determination of the widow's estate by her death as in the case of reversioners (*e*). Reference may be made to the observations of the Supreme Court in *Natvarlal* v. *Dadubhai* (1954) S.C. 61, (1954) S.C.R. 339 and the Full Bench decision of the Bombay High Court referred to in § 509A.

*Alienation with consent of reversioners.*—If the alienation was made by the widow with the consent of the next reversioners, but under circumstances which do not raise a presumption of legal necessity, the Court will upon proof of those circumstances set aside the alienation as against the adopted son (*f*) [§ 183].

*Limitation.*—The period of limitation for a suit by an adopted son against an alienee from the widow is 12 years from the date when the possession of the alienee becomes adverse to him; see Indian Limitation Act, 1908, art. 144. Where a sale is not for legal necessity, the adopted son is entitled to treat it *as a nullity*, and he may sue for *possession* without suing to have the sale set aside (*g*); hence art. 91 of the Indian Limitation Act, 1908, will not come in his way (*g*). See notes to § 209.

Now see Articles 65 and 59 of the new Limitation Act 1963.

A son adopted by a widow after the death of the first adopted son divests the adoptive mother of the estate inherited by her from her first adopted son and is unaffected by alienations made by her without necessity (*h*).

## VIII.—SURRENDER PRIOR TO ADOPTION

**509A. Surrender prior to adoption.**—If prior to his adoption a valid surrender is effected by his adoptive mother, the subsequently adopted son can divest the property which has already vested in the surrenderee. This view was taken by a Full Bench of the Bombay High Court (*i*) overruling a number of earlier decisions of that Court. The question had been expressly left open when it had been referred to a Full Bench of the same Court in an earlier case (*j*). [See § 197 (6)].

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(*d*) *Lakshmana Rau* v. *Lakshmi* (1882) 4 Mad. 160; *Lakshman Bhau* v. *Radhabai* (1887) 11 Bom. 609; *Antaji* v. *Dattaji* (1895) 19 Bom. 36; *Moro Narayan* v. *Balaji* (1895) 19 Bom. 809.

(*e*) (1887) 11 Bom. 609, *supra*; (1895) 19 Bom. 809, *supra; Ramakrishna* v. *Tripurabai* (1909) 33 Bom. 88, 1 I.C. 647; *Vaidyanatha* v. *Savithri* (1918) 41 Mad. 75, 42 I.C. 245, ('18) A.M. 469 [F.B.] overruling *Sreeramulu* v. *Kristamma* (1903) 26 Mad. 143; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584 [invalid surrender—subsequent adoption]; *Sakharam* v. *Thama* (1927) 51 Bom. 1019, 107 I.C. 265, ('28) A.B. 26 [invalid surrender—subsequent adoption].

(*f*) *Ramkrishna* v. *Tripurabai* (1911) 13 Bom. L.R. 940, 12 I.C. 529.

(*g*) *Hanamgowda* v. *Irgowda* (1924) 48 Bom. 654, 84 I.C. 374, ('25) A.B. 9.

(*h*) *Hanmant* v. *Krishna* (1925) 49 Bom. 604, 89 I.C. 62, ('25) A.B. 402; *Pattu Achi* v. *Rajagopala Pillai* (1941) Mad. 970, ('41) A.M. 699; *Govinda* v. *Shenfad* (1949) Nag. 416, ('52) A.N. 199.

(*i*) *Bahubali* v. *Gundappa*, I.L.R. (1954) Bom. 1026, 56 Bom. L.R. 501 (F.B.); *Tukaram* v. *Mt. Gangi* ('57) A.N. 28.

(*j*) *Pandu Mari Lote* v. *Shripati* (1954) Bom. 169 (F.B.), 55 Bom. L.R. 647, ('53) A.B. 428.

## IX.—EFFECTS OF INVALID ADOPTION

**510. Effect of invalid adoption.**—As a general rule it may be laid down that where there has been an adoption in form, but such adoption is invalid, the adopted son does not acquire any rights in the adoptive family, nor does he forfeit his rights in his natural family (*k*).

**511. Gift to a person whose adoption is invalid.**—Where a gift or bequest is made to a person who is described as an adopted son, but such person was not adopted at all, or if he was adopted, his adoption is held to be invalid, the validity of the gift or bequest depends on the intention of the donor or testator to be gathered from the language of the deed of gift or will and from the surrounding circumstances (*l*).

If the intention is to benefit the donee as *persona designata* [that is a designated person], the addition of his supposed relationship is merely a matter of description, and the gift prevails though the description is incorrect (*m*). But if the assumed fact of adoption is "the reason and motive of the gift and indeed a condition of it," then the gift cannot take effect if the adoption is pronounced invalid (*n*). Reference may be made to the undermentioned decision of the Supreme Court (*n*1).

*Illustrations*

(a) A bequeaths a legacy "to Koibullo whom I have adopted," and directs his wife "to perform the ceremonies according to the Shastras and bring him up." The ceremonies are not performed, and the adoption is held invalid. The bequest, however, to Koibullo is valid, for it cannot be said in this case that the assumed fact of adoption was the reason and motive of the gift, or that it was a condition of the gift. The intention is to benefit the individual, named Koibullo. The addition of his supposed character (of adopted son) is simply a matter of description. His identification is complete, and the gift will therefore take effect, though the description (of his being an adopted son) is incorrect. In such a case it is said that Koibullo takes as a *persona designata: Nidhoomoni* v. *Saroda* (1876) 26 W.R. 91, 3 I.A. 253. See the Indian Succession Act, 1925, s. 76.

(b) *A* adopts a son *B*. He then executes a writing whereby he authorizes *B* to offer oblations of *pinda* and water to him and his ancestors *"by virtue of his* (*B*) being my adopted son," and then makes a bequest to him of all his property. It is found that the adoption is invalid. The bequest to *B* does not take effect, for the words *"by virtue of B* being my adopted son" show clearly that it was the intention of *A* to give his property to *B* as *his adopted son: Fanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 12 I.A. 72.

## X.—MODE OF PROOF: ESTOPPEL

**512. Burden of proof and evidence.**—The fact of adoption must be proved in the same way as any other fact. There are no special rules of evidence to establish an adoption (*o*). But the evidence in support of an

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(*k*) *Bawani* v. *Ambabay* (1863) 1 Mad. H.C. 363; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364, 397; *Vaithilingam* v. *Natesa* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460; *Dalpatsingji* v. *Raisingji* (1915) 39 Bom. 528, 29 I.C. 943, ('15) A.B. 93; *Vaman* v. *Venkaji* (1921) 45 Bom. 829, 61 I.C. 460, ('21) A.B. 55; *Hari Das Chatterji* v. *Manmatha Nath Maulik* (1937) 2 Cal. 265, 160 I.C. 332, ('36) A.C. 1.

(*l*) *Fanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 12 I.A. 72, at p. 89; *Panchaksharamma* v. *Chinnabbayi* ('67) A.S.C. 207.

(*m*) *Nidhoomoni* v. *Saroda* (1876) 26 W.R. 91, 3 I.A. 253; *Bireswar* v. *Ardha Chander* (1892) 19 Cal. 452, 19 I.A. 101; *Subbarayar* v. *Subbammal* (1901) 24 Mad. 214, 27 I.A. 162; *Murari Lal* v. *Kundan Lal* (1909) 31 All. 339, 1 I.C. 687; *Khub Singh* v. *Ramji Lal* (1919) 41 All. 666, 52 I.C. 311, ('19) A.A. 391; *Bai Dhondubai* v. *Laxmanrao* (1923) 47 Bom. 65, 68 I.C. 504, ('22) A.B. 352.

(*n*) (1885) 11 Cal. 463, 12 I.A. 72, *supra*; *Surendra Keshub* v. *Doorgasoondery* (1892) 19 Cal. 513, 19 I.A. 108; *Karamsi* v. *Karsandas* (1899) 23 Bom. 271; *Pralhad* v. *Shantabai* (1947) Nag. 211.

(*n*1) *Ranganathan* v. *Periakaruppan* (1958) S.C.R. 214.

(*o*) See *Huradhun* v. *Muthoranath* (1849) 4 M.I.A. 414, 425 [acquiescence]; *Chandra Kunwar* v. *Narpat Singh* (1906) 34 I.A. 27, 29 All. 184 [admission]; *Ajabsing* v. *Nanabhau* (1898) 26 I.A. 48, 3 C.W.N. 130 [pedigree]; *Lal Achal Ram* v. *Kazim Husein* (1905) 32 I.A. 113, 27 All. 271 [tradition in a *wajib-ul-arz*]; *Rup Narain* v. *Gopal Devi* (1909) 36 I.A. 103, 36 Cal. 780, 3 I.C.

adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging an adoption (*o*1). That onus is particularly heavy where the adoption is made a long time after the date of the alleged authority to adopt (*p*). But when there is a lapse of a very long period between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained (*q*). It stands to reason that after a very long term of years, and a variety of transactions of open life and conduct upon the footing that the adoption was a valid act, the burden must rest heavily upon him who challenges its validity (*r*).

Failure to produce accounts may in the facts of a particular case be a very suspicious circumstance (*r*1).

The performance of the funeral rites of deceased by the person who claims to have been adopted to him thereafter by the widow of the deceased does not necessarily sustain an adoption unless it clearly appears that the adoption itself was performed under circumstances as would render it valid (*r*2). So also the performance of the marriage of the son alleged to have been taken in adoption by the alleged adoptive mother is a circumstance of neutral value when the alleged adoption is otherwise disproved (*r*3).

An *ex parte* statement made by a widow in mutation proceedings that she had authority from her husband to adopt is not admissible in evidence against the reversioners in a subsequent suit challenging the adoption either under sec. 32(3) or sec. 33 of the Indian Evidence Act, 1872 (*s*).

Statements made by a testator in his will to the effect that the legatee was the adopted son of the testator can be used as evidence by the legatee in a suit for a declaration of adoption (*t*).

**513. Estoppel.**—(1) A person who is otherwise entitled to dispute an adoption may, by his declaration, act or omission, be estopped from disputing it. The rule of estoppel is laid down in s. 115 of the Indian Evidence Act, 1872. It is as follows:

"Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any

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382 [lapse of time]; *Prem Devi* v. *Shambhu Nath* (1920) 42 All. 382, 76 I.C. 601, ('20) A.A. 322 [lapse of time]; *Puttu Lal* v. *Parbati Kunwar* (1915) 42 I.A. 155, 37 All. 359, 29 I.C. 617, ('15) A.PC. 15 [aged adopter]; *Diwakar* v. *Chandalal* (1917) 44 Cal. 201, 39 I.C. 6, ('16) A.PC. 81 [absence of deed and of entries of expenditure in ceremonies]. *Gokul Chandra* v. *Biswanath* ('64) A. Orissa 160; *Jagdeo Singh* v. *Shivadeni Singh* ('65) A.P. 351.

(*o*1) For instance see *Ragavamma* v. *Chinchamma* ('64) A.S.C. 136. Also see *Govinda* v. *Chimabai* ('68) A. Mys. 309.

(*p*) *Dal Bahadur Singh* v. *Bijai Bahadur Singh* (1930) 57 I.A. 14, 52 All. 1, 122 I.C. 8, ('30) A.PC. 79; *Devakka* v. *Giraddi* ('56) A.B. 99; *Sumantrabai* v. *Rishabhkumar* (1953) Nag. 69, ('52) A.N. 295; *Hariharsingh* v. *Deonarayan* (1954) Nag. 692, ('54) A.N. 319; *Balak Ram* v. *Nanun Mal* (1930) 11 Lah. 503, 128 I.C. 532, ('30) A.L. 579; *Biswanath* v. *Dhapu* ('66) A.C. 13.

(*q*) *Debi Prasad* v. *Tribeni Debi* ('70) A.S.C. 1286 (lapse of 54 years). *Ramakrishna Pillai* v. *Tirunarayana Pillai* (1932) 55 Mad. 40, 139 I.C. 684, ('32) A.M. 198; *Roshan Lal* v. *Samar Nath* (1938) Lah. 173, ('37) A.L. 626; *Venkata Rama* v. *Bhaskararao* ('62) A.A. P. 29; *Surajbai* v. *Sadashiv*, ('58) A.M.P. 100.

(*r*) *Venkata Seetharama Chandra Row* v. *Kanchumarthi Raju* ('25) P.C. 201; *V. Ramarao* v. *K. Bhaskarrao* ('69) A.S.C. 1359; *Nagayasami* v. *Kochadai* ('69) A.M. 329; *Nandkishore* v. *Brijbehari* ('35) Rajasthan 65; *Permanand* v. *Laxminarain* ('55) M.B. 129; *Venkateratnam* v. *Venkatanarasayamma* ('64) A.A.P. 109; *Godawari Devi* v. *Subh Karan* ('54) Ajmer 57. Also see cases cited under § 489(1), *supra*.

(*r*1) See *Kishori Lal* v. *Chaltibai* (1959) S.C.J. 560, ('59) A.S.C. 504 and the cases cited at p. 510 of the report. Also see *Chotibai* v. *Ganeshlal* ('64) A.M.P. 302. As to shifting of onus of proof see, for instance, *Thirumal* v. *Koppiah* (1966) II M.L.J. 155.

(*r*2) *Tayammaul* v. *Sashchalla* (1865) 10 M.I.A. 429; *Kishori Lal*, *supra*.

(*r*3) *Kishori Lal*, *supra*.

(*s*) (1930) 57 I.A. 14, 52 All. 1, 122 I.C. 8, ('30) A.PC. 79, *supra*.

(*t*) *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I.C. 289, ('27) A.P. 61.

suit or proceeding between himself and such person or his representative, to deny the truth of that thing" (*u*).

(2) Estoppel operates merely as a personal dis-qualification, and does not bind any one who claims by an independent title (*v*).

(2a) Estoppel does not confer status. It shuts out the mouth of certain persons if they try to deny the adoption. So if both the parties are equally conversant with the true state of facts the doctrine of estoppel can have no application (*v*1).

(3) A person may be so estopped although he was acting in good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension (*w*).

(4) The misrepresentation to operate as an estoppel must be of a matter of fact. An erroneous expression of opinion that an adoption was valid in law cannot lead to an estoppel (*x*).

(5) Mere acquiescence in an adoption, or mere presence at an adoption, does not create an estoppel (*y*) or even subsequent conduct recognising the adoption (*z*).

*J* and *R* are two Hindu brothers. In 1908 *J* executes a deed purporting to adopt *D* as a son to him. *J* dies 1912. *R* dies in 1914 leaving a daughter *S*. On *R*'s death *D* takes possession of his estate claiming to be entitled to it as *R*'s brother's adopted son. *S* sues *D* for a declaration that she is entitled to *R*'s property as his heir. *D* alleges that he was validly adopted by *J*, and that there was a giving and taking in adoption, and further, that if there was no giving or taking, *R* was estopped from disputing his adoption by reason of certain acts and representations of his, and *S*, claiming through *R*, was also so estopped. The acts and representations alleged to lead to estoppel are (1) that *R* had brought *D* from his village and been a witness to the deed of adoption, (2) that *R* had allowed *D* to perform the cremation ceremony of *J*, and (3) that at the time of *D*'s marriage *R* had represented that he was the adopted son of *J*. *No giving or taking in adoptions was proved to have taken place.* [If so, though there was an adoption *in fact* as shown by the deed of adoption, there was no valid adoption *in law*.] Held by the Judicial Committee that no estoppel arose under sec. 115 of the Indian Evidence Act, 1872. No estoppel can arise unless there was a misrepresentation as to a matter of fact. It is clear that there was no misrepresentation on the part of *R* as to the *fact* of the adoption. An adoption *in fact* was there. But *R* may have believed, though wrongly, that the adoption was *also valid in law;* but that creates no estoppel at all. In the course of their judgment their Lordships cited a passage from the judgment of the Judicial Committee in *Gopee Loll's case* (*a*) which is as follows: 'But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of [*R*]. [*R*] is alleged to have represented that [*D*] was adopted. The [defendants'] case is that he was in fact adopted. So far as the *fact* is concerned there is no misrepresentation. It comes to no more than this, that [*R*] arrived at a conclusion that the adop-

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(*u*) *Dharam Kunwar* v. *Balwant Singh* (1912) 39 I.A. 142, 148, 34 All. 398, 15 I.C. 673 [representation by a widow that she had power to adopt]; *Surendro Keshub* v. *Doorgasoondery* (1892) 19 I.A. 108, 128, 19 Cal. 513, 532 [no misrepresentation]; *Hari Shankar* v. *Raghuraj* (1907) 34 I.A. 125, 29 All. 519 [denial of adoption by person adopted]; *Dharam Prakash* v. *Kalawati* (1928) 50 All. 885, 110 I.C. 665, ('28) A.A. 459 [adoption challenged by adoptive mother]; *Laxman* v. *Babai* ('35) A.N. 241.

(*v*) *Dharam Kunwar* v. *Balwant Singh* (1912) 39 I.A. 142, 148, 34 All. 398, 15 I.C. 673; *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 243, 52 Cal. 482, 496, 87 I.C. 357, ('25) A.PC. 118.

(*v*1) *Kishori Lal* v. *Chaltibai* ('59) A.S.C. 504; *Eullamoni* v. *Netranand* ('67) A. Orissa 103; *Jagdeo Singh* v. *Shivadeni Singh* ('65) A.P. 351.

(*w*) *Surat Chunder* v. *Gopal Chunder* (1892) 19 I.A. 203, 215, 20 Cal. 296, 310.

(*x*) *Gopee Loll* v. *Chundraolee* (1872) I.A. Sup. Vol. 131, 133, 11 Beng. L.R. 391; (1925) 52 I.A. 231, 242-243, 52 Cal. 482, 495, 87 I.C. 357, ('25) A.PC. 118, *supra.*

(*y*) *Gurulingaswami* v. *Ramalakshmamma* (1895) 18 Mad. 53, 60; *Vaithilingam* v. *Murugaian* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460.

(*z*) *Tirkangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L.R. 992, ('44) A.B. 40.

(*a*) (1872) I.A. Sup. Vol. 131, 133, 11 Beng. L.R. 391.

tion which is admitted in fact was valid in law, a conclusion which in their Lordships judgment is erroneous; but that creates no estoppel, whatever between the parties": *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118. [Another point taken in the case was that an estoppel in cases of adoption was purely *personal*, so that if *R* was estopped, his daughter *S* could not be estopped. Their Lordships were inclined to this view, but they did not base their decision on that argument].

A situation can arise in which a previous award declaring an adoption to be invalid and acceptance of benefit under that award by the alleged adopted son and acting upon the award by the adoptive mother may create an estoppel against them from contending that the mother had not lost her right of adoption and asserting that she could adopt the same person as a son to her deceased husband. In such a case the estoppel is available to prevent fraud and a circuity of action (*b*).

**513A. The doctrine of factum valet in relation to adoption.**—The texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption, are *mandatory*. Hence the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provisions of those texts (*c*).

**514. Limitation.**—(1) The period of limitation for a suit to obtain a declaration that an alleged adoption is invalid, or never in fact took place, is 6 years from the date when the alleged adoption becomes known to the plaintiff [the Indian Limitation Act, 1908, Sch. I, art. 118].

(2) The period of limitation for a suit to obtain a declaration that an adoption is valid is 6 years from the date when the rights of the adopted son, as such, are interfered with [the Indian Limitation Act, 1908, Sch. I, art. 119].

(3) Now see Articles 57, 58 and 65 of the new Limitation Act, 1963.

Art. 118 applies only to a suit under sec. 42 of the Specific Relief Act, 1877, *for a declaratory decree* that an adoption is invalid or did not take place. The article applicable to a suit by a reversioner *for possession* of immovable property on the death of a Hindu female is art. 141 [see § 209 above], even if it is necessary to decide in the suit *whether an adoption was or was not valid: Kalyanadappa* v. *Chanbasappa* (1924) 51 I.A. 220, 48 Bom. 411, 79 I.C. 971, ('24) A.P.C. 137.

## XI.—KRITRIMA ADOPTION

**515. Kritrima form of adoption.**—The kritrima form of adoption is prevalent in Mithila and the adjoining districts, and it is recognized by the law. Either man or woman can adopt in this form. The following are the main points of distinction between *dattaka* adoption and *kritrima* adoption:—

(1) The consent of the adopted son is necessary to the validity of the *kritrima* adoption. But a minor, it would seem, may be adopted with the parent's consent (*c*1). The word '*kartaputra*' indicates *kritrima* and not *dattaka adoption* (*d*).

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(*b*) *Sundarabai* v. *Devaji* (1953) 2 M.L.J. 782, ('54) A.S.C. 82.

(*c*) *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364, 398, (1899) 22 Mad. 398, 26 I.A. 113, 144, *supra*; *Ganga* v. *Lekhraj* (1887) 9 All. 253, 296-297; *Gopal* v. *Hamant* (1879) 3 Bom. 273, 293-294; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160, 167; (1898) 22 Bom. 812, supra; *Timangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L.R. 992, ('44) A.B. 40; *Bhanwar Lal* v. *Mangi Bai* ('55) 5 Rajasthan 625.

(*c*1) *Umesh Bhagat* v. *Ram Kumari Devi* ('63) A.P. 362; *Lalita Prasad* v. *Sarnam Singh* (1933) 9 I.C. 491, ('33) A.P. 165.

(*d*) See *Lalita Prasad, supra.*

(2) The adopted son must belong to the same caste as the adoptive father. His age and his relationship to the adoptive father are immaterial.

(3) No ceremonies are necessary to the validity of a *kritrima* adoption, nor is a document necessary (*e*).

(4) A wife can adopt *a kritrima* son to *herself*, though her husband has adopted a son to himself. Similarly, a widow can adopt a *kritrima* son to *herself*. But neither a wife nor a widow can adopt a *kritrima* son to her husband, even when expressly authorised by him to do so. A wife adopting a *kritrima* son to *herself* does not require the consent of any person, not even that of her husband. A widow may adopt a *kritrima* son to *herself* without the consent of her husband's *sapindas*.

(5) A *kritrima* son does not lose his rights of inheritance in his natural family. In his adoptive family, however, he can only inherit to the person actually adopting him and to no one else (*f*).

*Kartaputra.*—As to kartaputra and his rights, see the undermentioned case (*g*).

## XII.—ILLATOM ADOPTION

**515A. Illatom adoption.**—The custom of affiliating a son-in-law and giving him a share, which is called illatom adoption, has been in vogue in certain communities of the old Madras Presidency (now mainly States of Madras and Andhra Pradesh). The institution is purely the result of custom and judicial recognition has been given to it (*h*). The two essential conditions of this adoption are that the adoptee must marry the daughter of the adopter and there should be an agreement to give him a share. Both the conditions must be fulfilled. Merely living in the house of the father-in-law and helping him in the management of property would not result in affiliation. There must be the requisite agreement. But it is not necessary that the marriage should take place before he is admitted into the family (*i*). A specific agreement is the basis of this affiliation but in case of a very old adoption the fact may be proved by clear evidence of the course of conduct of the parties and circumstances of the case (*j*). The incidents of this custom have now been crystallised into certain rules and no extension of those incidents is permissible unless established by a special custom (*k*). The son-in-law does not become an adopted son in the strict or real sense of adoption.

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(*e*) *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398.

(*f*) *Lakshmi Reddy* v. *Lakshmi Reddy* ('57) A.S.C. 314. Sarkar's Hindu Law, 7th ed., 293; Mayne's Hindu Law, section 226; Trevelyan's Hindu Law, pp. 159-161 and pp. 205-206. The rules stated here are now well established, *Gokhul Rai* v. *Janki Kuer* ('55) A.P. 487.

(*g*) *Kanhaiya Lal* v. *Mussammat Suga Kuer* (1925) 4 Pat. 824, 90 I.C. 26, 65 A.P. 90.

(*h*) *Kirstnamma* v. *Veikatasubbayya* ('19) P.C. 162 (The custom is the same in the Kamma caste and the Reddi caste); *Hanumantamma* v. *Rami Reddi* (1881) 4 Mad. 272; *Narasayya* v. *Ramachandrayya* ('56) Andh. Pra. 209; *Venkayya* v. *Satyanarayana* ('59) A.A.P. 360. Also see f.n. *i* below.

(*i*) *Narasayya* v. *Ramachandrayya* ('56) Andh. Pra. 209, 210.

(*j*) *Pathuri Venkateswarlu* v. *D. Chinna Raghavulu* ('57) Andh. Pra. 604; *Subbarao* v. *Mahalakshmamma* ('30) A.M. 883, 893 (claims of this nature should be very carefully scrutinised).

(*k*) *Narasayya* v. *Ramachandrayya* ('56) Andh. Pra. 209 (custom does not extend to marriage with foster-daughter); *Muthala* v. *Sankarappa* ('55) A.M. 3; *Subbarao* v. *Mahalakshmamma* ('30) A.M. 883.

He does not lose his right of inheritance in his natural family (*l*). Neither he nor his descendants become coparceners (*m*) in the family of adoption though on the death of the adopter he is entitled to the same rights and the same share as against any subsequently born natural son or a son subsequently adopted in accordance with the ordinary law (*n*). He cannot claim a partition with the father-in-law and the incidents of a joint family, such for instance as right to take by survivorship, do not apply. In respect of the property or share that he may get he takes it as if it were his separate and self-acquired property (*o*).

## XIII.—CUSTOMARY ADOPTION IN THE PUNJAB

**515B. Informal adoption in the Punjab.**—A customary adoption in the Punjab is ordinarily no more than a mere appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only. There is no tie of kinship between the appointed heir and the collaterals of the adoptive father. The incidents of an informal adoption of the above type as well as those of a formal customary adoption were examined by the Supreme Court in the undermentioned decision (*o*1).

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(*l*) *Sivada Balarami* v. *Sivada Pera Reddi* (1883) 6 Mad. 267; *Ramakristna* v. *Subbakka* (1889) 12 Mad. 442, 444.

(*m*) *Chenchamma* v. *Subbayya* (1886) 9 Mad. 114; *Muthala* v. *Sankarappa* ('35) A.M. 3 (no reversionary right or right of collateral succession).

(*n*) *Hanumantamma* v. *Rami Reddi* (1881) 4 Mad. 272.

(*o*) *Malla Reddi* v. *Padmamma* (1894) 17 Mad. 48.

(*o*1) *Kehar Singh* v. *Dewan Singh* ('66) A.S.C. 1555; *Sohan Singh* v. *Gurtej Singh* ('72) A.P. & H. 152.

# CHAPTER XXIV

# MINORITY AND GUARDIANSHIP

## LAW PRIOR TO HINDU MINORITY AND GUARDIANSHIP ACT, 32 OF 1956

*Note.*—Some material changes and modifications in the rules of Hindu law relating to minority and guardianship have been brought about by recent legislation embodied in the Hindu Minority and Guardianship Act, 1956. The Act abrogates all the rules of the law of minority and guardianship previously applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. It also supersedes any other law, contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in it. *The rules in the following paragraphs of the Chapter state the law prior to the coming into operation of that Act.*

**516. Age of majority.**—There is a difference of opinion among the Hindu writers as to the age of majority under Hindu law. According to some writers, minority terminates at the completion of the fifteenth year, according to others, at the completion of the sixteenth year. The former view is held in Bengal (*p*); the latter view, in other parts of India (*q*). This difference has lost much of its importance since the passing of the Indian Majority Act, 1875, which applies to all persons domiciled in India, and to all matters *except marriage, dower, divorce and adoption.* According to that Act, every minor of whose person or property a guardian had been appointed by any Court and every minor of whose property the superintendence has been assumed by a Court of Wards is deemed to have attained his majority at the completion of the twenty-first year; and in all others cases, at the completion of the eighteenth year.

*Marriage.*—See § 427 above. Also see sec. 5, Hindu Marriage Act, 1955.

*Adoption.*—See §§ 450 and 465 above. Also see sections 3(c), 10 and 11, Hindu Adoptions and Maintenance Act, 1956.

**517. Guardians.**—Guardians may be divided into three classes, namely—

(1) natural guardians [§§ 518-531];

(2) guardians appointed by a father by will [§ 532]; and

(3) guardians appointed—

(i) under the Guardians and Wards Act 8 of 1890 by a District Court or by a Chartered High Court in the exercise of its ordinary original civil jurisdiction; or

(ii) by a Chartered High Court in the exercise of its inherent powers [§§ 535-537].

See sections 6 and 9, Hindu Minority and Guardianship Act, 1956.

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(*p*) *Cally Churn* v. *Bhuggobutty* (1873) 10 Beng. L.R. 231 [F.B.]; *Mothoormohun* v. *Soorendro* (1876) 1 Cal. 108.

(*q*) *Shivji* v. *Datu* (1875) 12 Bom. H.C. 281, 290; *Reade* v. *Krishna* (1886) 9 Mad. 391, 397-398.

## I.—NATURAL GUARDIANS

**518. Guardianship of person and of separate property of minor.**—(1) The father is the natural guardian of the *person* and of the separate property of his minor children (*r*), and next to him the mother (*s*), unless the father has by his will appointed another person as the guardian of the person of his children [§ 532].

(2) No relation except the parents is entitled as of right to the guardianship of a minor (*t*). Failing the father and mother, the Court may appoint the nearest male paternal kinsman, and, failing paternal kinsmen, the nearest male maternal kinsman as guardian of the minor (*u*). But the Court is not bound to do so. It may appoint a maternal relation in preference to a paternal relation, or it may even appoint a stranger, if the welfare of the minor requires it (*v*).

(3) The Court has *no power* to appoint a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor (*w*).

(4) The provisions of this section apply—

(i) to the custody of the *person* of a minor, whether governed by the Mitakshara law or the Dayabhaga law;

(ii) to the custody of the *separate* property of a minor, as distinguished from his undivided interest in coparcenary property, in cases governed by the Mitakshara law; and

(iii) to the custody of the *separate* property of a minor as well as his *undivided interest* in coparcenary property in cases governed by the Dayabhaga law [§ 279].

As to the custody of the undivided interest of a minor in cases governed by the Mitakshara law, see § 519 below.

See sec. 6, Hindu Minority and Guardianship Act, 1956.

*Father's right.*—"As in this country [England] so among the Hindus the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which

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(*r*) *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110, 120; *Venkateswaran* v. *Saradambal* (1935) Rang. 590, 160 I.C. 878, ('36) A.R. 67.

(*s*) *Kaulesra* v. *Jorai* (1906) 28 All. 233; *Rangubai* v. *Gopal* (1903) 5 Bom. L.R. 542.

(*t*) *Subbarami Reddi* v. *Chenchuraghava Reddi* (1945) Mad. 714; *Ethilavulu* v. *Pethakkal* (1950) A.M. 390; *Kalipada* v. *Purnabala* (1948) 2 Cal. 485, (1948) A.C. 269.

(*u*) *Gulbai, In re* (1908) 32 Bom. 50.

(*v*) *Kristo Kissor* v. *Kadermoye* (1878) 2 Cal. L.R. 583; *Mst. Bhikuo Koer* v. *Chamela Koer* (1897) 2 C.W.N. 191, (1908) 32 Bom. 50; *Thayammal* v. *Kuppanna* (1915) 38 Mad. 1125, 26 I.C. 179, ('15) A.M. 659; Guardians and Wards Act, 1890, s. 17; *Emperor* v. *Sital Prasad* (1920) 42 All. 146, 54 I.C. 402, ('19) A.A. 36 [Kidnapping].

(*w*) Guadrians and Wards Act 8 of 1890, sec. 19, cl. (*b*). See *Besant* v. *Narayaniah* (1914) 41 I.A. 314, 38 Mad. 807, 822, 24 I.C. 290, ('14) A.PC. 41.

it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation" (*x*).

*Mother's right.*—When the father is alive, he is entitled to the custody of his minor child, however young it may be, in preference to the mother (*y*). In a Madras case, where the father had taken a second wife, the custody of a minor girl of very tender years was given to her mother (*z*).

*Capacity of minor to act as guardian.*—A minor is incompetent to act as guardian of any minor except his own wife or child [the Guardians and Wards Act 1890, sec. 21].

*Adoptive father.*—Where a widow adopts a son to her husband under an authority given to her by his will, the natural father should not, on the death of the adoptive mother, be appointed guardian of the person of his son where there are other suitable members of the adoptive father's family available and where the effect of appointing the natural father would be to frustrate the intention of the adoptive father expressed by him in his will (*a*).

**519. Guardianship of property where family is joint.**—If the minor is a member of a joint family governed by the Mitakshara law, the father as *karta* (manager) is entitled to the management of the whole coparcenary property including the minor's interest. After the father's death, the management of the property, including the minor's interest therein, passes to the eldest son as *karta* [§ 236]. The mother is not entitled to the custody of the undivided interest of her minor son in the joint property, because such property is not separate property, though she is entitled to the custody of his person and of his separate property, if any (*b*). If all the sons are minors, the Court may appoint a guardian of the whole of the joint property until one of them attains majority (*c*), specially when the widows of the father were quarrelling among themselves (*d*). On any one of the sons attaining majority, the guardianship of the property constituted by the Court ceases, and the Court is bound to hand over the joint family property to the adult son, notwithstanding the fact that the other sons are minors (*e*). See §§ 535-537 below. Also see sec. 12, Hindu Minority and Guardianship Act, 1956.

*Illustrations*

(a) *H*, a Hindu governed by the Mitakshara law, dies leaving two sons *A* and *B* and a widow the mother of *B*. *A* is an adult, bút *B* is a minor. After the death of *H*, it is competent to *A* and *B* to live as members of a joint Mitakshara family, or to partition the property inherited by them from their father. If they adopt the former course, *A* as the senior male member is entitled to manage the whole joint property, including the minor's undivided interest therein. *B*'s mother is not entitled to be appointed guardian of the undivided interest of her son *B* in the joint property, for such interest is not separate property. But she may be appointed guardian of *B*'s person and of his separate property, if any. If *A* and *B* partition the property inherited by them from their father, then *B*'s mother is entitled to the custody of the share allotted to *B* on partition, such share being his separate property [§ 223, sub-§ (4)]: *Gourah* v. *Gujadhur* (1880) 5 Cal. 219.

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(*x*) *Besant* v. *Narayaniah* (1914) 41 I.A. 314, 320-321, 38 Mad. 807, 819, 24 I.C. 290, ('14) A.PC. 41; *Sukhdeo* v. *Ram Chandar* (1924) 46 All. 706, 83 I.C. 24, (24) A.A. 622.

(*y*) *Empress* v. *Prankrishna* (1882) 8 Cal. 969.

(*z*) In re *Muruga* (1950) Mad. 85.

(*a*) *Monomohini Dasi* v. *Hari Prasad* (1925) 4 Pat. 109, 81 I.C. 1045, ('25) A.P. 444.

(*b*) *Gharib Ullah* v. *Khalak Singh* (1903) 25 All. 407, 30 I.A. 165; *Gourah* v. *Gujadhar* (1880) 5 Cal. 219; *Virupakshappa* v. *Nilgangava* (1895) 19 Bom. 309 [F.B.]; *Sham Kuar* v. *Mohanunda* (1892) 19 Cal. 301.

(*c*) *Bindaji* v. *Mathurabai* (1906) 30 Bom. 152; *Narasamma* v. *Satyanarayana* (1951) 1 M.L.J. 436, ('51) A.M. 793.

(*d*) *Seethabai* v. *Narasimha* (1945) Mad. 568. Also see *Rakhmabai* v. *Sitabai* (1952) 54 Bom. L.R. 55, (1952) Bom. 455, ('52) A.B. 160.

(*e*) *Ramchandra* v. *Krishnarao* (1908) 32 Bom. 259; *Chandrapal Singh* v. *Sarabjit Singh* (1936) 11 Luck. 67, 154 I.C. 855, ('35) A.O. 334; *Rajah Yenumula* v. *Chitrapu Buchi Venkayya Pantulu* (1949) 2 M.L.J. 774, ('51) A.M. 792.

(b) If in the case put in ill. (a), *A* also is a minor, the Court may appoint a guardian of the whole joint property under the Guardians and Wards Act, 1890, and the Court may in such a case appoint even *B*'s mother as such guardian: *Bindaji* v. *Mathuraba* (1905) 30 Bom. 152. But the guardianship of the individual appointed by the Court ceases when *A* attains majority, and the management of the whole property will then vest in him as *karta: Ramchandra* v. *Krishnarao* (1908) 32 Bom. 259.

*Capacity of minor to act as guardian.*—There is no rule of Hindu iaw that the managing member of an undivided family should be an adult. He may be a minor in which case he is competent to act as guardian not only of his own wife and children but also the wife and children of another minor member of the family [the Guardians and Wards Act, 1890, sec. 21].

**520. Guardianship of a married female.**—See § 443 above. Also see sec. 6 (*c*), Hindu Minority and Guardianship Act, 1956.

**521. Guardianship of an adopted son.**—The guardianship of an adopted son who is a minor passes on his adoption from his natural father and mother to his adoptive father and mother (*f*).

**522. Guardianship of illegitimate children.**—The mother is the lawful guardian of her illegitimate children (*g*). It was held by the High Court of Lahore that where the father is known he has the preferential right (*h*). This view has been dissented from by the High Court of Madras (*h*1). Also see section 6(b), Hindu Minority and Guardianship Act, 1956 *post*.

**523. Remarriage of mother.**—A Hindu widow does not by the mere fact of her remarriage lose her right of guardianship, in any case where remarriage is recognized by the custom of the caste to which she belongs (*i*).

See the Hindu Widow's Remarriage Act, 1856, secs. 3 and 5.

**524. Loss of caste.**—Under the Hindu law, loss of caste entailed a loss of the right of guardianship of the person and property of minors (*j*). But it is no longer so since the passing of the Caste Disabilities Removal Act, 1850 (*k*).

This act contains only one section which runs as follows:—

"So much of any law or usage now in force [in India] as inflicts on any person forfeiture of rights of property by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste shall cease to be enforced as law [in India]."

As to change of religion, see §§ 525-526.

**525. Change of religion by father.**—The fact that a father has changed his religion is of itself no reason for depriving him of the custody of his child-

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(*f*) *Sreenarain* v. *Kishen* (1873) 11 Beng. L.R. 171, I.A. Sup. Vol. 149, 163; *Lakshmibai* v. *Shridhar* (1879) 3 Bom. 1. See also *Nirvanaya* v. *Nirvanaya* (1885) 9 Bom. 365.

(*g*) *Venkamma* v. *Savitramma* (1889) 12 Mad. 67, 68; *Saithri, in the matter of* (1891) 16 Mad. 307, 317.

(*h*) *Prem Kaur* v. *Banarsi Das* (1934) 15 Lah. 630, 156 I.C. 87, ('34) A.L. 1003.

(*h*1) *Rajalakshmi* v. *Ramachandran* ('67) A.M. 113; *Dorai Raj* v. *S. R. Lakshmi* ('47) A.M. 172.

(*i*) *Ganga* v. *Jhalo* (1911) 38 Cal. 862, 10 I.C. 69; *Mst. Indi* v. *Ghania* (1920) 1 Lah. 146, 53 I.C. 783, ('19) A.L. 40; *Putlabai* v. *Mahadu* (1909) 33 Bom. 107, 144, 1 I.C. 659. But see *Panchappa* v. *Sanganbasawa* (1900) 24 Bom. 89, 91; *Mt. Ram Labhai* v. *Durga Das* (1934) 15 Lah. 28, 147 I.C. 19, ('33) A.L. 817.

(*j*) Strange's Hindu Law, vol. I, p. 160.

(*k*) *Kanahi Ram* v. *Biddya Ram* (1878) 1 All. 549; *Kaulesra* v. *Jorai* (1906) 28 All. 233.

ren (*l*). But if at the time of conversion, the father voluntarily abandons his parental rights, and entrusts the custody of his child to another person in order that it may be maintained and educated by him, the Court will not restore back the custody of the child to the father, if such a course is detrimental to the interests of the child. In such a case the Court should be guided by what it conceives to be best for the welfare and well-being of the child (*m*).

See notes to § 524.

Also see proviso (a) to s. 6, Hindu Minority and Guardianship Act, 1956.

**526. Change of religion by mother.**—A child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social status; and it is, therefore, ordinarily and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion. Therefore, where a Hindu mother changes her religion, the Court may, if it deems to be in the interest of the minor, remove the child from the custody of the mother, and place the child under a Hindu guardian (*n*).

Also see proviso (a) to sec. 6, Hindu Minority and Guardianship Act. 1956.

**527. Change of religion by minor.**—Where a Hindu child, who has become a convert to Christianity or any other religion, leaves his parents, and proceedings are instituted by the parents for the custody of the child, the question arises as to what is the true principle by which the Courts should be guided in such cases. Is it that the minor, if he is old enough to form an intelligent preference, should be allowed to exercise his own discretion as to where he will go? Or, is it that the parents are entitled as of right to the custody of the child, irrespective of his wishes? Or is it that the Court should in each case do what it conceives to be for the welfare and interest of the child? The first view was taken in the earliest decisions on the subject. Then came a series of cases in which the second view was taken (*o*). The last view is the one now taken by the High Courts of Bombay (*p*), Calcutta (*q*), and Allahabad (*r*).

## *POWERS OF NATURAL GUARDIAN*

**528. Alienations by natural guardian.**—The natural guardian of a Hindu minor has power in the management of his estate, to mortgage or sell any part thereof *in a case of necessity or for the benefit of the estate* (*s*). If the

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(*l*) Act 21 of 1850; *Muchoo* v. *Arzoon* (1866) 5 W.R. 235; *Shamsing* v. *Santabai* (1901) 25 Bom. 551, 555.

(*m*) *Mokoond* v. *Nobodip* (1898) 25 Cal. 881; *Joshy Assam, in the matter of* (1896) 23 Cal. 290.

(*n*) *Skinner* v. *Orde* (1871) 14 M.I.A. 309, 323.

(*o*) *The Queen* v. *Nesbitt* (1853) Perry's O.C. 103; *Reade* v. *Krishna* (1886) 9 Mad. 391.

(*p*) *Saithri, in the matter of* (1891) 16 Bom. 307.

(*q*) See *Joshy Assam, in the matter of* (1896) 23 Cal. 290; *Mokoond* v. *Nobodip* (1898) 25 Cal. 881.

(*r*) *Sarat Chandra* v. *Forman* (1890) 12 All. 213.

(*s*) *Hunooman Persaud* v. *Mussumat Babooee* (1856) 6 M.I.A. 393, 412 [mortgage by mother upheld]; *Soonder Narain* v. *Bennud Ram* (1879) 4 Cal. 76 [sale by mother for legal necessity upheld]; *Bai Amrit* v. *Bai Manik* (1875) 12 Bom. H.C. 79 [sale by mother upheld]; *Murari* v. *Tayana* (1895) 20 Bom. 286 [sale by mother of two plots of land—sale of one upheld and that of the other set aside as not being one for legal necessity]; *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135 [mortgage by mother not upheld as not being one for necessity]; *Raghubans* v. *Indarjit* (1923) 45 All. 77, 69 I.C. 683, ('22) A.A. 526 [mortgage by mother upheld in part]: *Ragho* v. *Zaga* (1929) 53

alienee does not prove any legal necessity or that he made reasonable enquiries, the sale is invalid (*t*). The power of a manager of a joint family to make a suitable provision in connection with the marriage of a daughter of the family in the shape of a gift of a small portion of the family property cannot be exercised by a widow, acting as guardian of her son, who is the owner of the property (*u*).

Also see sec. 8, Hindu Minority and Guardianship Act, 1956.

In *Hunooman Persaud* v. *Mussumat Babooee* (*v*), which is the leading case on the subject, the Judicial Committee said:

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly *in a case of need or for the benefit of the estate. . . . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.* . . . Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money."

*Alienation by natural guardian: Legal necessity.*—Where the mother of a minor as his natural guardian mortgages the minor's property for a legal necessity, and afterwards sells the property *before* the due date of payment of the mortgage amount, the sale itself is one without legal necessity though she applies part of the purchase money in payment of the mortgage debt. The minor therefore is entitled to set aside the sale subject, however, to payment to the purchaser of the amount applied towards payment of the mortgage debt, his estate having benefited to that extent (*w*). The minor will be liable in equity to make good to the purchaser the portion of the consideration by which he was benefited and the decree to be passed in his favour would be a conditional decree for possession on condition that he should pay to the purchaser the amount of consideration which has been found to be either for the benefit of his estate or for the purpose of legal necessity (*x*). In the case of a mortgage, by the guardian, of the minor's estate for the purpose of defraying the expenses of the minor's marriage performed in violation of the Child Marriage Restraint Act it was held that there was no legal necessity to support the mortgage (*y*).

Where the mother as natural guardian of her minor son sold the only house already burdened with a mortgage debt, created by her husband, as there was no possibility of being able to redeem the mortgage it was held that the sale was for legal necessity (*y*1). In the absence of her husband whose whereabouts are not known, a mother can alienate for legal necessity the joint family property of her minor son who is the karta of the family (*y*2).

*For the benefit of the estate.*—"Mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is 'for the benefit of the estate' within the meaning of this rule, which could hardly have been intended to include cases of speculative development of estates of minors" (*z*). When

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Bom. 419, 118 I.C. 555, ('29) A.B. 251 [sale by guardian of his own property and that of minor's property—*one* piece of land purchased with sale proceeds of both properties—sale of minor's property not upheld]; *Nagalinga Konar* v. *Madathi* ('50) A. Tr. Co. 30; *Balakrishna* v. *Ganesa* ('54) A. Tr. Co. 209 (F.B.); *Rangaswami* v. *Marappa* (1952) 2 M.L.J. 506, ('53) A.M. 230 [gift held invalid]. *Keluni Dei* v. *Kanhei Sahu* ('72) A. Orissa 28.

(*t*) *Mallappa* v. *Anant Balkrishna* (1936) 38 Bom. L.R. 941, 166 I.C. 154, ('36) A.B. 386.

(*u*) *Palaniammal* v. *Kothandarama Goundan* (1944) Mad. 418.

(*v*) (1856) 6 M.I.A. 393, 423.

(*w*) *Pandharinath* v. *Ramchandra* (1931) 33 Bom. L.R. 104, 130 I.C. 594, ('31) A.B. 157.

(*x*) *Ramnath* v. *Deoraj* ('57) A.P. 495.

(*y*) *Ram Jash Agarwala* v. *Chand Mandal* (1937) 2 Cal. 764.

(*y*1) *Keshavlal* v. *Nagarathnam,* ('64) A.M. 374; *Subbakhal* v. *Subba Gounder,* ('65) A.M. 371; *Kesavalu* v. *Nagarathnam* ('64) A.M. 374.

(*y*2) *Trutia Mirdha* v. *Basudev Singh* ('64) A. Orissa 123.

(*z*) *Kristna Chandra* v. *Ratan Ram* (1915) 20 C.W.N. 645, 647, 35 I.C. 673, ('16) A.C. 840; *Hemraj* v. *Nathu* (1935) 59 Bom. 525, 157 I.C. 406, ('35) A.B. 295 [F.B.].

the only circumstance relied on, in justification of the sale, is that the price realised is much more than the normal value of the property, the sale cannot be regarded as one for the benefit or the estate (*a*). A mortgage by a mother of the property of her minor son to secure a loan to carry on a trade on behalf of the minor which was not ancestral is not a transaction for the benefit of the minor (*b*). Nor a sale for the sole purpose of investing the price so as to bring in a larger income (*c*). An alienation by a guardian to pay the barred debts of the father of the minor is not binding on the minor's interest (*c*1). But alienation of movable property in danger of deterioration in value, or lands barren and yielding no income to invest proceeds in income yielding land, may be regarded as for the benefit of the estate (*d*). See § 243A.

The Calcutta High Court has held in a recent case that an unauthorised sale or mortgage of the ward's property may be validated by subsequent ratification by the ward on his attaining majority (*d*1).

*Burden of proof.*—The burden of proof on the alienee is the same as that in the case of an alienation by the manager (*e*). See § 244 above.

*The Guardians and Wards Act, 1890.*—Where a guardian is appointed of the property of a Hindu minor under the Guardians and Wards Act, 1890, he cannot alienate the immovable property of the minor *without* the sanction of the Court, not even in a case of necessity. If he does so, the alienation is voidable at the option of the minor (*f*). Where a Court has sanctioned the alienation under the Guardians and Wards Act, the alienee can rely upon the order of the Court and need not prove the actual legal necessity. The omission of the mention of any legal necessity in the order is only an irregularity (*g*). The powers, however, of the natural guardian of a Hindu minor are larger than those of a guardian appointed under that Act: a natural guardian may alienate the minor's property even without the sanction of the Court, provided the alienation is one for necessity or for the benefit of the estate. The Guardians and Wards Act, 1890, does not alter or affect the rights of natural guardians under the Hindu law (*h*). But once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished (*i*).

*Limitation.*—A suit by a ward who has attained majority to set aside a transfer of property by his guardian must be brought within three years from the date when the ward attains majority; the Indian Limitation Act, 1908, Sch. I, art. 44. A transfer by a guardian is not void, but voidable at the instance of the ward (*j*).

Now see Article 60(a) of the new Limitation Act, 1963.

*Alienation by manager of joint family of undivided interest of minor coparceners.*—See §§ 242 to 244.

**529. Contract by natural guardian.**—(1) A natural or even a *de facto* guardian has always the power to charge, mortgage or sell the properties of the infant on grounds of necessity or benefits of the minor. This law is well settled by a long course of decisions since *Hunooman Persaud Panday's* case

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(*a*) *Hemraj* v. *Nathu* (1935) 59 Bom. 525, 157 I.C. 406, ('35) A.B. 295 [F.B.]. *Thota Appanna* v. *Nakkava* ('63) A.A.P. 418.

(*b*) *Punnayyah* v. *Viranna* (1922) 45 Mad. 425, 70 I.C. 668, ('22) A.M. 273.

(*c*) *Ragho* v. *Zaga* (1929) 53 Bom. 419, 118 I.C. 555, ('29) A.B. 251.

(*c*1) *Sudhanya Kumar* v. *Haripada*, ('60) A.C. 34.

(*d*) *Palanippa* v. *Harvey* ('53) A. Tr. Co. 481; *Rabi Narayan* v. *Kanak Prova Devi* ('65) A.C. 444.

(*d*1) *Ramlal R. & Co.* v. *B. C. Patel & Sons*, 64 Cal. W.N. 126, 1960 Cal. 546.

(*e*) *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135; *Raghubans* v. *Indarjit* (1923) 45 All. 77, 69 I.C. 683, ('22) A.A. 526. Also see *Nathu* v. *Ganpat* ('58) A.B. 25; *Dhabani Dei* v. *Lingaraj* ('71) A. Orissa 224.

(*f*) Guardians and Wards Act, 1890, ss. 29-30; *Sinaya* v. *Munisami* (1899) 22 Mad. 289; *Tejpal* v. *Ganga* (1903) 25 All. 59 [where the guardian appointed by the Court was also the natural guardian].

(*g*) *Balaji Vasudeo* v. *Sadashiv Kashinath* (1937) Bom. 1, 38 Bom. L.R. 796, 165 I.C. 530, ('36) A.B. 389.

(*h*) *Ram Chunder* v. *Brojonath* (1879) 4 Cal. 929 [F.B.]; *Kanti Chunder* v. *Bishesuar* (1898) 25 Cal. 585 [F.B.]; *Manishankar* v. *Bai Muli* (1888) 12 Bom. 686; *Sham Das* v. *Umer Din* (1930) 11 Lah. 312, 126 I.C. 788, ('30) A.L. 497.

(*i*) *Arumugam* v. *Duraisinga* (1914) 37 Mad. 38, 12 I.C. 568, ('14) A.M. 648.

(*j*) *Laxmaya* v. *Rachappa* (1918) 42 Bom. 626, 46 I.C. 22, ('18) A.B. 180; *Fakirappa* v. *Lumanna* (1920) 44 Bom. 742, 58 I.C. 257, ('20) A.B. 1; *Pran Nath* v. *Bal Kishan* ('59) A. Punj. 313; *Brojendra* v. *Prosanna Kumar* (1920) 24 C.W.N. 1016, 59 I.C. 589, ('20) A.C. 776; *Labha Mal* v. *Malak Ram* (1925) 6 Lah. 447, 89 I.C. 602, ('25) A.L. 619; Contra *Bachchan Singh* v. *Kamta Prasad* (1910) 32 All. 392, 5 I.C. 585; *Rangaswami* v. *Marappa* ('53) A.M. 230, (1952) 2 M.L.J. 506.

(*k*). There is conflict of opinion however on the point as to whether the same principle applies to cases of simple loans contracted by a natural or *de facto* guardian of a minor either under a suitable bond or a promissory note. In *Waghela* v. *Sheikh Masludin* (*l*) [ill. (a)] it was held by the Privy Council that a guardian cannot contract in the name of the ward so as to impose on the latter any personal liability and this view was affirmed by the subsequent decision of the Judicial Committee in *Indur Chunder* v. *Radhakishore* (*m*). On the strength of these pronouncements, it has been held, principally by the Bombay High Court, that a minor is not only exempted from personal arrest and detention in execution of a money decree but that no decree can be passed against him on the basis of a contract entered into on his behalf by his guardian in execution of which his general assets could be attached and sold (*n*). On the other hand, it has been held by the Madras and Patna High Courts that the principle laid down by the Privy Council in *Waghela's* case (*o*) cannot and does not affect the rule of Hindu Law which confers a power upon the guardian to bind the minor's estate for purposes of necessity or protection of the minor's interests (*p*). All these cases have been discussed and reviewed by the Federal Court of India in *Kondamudi* v. *Myneni; Tadavarti* v. *Myneni* (*q*). Though the views expressed by the learned Judges on the points of law involved in the case are not quite identical, they concurred in affirming the decision of the Madras Full Bench against which the appeals were directed. The propositions of law receiving the largest measure of support from the pronouncements of the learned Judges of the Federal Court may be summarised as follows:—

(i) A guardian of a Hindu minor either *de jure* or *de facto* has no authority to impose a personal obligation upon the minor or his estate by an unconditional undertaking to pay a debt or loan not contracted for legal necessity or benefit of the minor.

(ii) A guardian *de jure* or even *de facto*, provided he is not an intruder on the estate of the minor, can borrow money for the protection or benefit of the minor, so as to make the minor's estate liable for the same, but in such cases the creditor can have a decree against the estate of the infant only on the principle of subrogation to the right of indemnity or reimbursement which the guardian may have against the ward's properties. This right of subrogation can be availed of when the guardian is personally liable for the debt, and no question arises of making out a contract directly between the creditor and the infant.

This was the view taken by Kania, C.J., Fazl Ali, J., and Mukherjea, J. According to Mr. Justice Mukherjea a creditor could proceed directly against the estate of the minor if the contract was for the supply of necessaries within the meaning of sec. 68 of the Indian Contract Act. In all other cases he can have recourse to the minor's estate only

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(*k*) 6 M.I.A. 393.
(*l*) 14 I.A. 89; 11 Bom. 551.
(*m*) 19 Cal. 507.
(*n*) *Maharana Shri Ranmalsingji* v. *Vadilal*, I.L.R. 20 Bom. 61; *Keshav* v. *Balaji* (1932) 34 Bom. L.R. 996; *Sankar* v. *Nathu* (1932) 34 Bom. L.R. 1001; *Nagindas* v. *Bhimrao*, I.L.R. (1943) Bom. 117. Wallis C.J. in *Ramajogayya* v. *Jagannadhan*, I.L.R. 42 Mad. 185.
(*o*) 14 I.A. 89.
(*p*) *Ramajogayya* v. *Jagannadhan* I.L.R. 42 Mad. 185; *Venkitaswami* v. *Muthusamy* (1919) 34 M.L.J. 177; *Meenakshi* v. *Ranga* (1932) A.M. 696; *Annamalai* v. *Muthuswami*, I.L.R. 1939 Mad. 891; *Satyanarayana* v. *Mallayya*, I.L.R. 58 Mad. 735; *Suchit* v. *Harnandan*, 12 Pat. 112.
(*q*) (1949) 11 F.C.R. 65; *Ramalinga* v. *Srinivasalu* ('55) A.M. 657, (1955) 2 M.L.J. 173.

indirectly on the principle of subrogation provided the guardian, on the state of accounts between him and the minor, could assert a right of indemnity or reimbursement against the estate of the latter. According to Mahajan J., the creditor has the right to proceed against the estate of the minor directly without invoking the principle of subrogation if the loan was one contracted for necessity or benefit of the infant, or was for supply of necessaries as contemplated by sec. 68 of the Indian Contract Act.

(iii) The same principles are applicable to moneys borrowed on the security of negotiable instruments. A minor cannot be made liable on a pronote executed by the guardian either *de jure* or *de facto* in the name of the minor.

It was held by Kania, C.J., and Mahajan, J., that to make the minor liable in such cases, it must be established that there is cause of action independently of the note, and the conditions necessary to make the minor's estate liable in respect of that particular transaction were satisfied.

(2) It is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property for the minor. As the minor is not bound by the contract there is no mutuality and the minor cannot claim specific performance of the contract. This was laid down by the Privy Council in *Mir Sarwarjan* v. *Fakhruddin* (r) [ill. (b)] and the principle has been followed in a number of subsequent cases by the different High Courts in India (s). A distinction has thus been drawn between a completed transfer of minor's property by the guardian, on grounds of legal necessity or benefit to the minor, and an executory contract of transfer entered into by the guardian on behalf of the infant for the same purpose, and specific performance has been held not to be available in the latter case because of want of mutuality. In *Subramanayam* v. *Subba Rao* (t) the Privy Council had to deal with a case where the mother of an infant as his natural guardian entered into a contract for the sale of the minor's property to a stranger. The contract was for the benefit of the minor and in pursuance of the agreement, the transferee was put in possession of the property. No sale deed was however executed, and the minor through his guardian instituted a suit for recovery of possession of the property contracted to be sold on the ground that the contract was not binding on him. It was held by the Privy Council that the defendant was protected under sec. 53(A) of the Transfer of Property Act, and the minor for whose benefit the contract was entered into answered most aptly the description of the transferor, in the sense in which the expression was used in the section.

In course of their judgment the Privy Council quoted with approval the following passage from Pollock and Mulla's Indian Contract and Specific Relief Acts (Ed. 7, p. 70) as laying down the correct law on the subject:—

"A minor's agreement being now decided to be void it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Privy Council. It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Privy Council, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further if it is for the benefit of the minor. But if

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(r) 39 I.A. 1, 39 Cal. 232.

(s) *Malla* v. *Muhammad Sharif*, 8 Lahore 212; *Soham Lal* v. *Atal Nath*, 56 All. 142; *Chodavarapu* v. *Chennuru* (1920) A.M. 423.

(t) 75 I.A. 115, A.P.C. 95.

either of these two conditions is wanting, the contract cannot be specifically enforced at all."

On the strength of this decision it has been held by Viswanath Shastri, J., of the Madras High Court (*u*) that when the mother of a Hindu minor entered into a contract for sale of the minor's property for purposes considered under Hindu Law as necessary, and there was no doubt about the competency of the guardian to act on behalf of the minor, the contract could be specifically enforced against the minor, and the line of authorities beginning with *Mir Sarwarjan's* case had no application to such circumstances.

It has been held by the Allahabad High Court (*v*) that although in general a claim for specific performance of a contract to sell the joint family property entered into by the manager will not be decreed against the minors, yet if fresh property has been purchased with the amount realised and the minor takes a share in the property so acquired, he will not be allowed to repudiate the contract.

As to specific performance of a contract to purchase immovable property by a competent guardian acting within his authority see the undermentioned case (*v*1).

(3) No act done by a person who is the guardian of a minor binds the minor, unless the act was done by him in his capacity of guardian. It is a question of fact in each case whether a particular act done by a person was done by him in his capacity of guardian or on his own behalf and on his own account. In the former case, the act binds the minor, provided it was otherwise within the power of the guardian; in the latter case, it does not. The mere fact that the name of the minor is not mentioned in a contract, or in a deed of sale or mortgage, is not conclusive proof that the transaction was not entered into on behalf of the minor. In each case, the language of the document and the circumstances in which it was executed must be considered (*w*) [ill. (c)].

(4) See sec. 8, Hindu Minority and Guardianship Act, 1956.

*Illustrations*

(a) The mother of a Hindu boy, *M*, acting as his guardian, sells property belonging to the minor for purposes of necessity free of all Government claims for revenue. The deed of sale contains a covenant binding the minor and heirs to indemnify the purchaser against any claims for revenue which the Government might make at any future time. Some time after the sale, the Government assessed the land. The purchaser sues *M*, who has then attained majority, upon the covenant contained in the deed. *M* is not liable on the covenant, the covenant being a personal one. Such a covenant is not valid and binding on a minor either under the English law or the Indian law: *Waghela* v. *Seikh Masludin* (1887) 11 Bom. 551, 14 I.A. 89. See subs-§ (1).

(b) *A*, as guardian of the estate of a minor, *B*, agrees to purchase immoveable property from *C*, on behalf *B*. *B* on attaining majority sues *C* for specific performance. *B* is not entitled to specific performance, nor is *C*. See sub-§ (2).

(c) *A* dies leaving a widow, *W*, and a minor son, *M*. After *A*'s death *W* enters into possession of the property left by *A*, and manages the same as guardian of *M*. After some time, in consequence of certain disputes, *G* applies to the Court to be appointed guardian of the person and property of *M*, and he is appointed such guardian. Before *G* can obtain possession of *M*'s property from *W*, *W* sells the property to *P* for Rs. 400 and conveys the property to *P as her own property and not as that of the minor*. Out of the Rs. 400, she applies Rs. 200 in satisfying a decree against the estate of her deceased husband, and the rest she spends for her own maintenance. *M* attains majority, and

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(*u*) *Ramlingam* v. *Babanambal* (1951) A.M. 431. Also see *Suryaprakasam* v. *Gangaraju* ('56) A. Andhra 33 (F.B.).

(*v*) *Sohan Lal* v. *Atal Nath* (1934) 56 All. 142, 148 I.C. 229, ('33) A.A. 846.

(*v*1) *Popat Namdeo* v. *Jagu* ('69) A.B. 140.

(*w*) *Indur Chunder* v. *Radhakishore* (1892) 19 Cal. 507, 19 I.A. 90 [renewal of lease]; *Nathu* v. *Balwantrao* (1903) 27 Bom. 390 [sale by mother]; *Murari* v. *Tayana* (1895) 20 Bom. 286, 288; *Watson & Co.* v. *Sham Lal* (1887) 14 I.A. 178, 15 Cal. 8; *Nandan Prasad* v. *Abdul Aziz* (1923) 45 All. 497, 74 I.C. 367, ('23) A.A. 581 [mortgage by mother as full owner]. See also *Balwant Singh* v. *Clancy* (1912) 39 I.A. 109, 34 All. 296, 14 I.C. 629 [sale by brother].

sues *P* to recover the property from him. The sale is void altogether, and *M* is entitled to recover the property. The sale being absolutely void, *P* is not entitled to a return of any part of the purchase money, not even of the Rs. 200 applied by *W* in payment of debts binding on the estate and therefore on *M*: *Nathu* v. *Balwantrao* (1903) 27 Bom. 390. See sub-§ (3).

**530. Compromise by natural guardian.**—It is competent to a guardian to enter into a compromise on behalf of his ward (*x*).

**531. Acknowledgment of debt by guardian.**—The natural guardian of a minor as well as a guardian appointed under the Guardians and Wards Act, 1890, has the power to acknowledge a debt or to pay interest on a debt so as to extend the period of limitation, provided the act was for the protection or benefit of the minor's property; but he had no power to revive a debt which was barred by limitation. Section 20 (3) (a) of the Limitation Act, 1963 includes a lawful guardian in the expression "agent duly authorised in this behalf" occurring in secs. 18 and 19 of the Act.

A *de facto* guardian has no authority to acknowledge a debt on behalf of the minor under sec. 18 read with sec. 20 of the Limitation Act, 1963 (*b*).

See the Limitation Act, 1963, secs. 18, 19 and 20 and the Indian Contract Act, 1872, sec. 25.

## II.—TESTAMENTARY GUARDIANS

**532. Guardians appointed by will.**—(1) A Hindu father may, by word of mouth or by writing, nominate a guardian for his children, so as to exclude even the mother from the guardianship (*c*). The mother, however, has not the power to appoint a guardian by will (*d*), but the Court may have regard to her wishes, if any, expressed in her will.

(2) The power of testamentary guardian to deal with property belonging to his ward is subject to the restrictions imposed by the will (*e*). The father can, by his will appoint a guardian both of the person as well as the property of his minor daughter. On the marriage of the daughter, the husband becomes the guardian of the person, but the testamentary guardian continues to be the guardian of her property (*f*).

(3) As regards guardianship of joint family property, there is a conflict of opinion whether the father of a joint family consisting of himself and his minor sons has power to appoint a guardian by his will of the *joint property* during the minority of the sons. In an earlier Bombay case, it was held that he had no such power (*g*). In a later Bombay case, it was held that he had the power to appoint such guardian and also to authorize him to alienate the joint property, and that, where an alienation was made, it was binding on the minor sons, provided it was within the scope of the authority conferred upon

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(*x*) *Nirvanaya* v. *Nirvanaya* (1885) 9 Bom. 365; *Sant Bhushan Lal* v. *Brij Bhushan Lal* ('67) A. Delhi 137.

(*b*) *Bireswar* v. *Ambika*, 45 Cal. 630; *Ramaswamy* v. *Kasinath* ('28) A.M. 226; *Chennappa* v. *Onkarappa* (1940) Mad. 358; *Kondamudi* v. *Myneni* (1949) 11 F.C.R. 65.

(*c*) *Deba Nand* v. *Anandmani* (1921) 43 All. 213, 59 I.C. 909, ('21) A.A. 346. See also *Jagannadha* v. *Ramayamma* (1921) 44 Mad. 189, 62 I.C. 437, ('21) A.M. 132 [guardian of son to be adopted]; *Budhilal* v. *Morarji* (1907) 31 Bom. 413.

(*d*) *Venkayya* v. *Venkata* (1898) 21 Mad. 401.

(*e*) Guardians and Wards Act, 1890, s. 27.

(*f*) *Rajarajeswari* v. *Sankaranarayana* (1948) Mad. 351.

(*g*) *Harilal* v. *Bai Mani* (1905) 29 Bom. 351.

him by the will (*h*). A Full Bench of the Bombay High Court has now adopted the earlier view (*i*). In Madras, it has been held by a Full Bench that it is not competent to the manager of a joint Hindu family, whether he is the father or uncle or an elder brother, to appoint a testamentary guardian to the *joint property* (*j*). It is submitted that the father has no power to appoint a guardian by his will of joint family property. At the moment of his death the property passes by survivorship to his minor sons, and he cannot by any testamentary direction authorize any person to deal with it during the minority of the sons. But it has been held by the same High Court that if the testator has no sons, he may by his will authorize his widow to adopt a son to him, and appoint a guardian to manage his estate during the minority of the adopted son (*k*). The decision would no doubt be correct if the property disposed of by will was the self-acquired property of the testator. But it would be questionable, if the property disposed of was ancestral.

(4) See sec. 9, Hindu Minority and Guardianship Act, 1956.

See the Guardians and Wards Act, 1890, secs. 6, 7, 17(2) and 39.

The Court is bound, in appointing a guardian, to have regard to the wishes of the father contained in his will, although probate of the will has not been obtained (*l*).

The judgment in the later Bombay case [38 Bom. 94], referred to in sub-§ (3), proceeds on the ground of convenience. The judgment in the Madras case proceeds upon the ground that since a Hindu cannot dispose of *coparcenary* property by will he cannot make arrangements for the management of that property by will after his death, or appoint a guardian to manage that property (*m*).

*Transfer of power of management by father.*—Where the father of a joint family consisting of himself and his minor sons appointed his nephew to manage the joint family property for a period of thirteen years, and the manager was under the arrangement liable only to pay a fixed sum in lieu of actual income, and the father died before the expiry of the period, it was held that the sons were not bound by the arrangement and that the manager was liable to account for the whole of the income after the father's death (*n*).

## III.—GUARDIANS APPOINTED BY THE COURT

**533. Power of Court to appoint guardian.**—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, the Court may make an order under the Guardians and Wards Act, 1890, appointing a guardian. [See secs. 4(4) and (5), and sec. 7 of the Act.] Where the father has appointed a testamentary guardian, the Court has no power to appoint a guardian under sec. 7 of the Guardians and Wards Act (*o*).

A father being the natural guardian of his minor son cannot be appointed guardian of the person of the son and no order under sec. 7 is necessary (*p*).

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(*h*) *Mahableshvar* v. *Ramchandra* (1914) 38 Bom. 94, 21 A.C. 350, ('14) A.B. 300; *Soobah Pirthee Lal* v. *Soobah Doorgah* (1867) 7 W.R. 73, at p. 75. See also *Venkatraman* v. *Janardhan* (1928) 52 Bom. 16, 28, 30, 106 I.C. 79, ('28) A.B. 8.

(*i*) *Brijbhukandas* v. *Ghashiram* (1935) 59 Bom. 316, 155 I.C. 12, ('35) A.B. 124 [FB.].

(*j*) *Chidambara* v. *Rangasami* (1918) 41 Mad. 561, 45 I.C. 905, ('19) A.M. 1046 [F.B.].

(*k*) *Jagannadha* v. *Ramayamma* (1921) 44 Mad. 189, 62 I.C. 437, ('21) A.M. 132.

(*l*) *Sarala Sundari* v. *Hazari Dasi* (1915) 42 Cal. 953, 28 I.C. 972, ('16) A.C. 324 [will made by husband containing directions about guardianship of his minor wife].

(*m*) *Chidambara* v. *Rangasami* (1918) 41 Mad. 561, 570, 572, 45 I.C. 905, ('19) A.M. 1046 [F.B.].

(*n*) *Venkatraman* v. *Janardhan* (1928) 52 Bom. 16, 106 I.C. 79, ('28) A.B. 8.

(*o*) *Amirthavalliammal* v. *Sironmani Ammal* (1938) Mad. 757.

(*p*) *Venkateswaran* v. *Saradambal* (1935) 13 Rang. 590, 160 I.C. 878, ('36) A.R. 67.

(2) Nothing in the Guardians and Wards Act, 1890, shall affect, or in any way derogate from, or take away any power possessed by a Chartered High Court. See sec. 3 of the Act.

**534. Guardian of person.**—(1) In appointing the guardian of a minor, the Court shall be guided by what, consistently with the law to which the minor is subject [§ 518], appears in the circumstances to be for the welfare of the minor. Reference may be made to sec. 13, Hindu Minority and Guardianship Act, 1956.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kinship to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor be old enough to form an intelligent preference, the Court may consider that preference.

See the Guardians and Wards Act, 1890 sec. 17.

**535. Guardian of minor's separate property.**—The only property of a minor of which a guardian can be appointed under the Guardians and Wards Act, 1890, is the *separate* property of the minor. A guardian cannot be appointed under that Act of the *undivided interest* of a minor in coparcenary property in cases governed by the Mitakshara law. The reason is that the interest of a member of a joint Mitakshara family is not separate or individual property (*q*). See § 519 above. Also see sec. 12, Hindu Minority and Guardianship Act, 1956.

**536. Alienation by guardian appointed under the Guardians and Wards Act, 1890.**—A guardian appointed by the Court under the Guardians and Wards Act, 1890, has no power to alienate the minor's property without the previous permission of the Court. An alienation without such permission is voidable at the instance of the minor and other persons affected thereby. [See secs. 29 and 30 of the Act.] Where an alienation is made with the permission of the Court it cannot be impeached by the minor or any other person except in a case of fraud or underhand dealing. The reason is that the alienee is entitled to trust to the order of the Court, and he is not bound to inquire as to the expediency or necessity of the alienation for the benefit of the minor's estate (*r*). See § 519. above.

**537. Guardian of minor's undivided corparcenary interest.**—Although a guardian cannot be appointed of the *undivided interest* of a minor in joint family property under the Guardians and Wards Act, 1890, a Chartered High Court may, in the exercise of its *inherent power*, appoint the managing mem-

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(*q*) *Gharib Ullah* v. *Khalak Singh* (1903) 25 All. 407, 416, 30 I.A. 165, 170; *Kajikar* v. *Maru* (1909) 32 Mad. 139, 1 I.C. 199; *Mulukh Raj* v. *Dhanabanta* ('57) A.C. 322.

(*r*) *Gangapershad* v. *Maharani Bibi* (1884) 11 Cal. 379, 383-384, 12 I.A. 47, 49-50 [mortgage]; *Sikher Chund* v. *Dulputty* (1880) 5 Cal. 363 [sale]; *Venkatasami* v. *Viranna* (1922) 45 Mad. 429, 65 I.C. 964, ('22) A.M. 135. See also *Jugal* v. *Anunda* (1895) 22 Cal. 545 [suit for specific performance against minor—see § 441]; *Mansaram Das* v. *Ahmad* (1916) 21 C.W.N. 63, 37 I.C. 380, ('17) A.C. 235.

ber of the family to be guardian of such interest where such appointment is clearly for the benefit of the minor, with power to him to alienate the joint family property including the minor's interest therein, and, where the property is to be sold, impose conditions upon the managing member to secure the minor's share of the proceeds of the sale. This is the practice in Bombay (*s*) and Calcutta (*t*). In a recent Allahabad case, the High Court, while holding that it had the power to appoint a guardian, refused to do so on grounds of inexpediency and want of precedent (*u*). See § 519 above. Also see sec. 12, Hindu Minority and Guardianship Act, 1956.

*Illustrations*

(a) *A*, and his minor son *B*, are members of a joint family governed by the Mitakshara law. The only property which the family possesses is a house which is in a very bad state of repair. Besides, there are family debts which have to be paid but the family has no means either to effect the repairs or to pay the debts. *C* offers to buy the house at Rs. 40,000, provided *A* obtains the sanction of the High Court for the sale on behalf of his minor son *B*. *A* cannot apply for the sanction unless he gets himself appointed guardian of *B*'s property. *A* thereupon applies to the Court that he may be appointed guardian of *B*'s property, and that the sale be sanctioned by the Court. It is proved to the satisfaction of the Court that, if the sanction be not given, the property is not likely to realize a sum approaching Rs. 40,000. This is a fit case for the appointment of *A* as guardian and for sanctioning the sale: *Manilal Hurgovan, in re* (1901) 25 Bom. 353.

(b) The facts are the same as in ill. (a) with this difference that *A* does not propose to sell the property, but to raise a loan on a mortgage of the property. It is proved to the satisfaction of the Court that if the mortgage is sanctioned by the Court, better terms can be obtained from the mortgagee than without the sanction. The High Court may appoint *A* guardian of *B*'s property, and sanction the mortgage: *Jairam Laxman, in re* (1892) 16 Bom. 634.

## IV.—GUARDIAN DE FACTO AND GUARDIAN AD HOC

**538. Alienations by guardian de facto and guardian ad hoc.**—(1) A person who is not an *ad hoc* guardian and does not pose as a guardian for particular purpose, but manages the affairs of the infant in the same way as a *de jure* guardian does could be described as a *de facto* guardian although he is not a natural guardian or a guardian appointed by the Court.

(2) A *de facto* guardian has the same power of alienating the property of his ward as a natural guardian (*v*). A *bona fide* mortgage executed by the *de facto* guardian of a Hindu minor for the benefit of his estate and with due regard to his interests cannot be impeached on the sole ground that he is merely a *de facto* guardian (*w*), for example, if it is effected for the marriage

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(*s*) *Manilal Hurgovan, In re* (1901) 25 Bom. 353; *Jagannath Ramji, In re* (1895) 19 Bom. 96; *Jairam Laxman, In re* (1892) 16 Bom. 634; *Mahadev Krishna, In re* (1937) Bom. 432 commenting upon the observations of Kania, J. in *re Dattatreya Govind* (1932) 56 Bom. 519, 141 I.C. 697, (1932) A.B. 537.

(*t*) *Hari Narain Das, In re* (1923) 50 Cal. 141, 74 I.C. 244, ('23) A.C. 409; *In re Bijaykumar Singh Buder* (1932) 59 Cal. 570, 138 I.C. 739, ('32) A.C. 502.

(*u*) *Govind Prasad, In the Matter of* (1928) 50 All. 709, 112 I.C. 873, ('28) A.A. 709.

(*v*) *Hanooman Persaud* v. *Mussumat Babooee* (1856) 6 M.I.A. 393, 412-413; *Seetharamanna* v. *Appiah* (1926) 49 Mad. 768, 92 I.C. 827, ('26) A.M. 457 [sale by maternal uncle upheld]; *Mohamud* v. *Nafur* (1899) 26 Cal. 820 [sale by paternal grandmother upheld]; *Bai Amrit* v. *Bai Manik* (1875) 12 Bom. H.C. 79, 81; *Lalla* v. *Koonwur* (1866) 10 M.I.A. 454 [mortgage by stepmother held not binding on the ground that it was fraudulent]; *Nathuram* v. *Shoma* (1890) 14 Bom. 562 [mortgage by father's cousin upheld]; *Komlamudi* v. *Myneni* (1949) 11 F.C.R. 65; *Palani Goundan* v. *Vanjiakkal* ('56) A.M. 476. Also see *Annapurnamma* v. *Ramanajaneyaratnam* ('59) A.A.P. 40; *Kasturi* v. *S. V. Rao* ('70) A.A.P. 440.

(*w*) *Kundan Lal* v. *Beni Pershad* (1932) 13 Lah. 399, 137 I.C. 115, ('32) A.L. 293.

of the minor's sister (*x*). But if the alienation is for a marriage in violation of the Child Marriage Restraint Act the transaction can be challenged (*y*). The High Courts of Bombay (*z*) and Madras (*a*) have held that a sale by a step-mother, though she was in each case the *de facto* manager of the minor's estate, is a sale by an unauthorized person, and is therefore void. The question as to the validity of a mortgage by a step-mother arose before the Judicial Committee in *Bunseedhur* v. *Bindeseree* (*b*), where it was held that the transaction being fraudulent, the minor was not bound by it. But the power of a step-mother to alienate the minor's property as a *de facto* guardian was not questioned. The Bombay decision has since been overruled by the Full Bench decision of the same Court (*c*). The view taken by the Bombay Full Bench is fully supported by the decision of the Federal Court in *Kondamudi* v. *Myneni* (*d*). The right to avoid the transaction is a personal right of the minor. It is a right to sue and is not heritable (*e*).

(3) An alienation by a *de facto* guardian, which is neither for necessity nor for the benefit of the estate of the minor is void *ab initio* in the sense that it confers no title on the alienee (*f*).

(4) A sale by a guardian *ad hoc*, *e.g.*, by a separated uncle who has never intermeddled or acted as a guardian is void (*g*).

**538A. De facto guardian of lunatic.**—The *de facto* manager of the estate of a lunatic has no power to alienate his property for necessity (*h*).

## V.—REMEDIES

**539. Procedure for recovering custody of minors.**—A guardian, who has been deprived of the custody of his ward, has the following remedies open to him:—

(1) He may proceed by suit against the person alleged to be in wrongful possession of the ward.

In *Besant* v. *Narayaniah* (*i*), where a suit was brought by a Hindu father in the District Court of Chinglepat for the custody of his minor sons, their Lordships of the Privy Council said: "A suit *inter partes* is not the form of procedure prescribed by the Act [that is, the Guardians and Wards Act, 1890] for proceedings in a *District Court* touching the guardianship of infants." Following this decision it has been held by the Madras High Court that the proper procedure in proceedings in a Mufassal Court touching the custody of a minor

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(*x*) *Sheo Govind* v. *Ram Adhin* (1933) 8 Luck. 182, 140 I.C. 556, ('33) A.O. 31.

(*y*) *Rambhau* v. *Rajaram* ('56) A.B. 250. Also see *Tatya Mohyaji* v. *Rabha Dadaji* (1953) Bom. 570, (1953) 55 Bom. L.R. 40, ('53) A.B. 273.

(*z*) *Limbaji* v. *Rahi* (1925) 49 Bom. 576, 88 I.C. 643, ('25) A.B. 499 [transferee entitled to benefit of s. 51 of the Transfer of Property Act, 1882].

(*a*) *Narayanan* v. *Ravunni* (1924) 47 Mad. L.J. 680, 84 I.C. 973, ('25) A.M. 260, commented upon in *Seetharamanna* v. *Appiah* (1926) 49 Mad. 768, at pp. 773-774, 92 I.C. 827, ('26) A.M. 457.

(*b*) (1866) 10 M.I.A. 454.

(*c*) *Tulsidas* v. *Vaghela Raisingji* (1933) 57 Bom. 40, 141 I.C. 17, ('33) A.B. 15.

(*d*) 11 F.C.R. 65.

(*e*) *Palani Goundan* v. *Vanjiakkal* ('56) A.M. 476.

(*f*) *Tatya Mohyaji* v. *Rabha Dadaji* (1953) 55 Bom. L.R. 40. *Contra Seetharamanna* v. *Appiah* (1926) 49 Mad. 768, 92 I.C. 827, ('26) A.M. 457.

(*g*) *Harilal* v. *Gordhan* (1927) 51 Bom. 1040, 105 I.C. 722, ('27) A.B. 611.

(*h*) *Narayan* v. *Ramchandra* ('57) A.B. 146 (F.B.); *Kanhaiyalal* v. *Harsingh* (1944) Nag. 698.

(*i*) (1914) 41 I.A. 314, 322, 38 Mad. 807, 820, 24 I.C. 290, ('14) A.P.C. 41.

is by way of petition under sec. 25 of the Act, and not by way of suit (*j*). On the other hand, it was held by the High Court of Bombay (*k*), that the dictum of the Privy Council in *Besant's* case was not intended to be of such general application as to take away the right of suit in all cases, that the provisions of the Guardians and Wards Act, 1890, were not exhaustive, and that a suit for the custody of a minor lies even in a Mufassal Court. The Chief Court of the Punjab (*l*) and the Allahabad High Court (*m*), have held that a petition is the only form of procedure allowed in matters relating to the custody of minors.

(2) He may proceed by a writ of *habeas corpus* under the Code of Criminal Procedure, 1898, s. 491 and Art. 226 of the Constitution (*m*1).

For the case where a minor is confined under such circumstances that the confinement amounts to an offence, see sec. 100 of the Code of Criminal Procedure, 1898. For the case where a female minor has been detained for an unlawful purpose, see s. 552 of that Code.

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(*j*) *Sathi* v. *Ramandi* (1919) 42 Mad. 647, 53 I.C. 399, ('20) A.M. 937 [F.B.], see also *Ibrahim* v. *Ibrahim* (1916) 39 Mad. 608, 33 I.C. 894, ('17) A.M. 612.

(*k*) *Achratlal* v. *Chimanlal* (1916) 40 Bom. 600, 37 I.C. 215, ('16) A.B. 129, following *Sharifa* v. *Munechan* (1901) 25 Bom. 574.

(*l*) *Ghasita* v. *Wazira* (1896) Punj. Rec. No. 41 [F.B.].

(*m*) *Sham Lal* v. *Bindo* (1904) 26 All. 594; *Utma Kuar* v. *Bhagwanta Kuar* (1915) 37 All. 515, 29 I.C. 416, ('15) A.A. 199.

(*m*1) *Rama Iyer* v. *Nataraja Iyer* (1948) A. Mad. 294; *Gohar Begum* v. *Suggi* 64 Bom. L.R. 54.

# CHAPTER XXV

# MAINTENANCE

## LAW PRIOR TO HINDU ADOPTIONS AND MAINTENANCE ACT 78 OF 1956

*Note.*—Some material and important alterations and modifications in the rules of Hindu law relating to maintenance have been brought about by recent legislation embodied in the Hindu Adoptions and Maintenance Act, 1956. That enactment is not exhaustive of the law of maintenance but in respect of all matters dealt with in the Act it supersedes the rule of the law of maintenance previously applicable to Hindus by virtue of any text or rule of Hindu law or any custom or usage having the force of law. It also supersedes any other law contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in it. *The rules in the following paragraphs of this Chapter state the law prior to the coming into operation of that Act.* The alterations and modifications in the law brought about by that Act are pointed out in the Notes under the provisions of that Act.

CONTENTS

*I.—Nature and extent of right of maintenance*—§§ 540-544A.

*II.—Persons entitled to maintenance*—§§ 545-565.

*III.—Amount of maintenance*—§§ 566-568.

*IV.—Transfer of family property and its effect on right of maintenance*—§§ 569-572.

*V.—Transfer of family dwelling-house and its effect on the right of residence*—§§ 573-575.

*VI.—Right of maintenance not affected by will*—§ 576.

*VII.—Transfer and attachment of right of maintenance*—§§ 577-578.

*VIII.—Suit for maintenance*—§§ 579-581.

## I.—NATURE AND EXTENT OF RIGHT OF MAINTENANCE

**540. Priority of debts over maintenance.**—Debts contracted by a Hindu take precedence over the right to maintenance (*n*) [§ 570]. Section 26 of the Hindu Adoptions and Maintenance Act, 1956, now deals with the question of priority of debts. Reference may be made to the Notes under that section.

**541. Liability for maintenance of two kinds.**—The liability of a Hindu to maintain others arises in some cases from the mere relationship between the parties, independently of the possession of the property [§ 542]. In other cases, it depends altogether on the possession of property (*o*) [§§ 543-544].

**542. Personal liability: liability of father, husband and son.**—A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not.

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(*n*) *Adhiranee* v. *Shona Malee* (1876) 1 Cal. 365; *Lakshman* v. *Satyabhamabai* (1878) 2 Bom. 494, 505.

(*o*) *Savitribai* v. *Luximibai* (1878) 2 Bom. 573 at p. 597, *et seq.* [F.B.]. Also see *Kamalammal* v. *Venkatalakshmi* ('65) A.S.C. 1348.

The obligation to maintain these relations is personal in character, and arises from the very existence of the relation between the parties (*p*).

Sections 18 and 20 of the Hindu Adoptions and Maintenance Act, 1956, now deal with the question of maintenance of wife, children and aged parents. Reference may be made to the Notes under those sections.

**543. Liability dependent on possession of coparcenary property: liability of manager.**—(1) The manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children (*q*). On the death of any one of the male members he is bound to maintain his widow and his children (*r*) [§ 559]. The obligation to maintain these persons arises from the fact that the manager is in possession of the family property. The liability to maintain a disqualified heir is governed by the same principle (*r*1).

(2) The same principles apply to cases governed by the Dayabhaga law. But in applying these principles, it is to be remembered that there can be no coparcenary according to that law between a father and sons [§ 277].

According to both the schools, a father is under a *personal* obligation to maintain his minor sons. But where the father has ancestral property in his hands, then if the case is governed by the Mitakshara law, sons, even if adult, are entitled to maintenance out of the ancestral property [§ 545], but not if the case is governed by the Dayabhaga law, for under that law sons do not acquire by birth any interest in ancestral property [§ 273].

As to impartiable property, see § 589.

**544. Liability dependent on possession of inherited property: liability of heirs.**—An heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited subject to the obligation to provide for such maintenance (*s*).

Section 22 of the Hindu Adoptions and Maintenance Act, 1956, now deals with the question of liability of heirs for maintenance of the *dependants* of a deceased person. Reference may be made to the Notes under that section.

*Illustrations*

(a) *Sister.*—A Hindu is under no *personal* obligation to maintain his sister, but if he inherits his father's estate, he is bound to maintain *her out of that estate,* she being a person whom his father was legally bound to maintain as his daughter, provided, of course, that she is unmarried [§ 542].

(b) *Step-mother.*—A step-son is under no personal obligation to maintain his step-mother; but if he inherits his father's estate, he is bound to maintain her out of the estate, she being a person whom his father was legally bound to maintain as his wife: *Bai Daya* v. *Natha* (1885) 9 Bom. 279: *Narbadabai* v. *Mahadev* (1881) 5 Bom. 99; *Audemma* v. *Varadareddi,* (1948) Mad. 803.

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(*p*) (1878) 2 Bom. 573, 597-598 [F.B.], *supra.*

(*q*) Manu. chap. 9 sec. 108; Narada, chap. 13, secs. 26, 27, 28, 33; *Vaikuntam* v. *Kallapiran* (1900) 23 Mad. 512, 516; *Cherutty* alias *Vasu* v. *Nangamparambil Ravu* alias *Kuttaman* (1940) Mad. 830, ('40) A.M. 664.

(*r*) *Bhagwan Singh* v. *Mst. Kewal Kaur* (1927) 8 Lah. 360, 101 I.C. 201, ('27) A.L. 280.

(*r*1) *Kamalammal* v. *Venkatalakshmi* ('65) A.S.C. 1349.

(*s*) *Khetramani* v. *Kashinath* (1869) 2 Beng. L.R.A.C. 15, 34, 38 [F.B.]; *Kamini* v. *Chandra* (1890) 17 Cal. 373, 376-378; *Mst. Rupa* v. *Mst. Srivabati* ('55) A. Orissa 28.

(c) *Mother-in-law.*—*A* dies leaving a widow *B* and a mother *C*. *B* is under no personal obligation to maintain her mother-in-law *C;* but if she inherits property from *A*, she is bound to maintain *C*, she [*C*] being a person whom *A* was legally bound to maintain as his mother: *Bai Kanku* v. *Bai Jadav* (1884) 8 Bom. 15.

(d) *Daughter-in-law.*—*A* dies leaving a widow *W* and a father *F*. He leaves no property. Is *F* under any obligation to maintain his destitute daughter-in-law *W*? Yes, but the obligation is only a *moral* one, so that he may refuse to maintain her. Suppose now that *F* dies leaving a widow *B*. On *F*'s death, *B* inherits his estate as his heir. *B* now comes under a *legal* obligation to maintain *W* out of the estate, she being a person whom the late proprietor (*F*) was *morally* bound to maintain (*t*). See § 564 below.

**544A. Liability of the Government.**—The obligation to maintain extends even to the Government when the Government takes the estate by escheat or by forfeiture (*u*).

## II.—PERSONS ENTITLED TO MAINTENANCE

**545. Sons.**—(1) A father is under a personal obligation to maintain his *minor* sons; therefore, he is bound to maintain them even out of his separate or self-acquired property. But he is under no such obligation to his *adult* sons; therefore, he is not bound to maintain them out of property which belongs exclusively to him (*v*).

If the father and sons are members of a joint family governed by the Mitakshara law, and there is joint family property, the sons, even if adult, are entitled to maintenance out of the joint property. The reason is that under the Mitakshara law, sons take a vested interest in joint family property by birth (*w*). The liability to maintain an adult son is not limited to the income of what would have been his share on a partition of the joint family property (*x*).

But the sons do not, in cases governed by the Dayabhaga law, acquire any interest by birth in ancestral property [§§ 273, 274]. A father, therefore, under the Bengal school, is not bound to maintain his *adult* sons either out of his separate or out of ancestral property.

(2) A son who is entitled to sue for partition can sue for maintenance (*y*). Where he cannot sue for partition, without the consent of certain coparceners, as in Bombay (*z*), he is entitled to maintenance out of the joint family property (*a*).

(3) Section 20 of the Hindu Adoptions and Maintenance Act, 1956, now provides that a Hindu father or mother is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and that a legitimate

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(*t*) *Janki* v. *Nand Ram* (1889) 11 All. 194; *Rajanikanta Pal* v. *Sajanisundaree Dasee* (1934) 61 Cal. 221, 61 I.A. 29, 147 I.C. 438, ('34) A.PC. 29; *Rangammal* v. *Echammal* (1899) 22 Mad. 305; *Ganga Dei* v. *Jagannath*, 22 Luck. 518, but see *Saran Bai* v. *Abdul Rashid* (1948) A.S. 127.

(*u*) *Mst. Golab Koonwar* v. *Collector of Benares* (1847) 4 M.I.A. 246.

(*v*) *Ammakannu* v. *Appu* (1888) 11 Mad. 91; *Premchand* v. *Hulashchand* (1869) 4 Beng. L.R. App. 23; *Ramchandra* v. *Sakaram* (1878) 3 Bom. 346, 350, 351; *Bhoopathi Nath Chakrabarti* v. *Basanta Kumaree Debee* (1936) 63 Cal. 1098, ('36) A.C. 556.

(*w*) See *Savitribai* v. *Luximibai* (1878) 2 Bom. 573, 597 [F.B.]; *Sartaj Kuari* v. *Deoraj Kuari* (1888) 10 All. 272, 288, 15 I.A. 51.

(*x*) *Chanviravda* v. *District Magistrate of Dharwar* (1927) 51 Bom. 120, 100 I.C. 575, ('27) A.B. 91 [lunatic son—claim for maintenance of lunatic while in asylum—claim upheld though in excess of lunatic's share of income].

(*y*) *Cherutty* alias *Vasu* v. *Nangamparambil Ravu* alias *Kuttaman* (1940) Mad. 830, ('40) A.M. 664.

(*z*) *Apaji* v. *Ramchandra* (1891) 16 Bom. 29.

(*a*) *Bhupal* v. *Tavanappa* (1922) 46 Bom. 435, 64 I.C. 568, ('22) A.B. 292.

or illegitimate child can claim maintenance from his or her father or mother so long as the child is a minor. Reference may be made to the Notes under that section.

**546. Daughters.**—(1) A father is bound to maintain his unmarried daughters. On the death of the father, they are entitled to be maintained out of his estate (*b*).

A daughter on marriage ceases to be a member of her father's family, and becomes a member of her husband's family (*c*). Thenceforth she is entitled to be maintained by her husband, and, after his death, out of his estate [§ 559]. If the husband has left no estate, her father-in-law, if he has got separate property of his own, is morally, though not legally, bound to maintain her; but, after his death she acquires a legal right to be maintained out of his estate on the principle stated in § 544 above. If she is unable to obtain maintenance from her husband, or, after his death, from his family, her father, if he has got separate property of his own, is under a moral, though not a legal obligation to maintain her. But it is not settled whether, after the father's death, she acquires a legal right to be maintained by his heirs out of his estate. The High Court of Bombay has held that she acquires no such right (*d*). On the other hand, the opinion has been expressed by the High Court of Calcutta, that she does acquire such right, provided she is unable to obtain maintenance from her husband's family (*e*). The Madras High Court has held that a widowed daughter who is without means and whose husband's family is unable to support her is entitled to be maintained by her step-mother out of her father's estate (*f*).

See notes to § 544 above.

(2) See section 20 of the Hindu Adoptions and Maintenance Act, 1956, and § 545(3) above. Also see sections 19 and 22 of that Act. Reference may also be made to the Notes under those sections.

**547. Grandchildren.**—(1) A grandfather is under no personal obligation to maintain his grandsons or granddaughters (*g*).

It has been held by the Calcutta High Court, that a predeceased son's daughter comes under the description of "deena Samasrita" (poor dependents) in Manu's text, and consequently there is a moral obligation on the part of the grandfather to maintain her. This moral obligation becomes a legal obligation on the part of those who inherit the grandfather's property (*h*).

(2) See sections 22 and 21(iv) and 21(v) of the Hindu Adoptions and Maintenance Act, 1956.

**548. Parents.**—(1) A son is under a personal obligation to maintain his aged father. He is also under a similar obligation to maintain his aged mother, and he is bound to maintain her, whether or not he has inherited property from his father (*i*).

*Step-mother.*—See § 544, ill. (b).

(2) Section 20 of the Hindu Adoptions and Maintenance Act, 1956, now provides for the maintenance by a son or daughter of his or her aged or infirm parents. Reference may be made to the Notes under that section.

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(*b*) *Bai Mangal* v. *Bai Rukhmini* (1899) 23 Bom. 291; *Tulsha* v. *Gopal Rai* (1884) 6 All. 632.

(*c*) *Kartic Chunder* v. *Saroda Sundari* (1891) 18 Cal. 642, 646.

(*d*) *Bai Mangal* v. *Bai Rukhmini* (1899) 23 Bom. 291.

(*e*) *Mokhada* v. *Nundo Lall* (1901) 28 Cal. 278, 288.

(*f*) *Ambu Bai Ammal* v. *Soni Bai Ammal* (1941) Mad. 13, ('40) A.M. 804.

(*g*) *Manmohini* v. *Balak Chandra* (1871) 8 Beng. L.R. 22; *Kalu* v. *Kashibai* (1883) 7 Bom. 127.

(*h*) *Provash* v. *Prokash* (1946) 2 Cal. 164.

(*i*) *Subbarayana* v. *Subbakka* (1885) 8 Mad. 236; *Satyanarayanamurthy* v. *Ram Subbamma* ('64) A.A.P. 105.

**549. Female members of a joint Hindu family.**—As to maintenance of female members of a joint Hindu family see § 543 above.

**550. Disqualified heirs.**—(1) Where a son or other heir is excluded from inheritance by reason of disability [§ 98], he is entitled to maintenance for himself and his family out of the property which he would have inherited but for the disability [§ 110].

(2) Section 28 of the Hindu Succession Act, 1956, removes all disqualification from succession on the ground of any disease, defect or deformity.

**551. Illegitimate sons.**—(1) The illegitimate sons of a Hindu may be divided into four classes, namely:—

(1) Illegitimate sons of a Hindu belonging to one of the three higher classes by a *dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of their putative father.

As to the meaning of the word "dasi" see § 43, nos. 1-3 note no (v) above.

(2) Illegitimate sons of a Sudra by a *dasi*.

(3) Illegitimate sons of a Hindu by a Hindu woman who is not a *dasi*.

(4) Illegitimate sons of a Hindu by a non-Hindu woman.

(1) The illegitimate son of a Hindu belonging to one of the three higher classes by a *dasi* is entitled only to maintenance and not to any share of the inheritance (Mit. ch. I, s. 12, v. 3). The right of maintenance attaches in the first instance to the separate property of the father (*j*). Where the father has left no such property, it attaches to property of the joint family of which the father was a member (*k*). Such a son is entitled to maintenance for life (*l*). When the father was the holder of an impartible estate, the illegitimate son has no right, apart from custom, to maintenance out of the estate (*m*). Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. He does not claim maintenance merely as a compassionate allowance (*n*).

(2) The illegitimate son of a Sudra by a *dasi* is entitled to a share after his father's death in the separate property of his father (Mit. ch. I, s. 12, v. 2). Where the father has left no separate property, but was joint with his collaterals at his death, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property. His position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the Court may, as in their case, award not only future but also

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(*j*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51; *Chuoturya* v. *Purhulad* (1857) 7 M.I.A. 18.

(*k*) *Ananthaya* v. *Vishnu* (1893) 17 Mad. 160; *Hiralal Laxmandas* v. *Meghraj Bhickchand* (1938) Bom. 779.

(*l*) *Nilmoney Singh* v. *Baneshur* (1879) 4 Cal. 91.

(*m*) *Harisinhji* v. *Ajitsinhji* (1949) Bom. 342.

(*n*) *Mothey Anja Ratna* v. *Koney Narayana Rao* ('53) A.SC. 433, (1952) 2 M.L.J. 342.

past maintenance so far as it is not barred by the law of limitation and may direct the same to be secured by a charge on the joint family property. Such maintenance is payable to the illegitimate son for life (*o*).

(3) The illegitimate son of a Hindu by a Hindu woman who is not a *dasi* is entitled to maintenance even if he be the result of a casual (*p*) or adulterous (*q*) intercourse. During his father's lifetime, he is entitled to maintenance against him (*r*). After the father's death he is entitled to maintenance out of the separate property of the father. Where the father has left no such property, he is entitled to maintenance out of the estate of the joint family of which the father was a member (*s*). But the right of the illegitimate son to maintenance is personal to him; it does not descend on his death to his offspring. Thus, if *A* dies leaving an illegitimate son *B*, and *B* dies leaving a son *C*, *C* is not entitled to maintenance out of *A*'s property (*t*).

According to the Dayabhaga school, the right of such a son to maintenance ceases on his attaining majority (*u*); according to the Mitakshara school, it extends up to his death (*v*).

(4) The illegitimate son of a Hindu by a non-Hindu woman is not entitled to maintenance under the Hindu law, but he may claim maintenance from his putative father under sec. 488 of the Code of Criminal Procedure, 1898. The right under that section, however, cannot be enforced against estate of the father after the father's death; it can only be enforced during the lifetime of the father (*w*).

In a Madras case it was observed that the illegitimate son of a Sudra by a *dasi* who was not entitled to inherit, should be allowed only a compassionate rate of maintenance (*x*). In a later Madras case it was said that this view was not correct and that regard should be had in every case to the income of the estate left by the putative father and to the mode of life to which the son was accustomed in the lifetime of the father (*y*).

The illegitimate son of a Hindu who is the result of an adulterous inter-course is in no case entitled to maintenance higher than the amount of the income which he would have got out of his share had he been a dasiputra (*z*).

(5) Section 20 of the Hindu Adoptions and Maintenance Act, 1956, now provides that a Hindu father or mother is bound during his or her lifetime to maintain his or her illegitimate children and that an illegitimate child can claim maintenance from his or her father or mother so long as the child is a minor. Reference may be made to the Notes under that section.

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(*o*) *Vellaiyappa Chetty* v. *Natarajan* (1931) 55 Mad. 1, 58 I.A. 402, 134 I.C. 1084 ('31) A.PC. 294 affmg. *Vellaiyappa* v. *Natarajan* (1927) 50 Mad. 340, 100 I.C. 655, ('27) A.M. 386.

(*p*) *Muttuswamy Jagavera* v. *Vencataswara* (1868) 12 M.I.A. 203, 220.

(*q*) *Rahi* v. *Govind* (1876) 1 Bom. 97; *Viraramuthi* v. *Singaravelu* (1877) 1 Mad. 306; *Subramania* v. *Valu* (1911) 34 Mad. 68, 5 I.C. 919.

(*r*) *Ghana* v. *Gereli* (1905) 32 Cal. 479; *Kuppa* v. *Singaravelu* (1885) 8 Mad. 325.

(*s*) (1911) 34 Mad. 68, 5 I.C. 919, *supra*; (1857) 7 M.I.A. 18, *supra*; (1868) 12 M.I.A. 203, *supra*, (where there was a remand); *Raja Parihcat* v. *Zalim Singh* (1878) 3 Cal. 214, 4 I.A. 159; *Hargobind* v. *Dharam Singh* (1884) 6 All. 329.

(*t*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51.

(*u*) *Nilmoney Singh* v. *Baneshur* (1879) 4 Cal. 91.

(*v*) *Hargobind* v. *Dharam Singh* (1884) 6 All. 329; *Kuppa* v. *Singaravelu* (1885) 8 Mad. 325.

(*w*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 (Christian woman); *Sitaram* v. *Ganpat* (1923) 25 Bom. L.R. 429, 73 I.C. 412, ('23) A.B. 384 (Mahomedan woman).

(*x*) *Gopalasami* v. *Arunachelam* (1904) 27 Mad. 32.

(*y*) *Rathinasabapathi* v. *Gopala* (1929) 56 Mad. L.J. 673, 121 I.C. 126, ('29) A.M. 545.

(*z*) *Chamava* v. *Iraya* (1931) 33 Bom. L.R. 1082, 1088, 134 I.C. 1158, ('31) A.B. 492.

**552. Illegitimate daughters.**—(1) There is no provision in Hindu law for the maintenance of illegitimate daughters (*a*); but they are entitled to claim maintenance from their putative father under sec. 488 of the Code of Criminal Procedure, 1898.

This view is put on the ground that the expression "*dasiputra*" occurring in texts bearing on the subject applies only to an illegitimate son (*putra*), and not to an illegitimate *daughter*.

(2) See section 20 of the Hindu Adoptions and Maintenance Act, 1956, and § 551(5) above. Reference may also be made to the Notes under those sections.

**553. Concubine—Avaruddhastri.**—(1) A Hindu is not entitled to transfer joint family property to an Avaruddhastri for her maintenance (*b*) nor is he bound to maintain her. He can discard her at any moment, and she cannot compel him to keep her or to provide for her maintenance (*c*). But if she was in his exclusive keeping *until his death*, his estate, in the hands of those who take it, is liable after his death for her maintenance (*d*). It is not a condition precedent to her right to maintenance that she should have resided in the same house as the deceased together with his wife and his family (*e*). But her right to maintenance is conditional upon her continued chastity (*f*).

*Avaruddhastri.*—In a Bombay case the High Court held that to constitute a concubine, an *avaruddha stree*, she must be a concubine with whom the connection of the deceased paramour was open and recognized and who was kept by him in his house practically as a member of the family. But this view was rejected by the Judicial Committee on appeal, and it was held that residence in the same house with her paramour together with his wife and regular family was not now necessary, whatever may have been the case when a concubine was a slave of the household (*g*).

*Kept mistress whose husband is alive.*—It has been held by the Bombay High Court that a married woman who left her husband and lived with another as his permanently kept mistress may be regarded as Avaruddhastri if she remains faithful to him and she is entitled to maintenance from his estate so long as she preserves her sexual fidelity to him (*h*). A Full Bench of the High Court of Andhra Pradesh has expressed the same view (*h*1). The Supreme Court has approved of the above view and held that her claim for maintenance cannot be defeated on the ground that she was a Brahmin and her paramour was a Sudra (*h*2).

*Amount of maintenance.*—In determining the amount of maintenance to be awarded to an *avaruddhastri* the Court should have regard to her age, her past mode of life, and the extent of the estate of the deceased paramour (*i*).

(2) The law on the question is now changed and an *avaruddhastri* cannot claim maintenance out of the estate of the deceased paramour where

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(*a*) *Parvati* v. *Ganpatrao* (1894) 18 Bom. 177, 183; *Vellaiyappa* v. *Natarajan* (1927) 50 Mad. 340, 100 I.C. 655, ('27) A.M. 386; *Champabai* v. *Raghunath Rao* (1946) Nag. 217, ('46) A.N. 253; *Pandurang* v. *Sonabai* (1948) Nag. 653; *Padmavati* v. *Ramchandra* (1950) Cut. 532, ('51) A. Orissa 248.

(*b*) *Thakur Rab Prasad Singh* v. *Chhotay Munwan* (1937) 12 Luck. 469, 164 I.C. 1000, ('37) A.O. 29.

(*c*) *Ramanarasu* v. *Buchamma* (1900) 23 Mad. 282.

(*d*) *Ningareddi* v. *Lakshmawa* (1902) 26 Bom. 163; *Vrandavandas* v. *Yamunabai* (1875) 12 Bom. H.C.A.C. 229; *Rama Raja* v. *Papammal* (1925) 48 Mad. 805, 90 I.C. 983, ('25) A.M. 1230; *Shiva Kumari* v. *Uday Pratap* (1947) All. 642.

(*e*) *Bai Nagubai* v. *Bai Monghibai* (1926) 53 I.A. 153, 50 Bom. 604, 96 I.C. 20, ('26) A.PC. 73, reversing (1923) 47 Bom. 401, 69 I.C. 291, ('23) A.B. 130.

(*f*) *Yashvantrav* v. *Kashibai* (1888) 12 Bom. 26.

(*g*) *Bai Nagubai* v. *Monghibai, supra.* The decision in *Musammat Haidri* v. *Narindra* (1926) 1 Luck. 184, 98 I.C. 677, ('26) A.O. 294, is no longer good law.

(*h*) *Akku Prahlad* v. *Ganesh Prahlad* (1945) Bom. 217.

(*h*1) *Ramamoorty* v. *Sitharamamma* ('61) A.A.P. 131 (F.B.).

(*h*2) *Gopal Rao* v. *Sitharamamma* ('65) A.S.C. 1970.

(*i*) (1875) 12 Bom. H.C.A.C. 229, *supra.*

his death took place after the coming into operation of the Hindu Adoptions and Maintenance Act, 1956. She is not one of the persons within the definition of dependents given in section 21 of that Act. Reference may be made to sections 21 and 22 of that Act and Notes thereunder.

Pre-existing rights of maintenance holders are not affected by that Act. A right of maintenance which an *avaruddhastri* had acquired prior to the Act is not nullified by the Act (i1).

## *MAINTENANCE OF WIFE*

**553A. Statutory right of maintenance.**—The wife's right to separate maintenance and residence was regulated by the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946. That Act has now been repealed by section 29 of the Hindu Adoptions and Maintenance Act, 1956. Section 18 of that Act lays down that the wife, whether married before or after commencement of the Act, is entitled to be maintained by her husband during her lifetime unless she is unchaste or has ceased to be a Hindu by conversion to another religion. Reference may be made to the Notes under that section. In §§ 554, 555, 556 (1) and 557 (1) the law has been stated as it stood prior to the Act of 1946 under the decided cases.

**554. Wife's right of maintenance.**—(1) A wife is entitled to be maintained by her husband, whether he possesses property or not (*j*). When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style (*k*). The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired (*l*). The maintenance being a matter of personal obligation, she has no claim for maintenance against her husband's property in the hands of a transferee from him. Nor has she any claim against the Government, if his property has been attached under secs. 87 and 88 of the Criminal Procedure Code, 1898, as the property of an absconder (*m*).

Her remedy is to obtain a decree of a Civil Court creating a formal charge on the property (*n*).

(2) A wife is not entitled, during her husband's life-time, to be maintained either by her relations or by her husband's relations, even if she has been deserted by him unless they have in their possession property belonging to her husband (*o*).

**555. Separate residence and maintenance.**—(1) A wife's first duty to her husband is to submit herself obediently to his authority, and to *remain under his roof and protection* (*p*). She is not, therefore, entitled to separate residence or maintenance, unless she proves that, by reason of his misconduct or by his

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(i1) *Ramamoorty supra.*

(*j*) *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99, 103.

(*k*) *Prem Pratap Singh* v. *Jagat Pratap Kunwari* (1944) All. 118.

(*l*) *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 48.

(*m*) *Chatru* v. *The Crown* (1929) 10 Lah. 265, 111 I.C. 435, ('28) A.L. 681.

(*n*) *Secretary of State for India* v. *Ahalyabai Narayan* (1938) Bom. 454, 40 Bom. L.R. 422, 176 I.C. 453, ('38) A.B. 321.

(*o*) *Ramabai* v. *Trimbak* (1872) 9 Bom. H.C. 283.

(*p*) *Sitanath* v. *Haimabutty* (1875) 24 W.R. 377, 379.

refusal to maintain her in his own place of residence or for other justifying cause, she is compelled to live apart from him (*q*).

Neither unkindness not amounting to cruelty (*r*), nor the fact that the husband has taken a second wife (*s*), nor ordinary quarrels between husband and wife (*t*), justify the wife in leaving her husband's house. But she would be justified in leaving his house, and would be entitled to separate maintenance from him, if he kept a concubine in the house (*u*), or habitually treated her with such cruelty as to endanger her personal safety (*v*). She is not bound to prove repeated violence; nor is delay in bringing the suit a ground for refusing the relief (*w*).

Where a husband who was on cordial terms with his wife made a gift of his property to his wife, the ostensible purpose being her maintenance, it was held that the wife was not a creditor and that the gift in her favour could not prevail against the rights of the creditors (*x*).

(2) A wife living apart from her husband for no improper purpose may at any time return and claim to be maintained by him. Her right is not forfeited, but is only suspended so long as she commits a breach of duty by living apart from him (*y*); so, where she subsequently comes back and offers to live with him, his refusal to take her back entitles her to demand maintenance.

The suspension ceases when the husband dies. He cannot under the provisions of the Succession Act execute a Will to defeat such a right (*z*). The amount of maintenance to which she would be entitled depends on various circumstances, such as the past relations between the parties, their social standards and the husband's property (*a*). Where the wife lived with her father who was in affluent circumstances and did not claim maintenance from her husband for a long time and the husband had no property, arrears prior to the date of demand were refused (*b*).

Where a husband turned his wife out of doors because he suspected her chastity and the wife obtained an order against him for maintenance under sec. 488 of the Code of Criminal Procedure, 1898, and when she proceeded to execute the order, he filed a suit for restitution of conjugal rights, it was held that it was a proper case for refusing the husband a decree (*c*).

**555A. Statutory right of maintenance.**—(1) The Hindu Married Women's Right to Separate Maintenance and Residence Act (19 of 1946), which came into force on 23rd April 1946 gave a statutory recognition to many of the principles discussed above, and at the same time liberalised the law in certain respects in favour of the married woman.

Section 2 of the Act was as under:

Notwithstanding any custom or law to the contrary at Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely.—

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(*q*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 634; *Nityc* v. *Soondaree* (1868) 9 W.R. 475 [refusal to maintain]; *Sitabai* v. *Ramchandrarao* (1910) 12 Bom. L.R. 373, 6 I.C. 525 [abandonment of wife]; *Shinappaya* v. *Rajamma* (1922) 45 Mad. 812, 69 I.C. 25, ('22) A.M. 399 [husband's leprosy]; *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L.R. 77, 162 I.C. 188, ('36) A.C. 138; *Krishna Iyer* v. *Ramu Ammal* ('54) Tra. Co. 221; *Udayanath* v. *Shivapriya* ('57) A. Orissa 199; *Ajaib Kaur* v. *Uttam Singh* ('60) A. Punj. 117.

(*r*) (1873) 24 W.R. 377, *supra*.

(*s*) *Virasvami* v. *Appasvami* (1863) 1 Mad. H.C. 375.

(*t*) *Rajlukhy* v. *Bhootnath* (1900) 4 C.W.N. 488.

(*u*) *Gobind* v. *Dowlut* (1870) 14 W.R. 451; *Dular Kocri* v. *Dwarkanath* (1905) 32 Cal. 234, 239; *Mallawa* v. *Shiddappa* (1949) Bom. 762 (even though the concubine was kept in a separate house).

(*v*) *Matangini* v. *Jogendra* (1892) 19 Cal. 84.

(*w*) *Ude Singh* v. *Mst. Daulat Kaur* (1935) 16 Lah. 892, 158 I.C. 223, ('35) A.L. 386.

(*x*) *Brij Raj Kuar* v. *Ram Dayal* (1932) 7 Luck. 411, 135 I.C. 369, ('32) A.O. 40.

(*y*) *Surampalli* v. *Surampalli* (1908) 31 Mad. 338.

(*z*) *Periambal* v. *Sundarammal* (1945) Mad. 586.

(*a*) *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L.R. 77, 162 I.C. 188, ('36) A.B. 138.

(*b*) *Sobhanadramma* v. *Narasimhasvami* (1934) 57 Mad. 1003, 150 I.C. 797, ('34) A.M. 401.

(*c*) *Babu Ram* v. *Musammat Kokla* (1924) 46 All. 210, 79 I.C. 634, ('24) A.A. 391.

(1) if he is suffering from any loathsome disease not contracted from her;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him (c1);

(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish;

(4) if he marries again;

(5) if he ceases to be a Hindu by conversion to another religion;

(6) if he keeps a concubine in the house or habitually resides with a concubine (*d*);

(7) for any other justifiable cause (*e*).

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights.

It will be noticed that all the specific clauses were in the present tense. It was enough, therefore, for the purposes of the section that the grounds were in existence at the date when the claim for separate maintenance and residence was made by the wife, no matter whether they started before or after the passing of the Act.

With regard to ground (4), however, there was a difference of judicial opinion. The Nagpur High Court held that the provision was not declaratory of the existing law, under which the wife could not be allowed to reside separately simply because the husband married again. The view was taken that the provision was not retrospective and applied only if the second marriage of the husband had taken place after the Act came into operation (*f*). In a later ruling that view was confirmed by a Full Bench of that High Court (*g*). On the other hand the Madras High Court in an earlier decision (*h*) took the view that the expression "married again" had not been used with reference to any particular period of time and was merely a description of the position of the husband as a twice married man at the date when the wife's claim for separate residence was made. That decision has been overruled by a Full Bench (*i*) of the same High Court in which agreement was expressed with the Nagpur view. The Bombay High Court also agreed with the Nagpur view (*j*). The High Courts of Punjab (*j*1), Patna (*j*2), Andhra Pradesh (*j*3), Madhya Pradesh (*j*4), Rajasthan (*j*5) and Mysore (*j*6) have also taken the same view. But the High Courts of Allahabad (*k*), Orissa (*l*), Vindhya Pradesh (*m*) and Madhya Bharat (*n*) took the contrary view and agreed with the earlier Madras decision.

(2) Section 18 of the Hindu Adoptions and Maintenance Act, 1956, now lays down the grounds which entitle a Hindu wife to live separately from her husband without forfeiting her claim to maintenance. The grounds are substantially the same as under the repealed Act of 1946. Reference may be made to the Notes under that section.

**556. Unchastity of wife.**—(1) A wife, who leaves her home for purposes of adultery, and persists in following a vicious course of life, forfeits her right

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(*c*1) *Shyamsundar* v. *Shantamani* ('62) A. Orissa 50; *Kamala* v. *Rathnavelu* ('65) A.M. 88.

(*d*) *Venkataramana* v. *Nookalamma* ('56) A. Andh. Pra. 49.

(*e*) *Malla Reddy* v. *Subbama* ('56) A. Andh. Pra. 237 (impotency of husband); *Gopal* v. *Kallu* ('60) A. Raj. 60; 9 Raj. 725.

(*f*) *Sukhribai* v. *Pohkalsing* (1950) Nag. 196, ('50) A.N. 33.

(*g*) *Kasubai* v. *Bhagwan* ('55) A.N. 210.

(*h*) *Lakshmi Ammal* v. *Narayanaswamy* (1950) 1 M.L.J. 63, ('50) A.M. 321; *Nagendramma* v. *Ramakotayya* ('54) A.M. 713, (1955) 1 M.L.J. 25.

(*i*) *Palaniswami* v. *Devanai Ammal* ('56) A.M. 337 (F.B.).

(*j*) *Laxmibai* v. *Wamanrao* (1953) Bom. 1031, (1953) 55 Bom. L.R. 357, ('53) A.B. 342.

(*j*1) *Ram Parkash* v. *Savitri Devi* ('58) A. Punj. 87 (F.B.); (1957) Punj. 1859.

(*j*2) *Sarbo Gopain* v. *Anta Lal* ('58) A.P. 613.

(*j*3) *Satyanarayana* v. *Seetharamamma* ('63) A.A.P. 270 (F.B.).

(*j*4) *Padamlochan* v. *Sulochana* ('59) A.M.P. 245.

(*j*5) *Gopal* v. *Kallu* ('60) A. Raj. 60; 9 Raj. 725.

(*j*6) *Madanvali* v. *Padmanna* ('60) A. Mys. 299.

(*k*) *Pancho* v. *Ram Prasad* ('56) A.A. 41, *contra*, *Ratan Chand* v. *Kalawati* ('55) A.A. 364.

(*l*) *Kulamani Hota* v. *Parbati Debi* ('55) A. Orissa 77, (1955) Orissa 354; *Sashimukhi* v. *Brundaban Das* ('59) A. Orissa 132.

(*m*) *Baijnath* v. *Hiraman* ('51) A.V.P. 10.

(*n*) *Sajjanbai* v. *Prabhulal* ('52) A.M.B. 140.

to maintenance (*o*), even though it is secured by a decree (*p*). But it would seem that if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a "bare" (or what is also called "starving") maintenance, that is, food and raiment just sufficient to support her life (*q*). The burden of proving that the erring wife has returned to purity is on the wife herself (*r*).

See §§ 96 and 651.

(2) Section 18(3) of the Hindu Adoptions and Maintenance Act, 1956, lays down that a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste. Reference may be made to the Notes under that section.

**557. Change of religion by husband.**—(1) A wife is entitled to maintenance, though her husband may abandon Hinduism (*s*).

(2) Where a marriage has been dissolved under the Native Convert's Marriage Dissolution Act, 1866, at the suit of a husband who has abandoned Hinduism, the Court may by its decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court thinks just. An allowance so ordered ceases from the time of any subsequent marriage of the wife.

See the Native Convert's Marriage Dissolution Act, 1866, sec. 28. See aiso § 411 above.

(3) Section 18(2) (f) of the Hindu Adoptions and Maintenance Act, 1956, lays down that a wife is entitled to live separately from her husband without forfeiting her claim to maintenance if the husband has ceased to be a Hindu by conversion to another religion.

**558. Wife of disqualified heir.**—Where the husband is excluded from inheritance on account of personal disability [§ 98], his wife is entitled to maintenance out of the property which he would have inherited but for the disability. But her right to maintenance is conditional upon her continued chastity (*t*).

## *MAINTENANCE OF WIDOW*

**558A. Maintenance of widow: Hindu Women's Rights to Property Act, 1937.**—(1) The right of a widow, when she did not succeed to her husband's property, was one of considerable importance and consequence. The position and rights of a widow both under the Mitakshara and Dayabhaga law has been stated in the earlier Chapters. The rights of the three widows mentioned in the Hindu Women's Rights to Property Act, 1937, to claim maintenance were not abolished in express terms but the effect of recognition of their rights by that Act was that there was little occasion for them to claim main-

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(*o*) *Ilata* v. *Narayanan* (1863) 1 Mad. H.C. 372; *Debi Saran* v. *Daulata* (1917) 39 All. 234, 39 I.C. 10, ('17) A.A. 86; *Kandasami* v. *Murugammal* (1896) 19 Mad. 6.

(*p*) (1896) 19 Mad. 6, *supra.*

(*q*) See *Parami* v. *Mahadevi* (1910) 34 Bom. 278, 5 I.C. 960, and the case cited in the preceding foot-note.

(*r*) *Zuli* v. *Gopalia* (1946) Nagpur 619, (1946) A.N. 375.

(*s*) *Mansha* v. *Jiwan* (1884) 6 All. 617.

(*t*) *Yashvantrav* v. *Kashibai* (1888) 12 Bom. 26, 28. Mitakshara, chap. ii, sec. 10, paras. 14, 15 Dayabhaga, chap. v. para. 19.

tenance since they were not excluded from inheritance and were entitled to a share on partition. There was nothing, however, in the Act to compel the widow to sue for partition where the deceased husband was a member of a joint family and it was held that her right to claim maintenance had been preserved intact and she was entitled to sue for maintenance without having recourse to the remedy of partition (*u*).

(2) The position and rights of a widow have been materially changed by the Hindu Succession Act, 1956, and the question of a widow's right to claim maintenance must now be considered in the context of the provisions of that Act. Reference must also be made to the provisions of the Hindu Adoptions and Maintenance Act, 1956 (see Notes under sections 21 and 22 of that Act). In §§ 559-565 the law has been stated as it stood prior to the Hindu Women's Right to Property Act, 1937, under the decided cases.

**559. Widow's right of maintenance.**—(1) A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance—

(i) out of her husband's separate property (*v*); also

(ii) out of property in which he was a coparcener at the time of his death (*w*).

(2) A widow does not lose her right of maintenance out of the estate of her husband even though she may have lived apart from him in his lifetime without any justifying cause and was living separate from him at the time of his death (*x*).

(3) See § 558A above.

*Illustrations*

(a) A Hindu governed by the Mitakshara law dies leaving a widow and male issue. He leaves self-acquired property. The male issue will inherit the property subject to the obligation to maintain the widow out of that property.

(b) *A* and his father *F* are members of a joint family governed by the Mitakshara law. *A* dies leaving a widow and *F*. On *A*'s death, his undivided interest in the coparcenary property lapses so as to *enlarge* the interest of *F* in the property. *A*'s widow is entitled to be maintained by her father-in-law *F* out of the coparcenary property *quoad* the interest of *A* in the property. If *F* refuses to maintain her, she may sue him to have her maintenance charged on a portion of the joint property, such portion not exceeding one half of the property, that being her husband's share in the property: *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(c) *A* and his brother *B* are members of a joint family governed by the Dayabhaga law. *A* dies leaving him surviving a widow *W*, a son *S*, and a brother *B*. *S* will succeed to *A*'s separate property as well as his undivided interest in the coparcenary property (§ 78), subject to the obligation to maintain *W* out of the property. If *A* dies without leaving male issue, *W* will succeed to the whole of his property, joint as well as separate, in which case she will take a widow's estate in *A*'s separate property, and will be a coparcener with *B* as to the joint property with the right of demanding a partition of such property against *B* [§ 348].

*Nature and extent of widow's right of maintenance.*—The only person who is under a legal obligation to maintain out of *his own* property the widow of a deceased Hindu

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(*u*) See pp. 101, 102 *supra* and cases cited in f.n. (*i*), (*j*) and (*k*) on those pages.

(*v*) *Brinda* v. *Radhica* (1885) 11 Cal. 492, 494; *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99, 106; *Bhagabai* v. *Kanailal* (1871) 8 Beng. L.R. 225.

(*w*) *Devi Prasad* v. *Gunwanti* (1895) 22 Cal. 410; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45; *Becha* v. *Mothina* (1901) 23 All. 86; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199; *Shridar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A.N. 198.

(*x*) *Surampalli* v. *Surampalli* (1908) 31 Mad. 388.

is her own son [§ 548]. As regards others, her only right to maintenance is *out of her husband's estate*. That estate may be in the hands of his male issue as in ills. (a) and (c) or it may be in the hands of his coparceners as in ill. (b). But whether it is in the hands of the one or the other, he is liable to maintain her, not because he is under a personal obligation to maintain her, but because he has in his hands her husband's estate. The property is liable for her maintenance and a charge may be created on it even if the property is attached and held by Government on the ground that the present holder has absconded (*y*). At the same time it is to be remembered that her maintenance is not *ipso facto* a charge upon her husband's estate [§ 569]. The estate may be sold for her husband's debts, or, where it is the joint property of the family for debts binding on the family [§ 570]. Even if it is sold without any justifying necessity, she cannot follow it in the hands of a *bona fide* purchaser for value, unless she has acquired a previous charge on the estate for her maintenance (*z*). [§§ 569-570].

*Widow's rights against joint family property.*—*A* and *B* are two brothers joint in food, worship and estate. *A* dies leaving a widow *W*. *W* has private property of her own out of which she is able to maintain herself. Is *W* entitled to maintenance out of the income of the joint property which passed into the hands of *B* by survivorship on *A*'s death? No according to the Calcutta High Court (*a*). Yes, according to the Madras High Court, subject to this that her private means should be taken into account in determining the quantum of maintenance to be decreed to her (*b*). According to the Madras High Court, the right of the widow of a coparcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself; she is therefore entitled to some maintenance out of her husband's estate. A number of decisions on the subject were recently considered by a Full Bench of the Andhra Pradesh High Court (*b*1) which is in agreement with the Madras High Court.

Where a widow suing her husband's coparceners for maintenance has, at the time the suit is brought, sufficient joint family funds to provide her with maintenance for several years, the Court should refuse to decree maintenance to her, leaving her to file a fresh suit after that period (*c*). The same principle applies where she ought to have in her hands joint family funds which, however, are not available at the date of the suit they having been dissipated by her before suit (*d*). A widow inheriting some of her husband's share of the joint family property under Hindu Women's Rights to Property Act, 1937, is still entitled to maintenance with reference to the other properties, but, in fixing the maintenance the property inherited by her may be taken into consideration (*e*). In a recent case it was held by the High Court of Andhra Pradesh (*f*) that a widow inheriting her husband's separate property can sue for maintenance from the joint family estate in which her husband had interest.

A prior decree obtained by her against her husband during his life-time for maintenance is no bar to her claiming a right of maintenance and right of residence against the heirs (*g*).

Where a widow sues for maintenance after partition among the coparceners of the joint family she is entitled to a decree only against those members who are in possession of her husband's share, such as her son (natural or adopted) and his sons and grandsons (*h*). But when a charge has been created by a maintenance decree prior to partition in respect to the entire family estate such charge is not affected by subsequent partition and the charge holder can proceed against any property covered by the charge (*i*).

Where a widow gets maintenance from the surviving members of the joint family to which her husband belonged, she is not assessable to income-tax even though there

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(*y*) *Secretary of State for India* v. *Ahyalyabai Narayan* (1938) Bom. 454, 40 Bom. L.R. 422, 176 I.C. 453, ('38) A.B. 321.

(*z*) *Kuloda Prosad* v. *Jageshar* (1900) 27 Cal. 194; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398, ('20) A.M. 722.

(*a*) *Ramawati* v. *Manjhari* (1906) 4 Cal. L.J. 74.

(*b*) *Lingayya* v. *Kanakamma* (1915) 38 Mad. 153, 28 I.C. 200, ('16) A.M. 444.

(*b*1) *Varahalu* v. *Sithamma* ('61) A.A.P. 272 (F.B.).

(*c*) *Dattatraya* v. *Rukhmabai* (1909) 33 Bom. 50, 1 I.C. 466.

(*d*) *Srinivasa* v. *Ammani* (1931) 61 Mad. L.J. 381, 134 I.C. 981, ('31) A.M. 668.

(*e*) *Sarojinidevi* v. *Subrahmanyam* (1945) Mad. 61.

(*f*) *D. Rangamma* v. *D. Chinnabbayi* ('57) A. Andh. Pra. 598.

(*g*) *Mt. Sham Devi* v. *Mohan Lal* (1934) 15 Lah. 591, 152 I.C. 606, ('34) A.L. 167.

(*h*) *Narasimham* v. *Venkatasubbamma* (1932) 55 Mad. 752, 137 I.C. 949, ('32) A.M. 351; *Laxmibai Ganapatrao* v. *Radhabai Krishnaji* (1945) Bom. 604. But see *Rangaiah* v. *Chirinaiyah* ('70) A.A.P. 33.

(*i*) *Savitribai* v. *Radhakishan* (1947) Nag. 381.

is a single surviving coparcener (*j*); *Commissioner of Income-tax* v. *Luxminarayan* (1935) 59 Bom. 618, 37 Bom. L.R. 692, 159 I.C. 424, ('35) A.B. 412. Where in a joint family consisting of females only the amount payable as maintenance to a widow is increased by an agreement the amount continues to be exempt from payment of income-tax (*k*).

**560. Widow residing apart.**—(1) A wife cannot leave her husband's house when she chooses and require him to provide maintenance for her elsewhere. But the case of a widow is different. A widow is *not bound* to reside with her husband's family, and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, *e.g.*, in her parent's house (*l*). All that is required of her is that she must not leave her husband's house for improper or unchaste purposes, and she is entitled to separate maintenance unless she is guilty of unchastity or other improper practices after she leaves that residence (*m*). Where the property is so small as not to admit of an allotment to her of a separate maintenance, the Court may, in the exercise of its discretion, refuse separate maintenance to her (*n*).

(2) Where the husband by his will makes it a condition that his wife should reside in the family house with his relatives, she is not entitled to separate maintenance if she resides elsewhere without just cause (*o*). Strained relations between herself and her husband's adopted son on account of former litigation between them may be a just cause (*p*).

(3) See § 558A above.

**560A. Arrears of maintenance.**—(1) A widow who has left the residence of her deceased husband, not for unchaste purposes, is entitled not only to maintenance, but also to arrears of maintenance from the date of her leaving her husband's residence, though she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence (*q*).

It is erroneous in law to fix the *date of the widow's suit* as the starting point of maintenance. The proper date is the *date on which she left her husband's residence. If after* the husband's death the widow has remained in his house and has accepted maintenance in fact and in kind, she is not entitled to arrears from the *date of her husband's death* except perhaps in an extreme case where she is kept under circumstances of extreme penury and oppression. Such a case, however, must be treated as most exceptional and would require unimpeachable proof. The Judicial Committee is extremely reluctant to interfere with the amount of a decree for maintenance unless there has been some miscarriage in the way the amount has been arrived at (*r*). Courts have got large discretion in awarding arrears (*s*) and may take into consideration the fact that a sudden

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(*j*) *Vedathanni* v. *The Commissioner of Income-tax* (1933) 56 Mad. 1, 40 I.C. 17, ('32) A.M. 733.

(*k*) *Commissioner of Income Tax, U.P. & C.P.* v. *Sarwan Kumar* (1945) All. 509.

(*l*) *Dattatraya Maruti* v. *Laxman Jettappayya* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260; *Hari* v. *Narmadabai* (1949) Nag. 964.

(*m*) *Raja Pirthee Singh* v. *Rani Rajkooer* (1873) 12 Beng. L.R. 238, 247, I.A. Sup. Vol. 203; *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 421, 6 I.A. 114, 119; *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128; *Kasturbai* v. *Shivajiram* (1879) 3 Bom. 372; *Gokibai* v. *Lakhmidas* (1890) 14 Bom. 490; *Siddessury* v. *Janardan* (1902) 29 Cal. 557.

(*n*) *Godavaribai* v. *Sagunabai* (1898) 22 Bom. 52; (1879) 3 Bom. 372, *supra; Ramchandra* v. *Sagunabai* (1880) 4 Bom. 261.

(*o*) *Mulji* v. *Bai Ujam* (1889) 13 Bom. 218; *Girianna* v. *Honama* (1891) 15 Bom. 236; *Tin Couri* v. *Krishna* (1893) 20 Cal. 15; *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128.

(*p*) *Jamuna Kunwar* v. *Arjun Singh* (1940) All. 739, 143 I.C. 27 ('41) A.A. 43.

(*q*) (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128.

(*r*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128.

(*s*) *Gurushiddappa* v. *Parwateewa* (1937) Bom. 113, 38 Bom. L.R. 1293, 167 I.C. 973, ('37) A.B. 135; *Manilal* v. *Sushila* ('56) A.B. 402; *Chundru Venkanna* v. *Chundru Satyanarayanamma* ('57) A. Andh. Pra. 652.

demand for a large sum by way of arrears would be inequitable and embarrassing (*t*). In this case the High Court awarded arrears for 25 months against 12 years' claim. The Court may for sufficient reasons refuse to award any arrears, or it may award arrears at a rate lower than that fixed for her future maintenance (*u*). Arrears at an enhanced rate should be allowed only from the date of the suit for enhancement (*v*).

Where a widow was entitled under an agreement to maintenance at a certain rate to be paid on a particular date in each year and she dies some time before the time fixed for payment, her heir is entitled to recover the proportionate amount of maintenance due after the last payment till her death, for the right accrues from day to day (*w*).

(3) See § 558A above.

**561. Unchastity of widow.**—(1) The right of a widow to maintenance is conditional upon her leading a life of chastity. If she becomes unchaste, the burden of proving which is on the opposite party (*x*), the right is forfeited (*y*), even if it has been secured by a decree (*z*) or by agreement (*a*). But if she returns to a moral life, she is entitled to "bare" or what is also called "starving" maintenance, that is, to food and raiment just sufficient to support her life (*b*) [§§ 96 and 556].

(2) A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings (*c*).

*Provision for maintenance under an agreement.*—It often happens that a dispute arises between the widow and her husband's relations as to the *amount* of maintenance and the amount is fixed amicably by an agreement between the parties. In such a case, if the husband's relations fail to pay the amount fixed by the agreement, and she sues them for maintenance under the agreement, she is not entitled to maintenance of any sort if subsequent unchastity is proved (*d*). But if the unchastity does not continue up to the date of the suit, and she has reformed her ways before the suit and reverted to a chaste life, she is entitled to bare maintenance (*e*). These cases must be distinguished from the case where the widow claims her husband's property as being his self-acquired property, and the dispute is settled by an agreement between the parties whereby her husband's relations agree to pay her a fixed sum of money monthly or annually in consideration of her releasing her claim to the property. In such a case, if the relations fail to pay the agreed amount, and the widow sues them for arrears due to her under the agreement, she is entitled to a decree for the full amount notwithstanding her subsequent unchastity (*f*).

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(*t*) *Dattatraya Maruthi* v. *Laxman Jettappayya* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260; *Govardhan* v. *Gangabai* ('64) A.M.P. 168.

(*u*) *Raghubans* v. *Bhagwant* (1899) 21 All. 183; *Karbasappa* v. *Kallava* (1919) 43 Bom. 66, 47 I.C. 623, ('18) A.B. 122; *Shridhar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A.N. 198; *Gurushiddappa* v. *Parwatewwa* (1937) Bom. 113, 38 Bom. L.R. 1293, 167 I.C. 973, ('37) A.B. 135. See *Krishnamurthy* v. *Suryakantamma* ('55) A. Andh. Pra. 5; *Rajamma* v. *Varadarajulu* ('57) A.M. 198.

(*v*) *Veerayya* v. *Chellamma* (1939) Mad. 234.

(*w*) *Rangappava* v. *Shiva* (1934) 57 Mad. 250, 145 I.C. 961, ('33) A.M. 699.

(*x*) *Lakshmi Chand* v. *Anandi* (1935) 62 I.A. 250, 57 All. 672, 37 Bom. L.R. 849, 157 I.C. 819, ('35) A.P.C. 180.

(*y*) *Raja Pirthee Singh* v. *Rani Rajkooer* (1873) 12 Beng. L.R. 238, 247, I.A. Supp. Vo. 203; *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 783, 7 I.A. 115; *Valu* v. *Ganga* (1883) 7 Bom. 84; *Roma Nath* v. *Rajonimoni* (1890) 17 Cal. 674; *Vishnu* v. *Manjamma* (1885) 9 Bom. 108.

(*z*) (1885) 9 Bom. 108, *supra*; *Daulta Kuari* v. *Meghu* (1893) 15 All. 382; *Ranmalsangji* v. *Kundankuwar* (1902) 26 Bom. 707.

(*a*) *Nagamma* v. *Virabhadra* (1894) 17, Mad. 392.

(*b*) *Honamma* v. *Timannabhat* (1877) 1 Bom. 559; *Sathyabhama* v. *Kesavacharya* (1916) 39 Mad. 658, 29 I.C. 397, ('16) A.M. 464; *Bhikubai* v. *Hariba* (1925) 49 Bom. 459, 94 I.C. 665, ('25) A.B. 153; *Ram Kumar Dube* v. *Bhagwanta* (1934) 56 All. 392, 148 I.C. 625, ('34) A.A. 78 where Rs. 15 per month were allowed, the estate paying a land revenue of Rs. 3,500.

(*c*) *Haji Saboo Sidick* v. *Ayeshabai* (1903) 27 Bom. 485, 30 I.A. 127.

(*d*) *Nagamma* v. *Virabhadra* (1894) 17 Mad. 392; *Kisanji* v. *Lakshmi* (1931) 33 Bom. L.R. 510, 135 I.C. 477, ('31) A.B. 286. See also *Shivlal* v. *Bai Sankli* (1931) 33 Bom. L.R. 490, 132 I.C. 444, ('31) A.B. 297.

(*e*) (1916) 39 Mad. 658, 29 I.C. 397, ('16) A.M. 464, *supra*; (1925) 49 Bom. 459, 94 I.C. 665, ('25) A.B. 153, *supra*.

(*f*) *Bhup Singh* v. *Lachman* (1904) 26 All. 321, 325.

*Provision for maintenance under a will.*—Where maintenance is given by a will, it is not forfeited by unchastity unless it is expressly provided that it should be so forfeited (*g*).

*Provision for maintenance under a decree.*—A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce her right (*h*). If the decree is suspended in its operation, and she returns to a life of chastity, the Court may award her bare maintenance (*i*).

**562. Right of widow to reside in family house.**—(1) A Hindu widow is, in the absence of any special circumstances, entitled to reside in the family dwelling house in which she lived with her husband [see § 573 below].

A Hindu who died in 1888 provided by his will that his elder wife should "have the right of residence for the term of her natural life in the three-storied portion of" a specified house. Her son resided with her in that portion of the house continuously from his father's death. Upon a partition in 1898 that portion of the house was allotted to the son subject to his mother's right of residence. In 1899 the right, title and interest of the son was sold in execution, but the purchaser did not attempt to take possession for over twelve years. The son claimed that the right of the purchaser was barred by adverse possession. It was held by the Judicial Committee that upon the true construction of the will the widow had an exclusive right of residence, not merely a Hindu widow's right of residence and that the son's possession was merely by her licence, and not adverse to the purchaser (*j*).

(2) Section 23 of the Hindu Succession Act, 1956, lays down special provisions respecting dwelling-house wholly occupied by members of the family of a deceased Hindu.

**563. Widow remarrying.**—(1) A widow by remarriage forfeits her right of maintenance out of the estate of her first husband [the Hindu Widow's Remarriage Act, 1856, sec. 21].

The High Court of Allahabad has held that a widow who is allowed to remarry according to the *custom* of her caste existing from before the passing of the Hindu Widow's Remarriage Act, and hence is not bound to take advantage of the provisions of the Act, does not, by reason of remarriage, forfeit her rights by inheritance to the estate of her first husband or to be maintained out of the same (*k*), and this view has been followed by the High Court of Madhya Bharat (*l*) and the Chief Court of Oudh (*m*). The other High Courts have held that she does (*n*). According to the Allahabad High Court a custom of remarriage does not necessarily carry with it, as a legal incident thereof, a further custom of forfeiture upon marriage. Anybody who claims there has been forfeiture by reason of remarriage, must prove affirmatively that such forfeiture is an incident of the custom under which the remarriage took place (*o*).

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(*g*) *Parami* v. *Mahadevi* (1910) 34 Bom. 278, 5 I.C. 960.

(*h*) *Vishnu* v. *Manjamma* (1885) 9 Bom. 108; *Daulta Kuari* v. *Meghu* (1893) 15 All. 382, *supra*.

(*i*) *Honamma* v. *Timannabhat* (1877) 1 Bom. 559, as explained in *Bhikubai* v. *Hariba* (1925) 49 Bom. 459, *supra*.

(*j*) *Annada Prashad* v. *Ambica Prashad* (1926) 53 I.A. 201, 53 Cal. 948, 97 I.C. 761, ('26) A.P.C. 96.

(*k*) *Gajadhar* v. *Kaunsilla* (1909) 31 All. 161; *Mula* v. *Partab* (1910) 32 All. 489, 6 I.C. 116; *Mangat* v. *Bharto* (1927) 49 All. 203, 100 I.C. 734, ('27) A.A. 523; *Bhola Umar* v. *Mst. Kausilla*, 55 All. 24; *Narain* v. *Mohan Singh* ('37) A.A. 343; *Md. Abdul Samad* v. *Girdhari Lal* ('42) A.A. 175; *Jileba* v. *Parmesra* ('50) A.A. 700; *Mohan Lal* v. *Mst. Bhudevi* ('54) A.A. 588.

(*l*) *Ram Kunwar* v. *Ochha Dhanpal* ('51) A.M.B. 96.

(*m*) *Ram Lal* v. *Musammat Jwala* (1928) 3 Luck. 610, 109 I.C. 791, ('28) A.O. 338; *Gajadhar* v. *Musammat Sukhdei* (1930) 5 Luck. 689, 121 I.C. 899, ('31) A.O. 107.

(*n*) *Vithu* v. *Govinda* (1898) 22 Bom. 321 [F.B.]; *Rama Appa Patil* v. *Sakhu Dattu Gharal* (1954) 56 Bom. L.R. 227, ('54) A.B. 315; *Rasul* v. *Ram Surun* (1895) 22 Cal. 589; *Murugayi* v. *Viramakali* (1877) 1 Mad. 226; *Suraj* v. *Attar* (1922) 1 Pat. 706, 67 I.C. 550, ('22) A.P. 378; *Santala* v. *Badaswari* (1923) 50 Cal. 227, 75 I.C. 11, ('24) A.C. 98; *Manabai* v. *Chandanbai* ('54) A.N. 284; *Hira Dei* v. *Bodhi Sahu* ('54) A. Orissa 172.

(*o*) *Bhola Umar* v. *Kausilla* (1933) 35 All. 24, 140 I.C. 631, ('32) A.A. 617; *Jileba* v. *Parmesra* ('50) A.A. 700.

The whole point is whether the provisions of the Hindu Widow's Remarriage Act, 1856, apply to the case of a remarriage where such remarriage is allowed by the *custom* of the caste. If they do, a widow by remarriage forfeits all interest in her husband's property whether it be (1) by inheritance to her husband, or (2) by way of maintenance out of his property. If they do not, she does not forfeit either of those rights. The Allahabad High Court holds the latter view. The other High Courts hold the former view, and they have accordingly decided that a widow on remarriage forfeits her interest in the estate *inherited* by her from her first husband, even though the remarriage is allowed by the custom of the caste. No case has arisen in those Courts as to the right of such a widow to maintenance out of the property of her first husband; but it is clear that if such a case did arise, the right would be negatived.

See notes to § 43, under the head "Widow."

(2) Remarriage of a widow is not now under the Hindu Succession Act, 1956, a ground for divesting the estate inherited by her from her husband (see Notes under section 8 of that Act). The question of maintenance stands on a different footing since by operation of sections 21(iii) and 22 of the Hindu Adoptions and Maintenance Act, 1956, a widow on remarriage ceases to be a dependent. Reference may be made to the Notes under those sections.

**564. Widowed daughter-in-law.**—(1) What is stated in § 558A applies *mutatis mutandis* to a widowed daughter-in-law. Section 19 of the Hindu Adoptions and Maintenance Act, 1956, now deals with the question of maintenance of widowed daughter-in-law. Section 21(vii) of that Act includes a widowed daughter-in-law in the category of *dependents* and s. 22 lays down rules relating to maintenance of the *dependents* of a deceased person. Reference may be made to the Notes under those sections. The right to claim maintenance under those provisions ceases upon her remarriage. In sub-paragraphs (2) and (3) below, the law has been stated as it stood prior to the Hindu Women's Rights to Property Act, 1937, under the decided cases.

(2) Where there is no property left by the husband, or where the property in which he was a coparcener at the time of his death is not sufficient for the maintenance of the widow, the question arises whether she has a *legal* claim for maintenance either against her own relations or against her husband's relations. It has been held that she has no such claim either against her father or against his estate in the hands of his heirs [§ 546]. Nor has she any claim to maintenance against her husband's relations (*p*).

Even her father-in-law is not under a legal obligation to maintain her (*q*). But if he has got separate property of his own, he is under a *moral* obligation to maintain her out of such property. On the death, however, of the father-in-law, his son, widow, or other heir inheriting his property, comes under a legal obligation to carry out this moral obligation, and to maintain her out of such property. In other words, on the death of the father-in-law, the moral obligation on him to maintain his daughter-in-law ripens into a legal obligation on his *heirs* inheriting his estate in accordance with the principle stated in § 544 above (*r*). This is subject, according to the Bombay

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(*p*) *Ganga Bai* v. *Sita Ram* (1876) 1 All. 170; *Savitribai* v. *Luxmibai* (1878) 2 Bom. 573 [husband's paternal uncle]; *Apaji* v. *Gangabai* (1878) 2 Bom. 632 [husband's brother]; *Bai Daya* v. *Nathu* (1885) 9 Bom. 279 [step-son].

(*q*) *Kalu* v. *Kashibai* (1883) 7 Bom. 127; *Meenakshi* v. *Rama Aiyar* (1914) 37 Mad. 396, 18 I.C. 34, ('14) A.M. 587.

(*r*) *Janki* v. *Nand Ram* (1889) 11 All. 194 [F.B.]; *Siddessury* v. *Janardan* (1902) 29 Cal. 557; *Kamini* v. *Chandra* (1890) 17 Cal. 373; *Yamunabai* v. *Manubai* (1899) 23 Bom. 608; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199, 207; *Ammakannu* v. *Appu* (1888) 11 Mad. 91; *Jai Nand* v. *Musammat*

High Court, to the condition that her husband was living at the time of his death in union with his father (*s*). The Madras High Court has held on the other hand that this obligation exists even when the deceased husband of the widow was divided from his father and other coparceners (*t*).

In a case in which the father-in-law had disposed of his property by will, it was held by the High Court of Bombay, that the daughter-in-law was not entitled to maintenance out of the property in the hands of the devisee (*u*). This decision has been followed by the Madras High Court (*v*) but the Calcutta High Court has held the other way (*w*).

(3) The daughter-in-law does not lose her right of maintenance out of the estate of her father-in-law by declining to reside in her father-in-law's house (*x*).

Under the Bengal law in case of partition between a son and a grandson by a predeceased son of the deceased proprietor, the charge of maintaining the widow of the predeceased son must be placed on the share allotted to her son and not on the entire estate left by the father-in-law (*y*).

**565. Loss of caste.**—Excommunication from caste does not deprive a Hindu wife of her right of maintenance (*z*).

## III.—AMOUNT OF MAINTENANCE

**566. Amount of maintenance payable to a widow.**—(1) Section 23 of the Hindu Adoptions and Maintenance Act, 1956, now lays down rules relating to the quantum of maintenance to be allowed *inter alia* to a widow and the considerations affecting the determination of the same. Reference may be made to the Notes under that section. In sub-paragraphs (2) to (5) below the law has been stated as it stood prior to that Act under the decided cases.

(2) The maintenance to be awarded to a widow should be such an amount as will enable her to live consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house (*a*), unless there are circumstances which affect, one way or the other, her mode of living there. In other words, in determining the amount of maintenance the Court should have regard to the following circumstances (*b*):—

(i) the value of the estate, taking the debts for which it is liable also into consideration (*c*);

(ii) the position and status of the deceased husband and of the widow;

(iii) the reasonable wants of the widow including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incident to her station in life (*d*);

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*Paran* (1929) 4 Luck. 491, 118 I.C. 419, ('29) A.O. 251 [F.B.]; *Rangammal* v. *Echammal* (1899) 22 Mad. 305.

(*s*) *Yamunabai* v. *Manubai* (1899) 23 Bom. 608.

(*t*) *Appavu* v. *Nallammal* (1949) Mad. 16.

(*u*) *Bai Parvati* v. *Tarwadi* (1901) 25 Bom. 263.

(*v*) *Sankaramuthy* v. *Subbamma* (1939) Mad. 242.

(*w*) *Fool Coomari Dasi* v. *Debandra Nath Sil* (1942) 1 Cal. 202, 202 I.C. 30, ('42) A.C. 474.

(*x*) *Siddessury* v. *Janardan* (1902) 29 Cal. 557.

(*y*) *Abani Mohan* v. *Biswanath* (1950) 54 C.W.N. 654, ('50) A.C. 142.

(*z*) *Queen* v. *Marimuttu* (1882) 4 Mad. 243. See Act 21 of 1850.

(*a*) *Rajanikanta Pal* v. *Sajanisundaree Dasee* (1934) 61 Cal. 221, 61 I.A. 29, 147 I.C. 438, ('34) AP.C. 29.

(*b*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128; *Nagendramma* v. *Ramakotayya* (1955) 1 M.L.J. 25, ('54) A.M. 713; *Kirpal Singh* v. *Chandrawati Devi* ('51) A.A. 507.

(*c*) *Shridhar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A.N. 198.

(*d*) *Nittokissoree* v. *Jogendro Nauth* (1878) 5 I.A. 55; *Baisni* v. *Rup Singh* (1890) 12 All. 558; *Devi Persad* v. *Gunwanti* (1895) 22 Cal. 410;

(iv) the past relations between her and her husband (*e*).

(3) In calculating the amount of maintenance, the widow's *stridhana* must be taken into account unless it is of an unproductive character, such as clothes and jewels (*f*). But if the ornaments are of great value and are likely to be converted into money, that fact may be considered (*g*). A Full Bench of the High Court of Andhra Pradesh has expressed the view that the widow's separate property which is productive cannot be taken into account (*g*1). A voluntary payment by a brother to which she has no claim and which may be stopped at any moment ought not to be taken into account (*h*), nor her earnings by her own personal exertions (*i*). There is a conflict of opinion whether a widow is entitled to maintenance out of the property of the joint family to which her husband belonged, when the income from her *stridhana* is sufficient for her maintenance [see notes to § 559].

(4) The widow of a deceased coparcener is not entitled to maintenance in excess of the annual income of the share to which her husband would have been entitled on partition, if living (*j*). Where the estate is heavily indebted even one-fifth or one-sixth of the husband's income may be an adequate maintenance (*k*). No hard and fast rule can be laid down that she is entitled to a particular fraction of the income. In fixing the rate of maintenance the Court takes into consideration the income of the joint family at the time of the institution of the suit and not as on the death of her husband (*l*).

(5) A widow, who has once received a sufficient allotment for her maintenance, but has dissipated it, is not entitled to further maintenance (*m*).

*Wants and exigencies.*—"By the common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow" (*n*).

*Value of the estate.*—"The amount of the property, doubtless, is *an element* in determining the sufficiency of maintenance, but it cannot be regarded as the criterion" (*o*).

*Conduct of widow.*—The conduct of the claimant to maintenance may also be taken into consideration (*p*).

*Funeral expenses of the widow.*—The funeral expenses of a widow are payable out of the estate of her husband. Her *stridhana* cannot be charged with such expenses (*q*).

*Maintenance of wife forsaken by her husband.*—Where a husband forsakes his wife without any justifying cause, she is entitled to one-third of the husband's property for

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*Dalel Kunwar* v. *Ambika* (1903) 25 All. 266; *Sundarji* v. *Dahibai* (1905) 29 Bom. 316; *Lala Maheshwari Prasad* v. *Mst. Sahdei Kunwar* (1938) 13 Luck. 13, 165 I.C. 227, ('37) A.O. 16.

(*c*) *Purushottamdas Harijivandas* v. *Bai Ruxmani* (1938) Bom. 1, 39 Bom. L.R. 458, 170 I.C. 897, ('37) A.B. 358.

(*f*) *Shib Dayee* v. *Doorga Pershad* (1872) 4 N.W.P. 63; *Savitribai* v. *Luximibai* (1878) 2 Bom. 573, 584; *Gokibai* v. *Lakhmidas* (1890) 14 Bom. 490.

(*g*) *Gurushiddappa* v. *Parwatewwa* (1937) Bom. 113, 38 Bom. L.R. 1293, 167 I.C. 973, ('37) A.B. 135.

(*g*1) *Varahalu* v. *Sithamma* ('61) A.A.P. 272.

(*h*) *Bahuri Saraswati Kuer* v. *Bahuria Sheoratan Kuer* (1933) 12 Pat. 869, 149 I.C. 738, ('34) A.P. 99.

(*i*) *Jai Ram* v. *Mst. Shiv Devi* (1938) Lah. 352, ('38) A.L. 344; *Bai Jaya* v. *Ganpatram Kalidas* (1941) Bom. 483, 196 I.C. 607, ('41) A.B. 305, 43 Bom. L.R. 618.

(*j*) *Madhavrav* v. *Gangabai* (1878) 2 Bom. 639; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199, 209; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 48.

(*k*) *Srimati Sabitri Thakurain* v. *Mrs. F. A. Savi* (1933) 12 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

(*l*) *Veerraju* v. *Narayanamma* (1953) Mad. 22, ('53) A.M. 159 (F.B.); *Krishnamurthy* v. *Suryakantamma* ('55) A. Andh. Pra. 5, (1954) 2 M.L.J. (Andh.) 170.

(*m*) *Savitribai* v. *Luximibai* (1878) 2 Bom. 573, 583.

(*n*) *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 6 I.A. 114, 118; *Rangubai* v. *Subaji* (1912) 36 Bom. 383, 14 I.C. 821.

(*o*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 413, I.A. Sup. Vol. 47, 82.

(*p*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 413, I.A. Sup. Vol. 47, 82; *Surampalli* v. *Surampalli* (1908) 31 Mad. 338, 341.

(*q*) *Ratanchand* v. *Jacherchand* (1898) 22 Bom. 818.

her maintenance. It has been so held by the High Court of Bombay on the strength of a text of Yajnavalkya (*r*).

**567. Amount of maintenance for other females.**—The principles upon which maintenance is allowed to a widow are to be applied *mutatis mutandis* in determining the amount of maintenance to be awarded to other females; that is to say, the Court must have regard to the value of the property, and it must take into consideration the independent means of support, if any, of the person claiming the maintenance (*s*). See § 566 (1) above.

**568. Amount may be increased or decreased.**—The amount of maintenance, whether it is fixed by a decree or by agreement, is liable to be increased or diminished, whenever there is such a change of circumstances as would justify a change in the rate (*t*). Thus the rate of maintenance may be enhanced, if the income of the estate has materially increased (*u*) or there has been a material increase in the cost of living (*v*) provided this was not anticipated and allowed for at the time of the decree (*w*). Similarly, the rate may be reduced, if the income of the estate has diminished (*x*), unless the diminution has been caused by the default or negligence of the person liable for maintenance (*y*). But the rate of maintenance need not vary with every fluctuation in the income (*z*). An agreement by a widow to receive a fixed maintenance per annum and *not to claim any increase in future* even in case of change of circumstances is binding upon her (*a*).

Section 25 of the Hindu Adoptions and Maintenance Act, 1956, now lays down that the amount of maintenance, whether fixed by a decree of Court or by agreement, either before or after the commencement of the Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration. Reference may be made to the Notes under that section.

*Procedure. A separate suit* must be brought to vary the rate of maintenance fixed by a decree, unless the decree contains a clause enabling the parties to apply for a modification of its terms, in which case an application may be made to alter the rate in *execution proceedings* (*b*).

It may be asked why it is that the rate of maintenance, though fixed by *agreement*, may be varied by the Court in a suit brought for that purpose. The answer is that the right to maintenance does not rest on contract, but on the provisions of the Hindu law which expressly govern the rights and duties of the different members of a Hindu family (c).

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(*r*) *Ramabai* v. *Trimbak* (1872) 9 Bom. H.C. 283, *Mayukha*, chap. 20, para. 1.

(*s*) *Mahesh* v. *Dirgpal* (1899) 21 All. 232, 234; *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 413, I.A. Sup. Vol. 47, 82.

(*t*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 624, 630; *Rajender* v. *Putto* (1879) 5 Cal. L.R. 18; *Thakur Sheo Mangal Singh* v. *Thakurain Bodhi Kuar* (1936) 11 Luck. 607, 159 I.C. 356, ('36) A.O. 60; *Saraswati* v. *Rupa* ('62) A. Orissa 193; *Sankaranarayana* v. *Lakshmi Ammal* (1960) 1 Mad. L.J. 215; ('60) A.M. 294 [Court can enhance the amount from date of demand].

(*u*) *Bansidhar* v. *Champoo* (1946) 21 Luck. 152.

(*v*) *Bangaru* v. *Vijayamachi* (1899) 22 Mad. 175.

(*w*) *Veerayya* v. *Chellamma* (1939) Mad. 234.

(*x*) *Trimbak* v. *Bhagu Bai* (1941) Nag. 437, 185 I.C. 580, ('39) A.N. 249.

(*y*) *Gojikabai* v. *Dattatraya* (1900) 24 Bom. 386; *Vijaya* v. *Sripathi* (1885) 8 Mad. 94; *Ruka Bai* v. *Ganda Bai* (1878) 1 All. 594.

(*z*) *Lala Maheshwari Prasad* v. *Mst. Sahdei Kunwar* (1938) 13 Luck. 13, 165 I.C. 227, ('37) A.O. 16.

(*a*) *Moheishwara* v. *Durgamba* (1924) 47 Mad. 308, 78 I.C. 831, ('24) A.M. 687; *Purushottamdas Harijivandas* v. *Bai Ruxmani* (1938) Bom. 1, 39 Bom. L.R. 458, 170 I.C. 897, ('37) A.B. 358.

(*b*) *Maharana Shri Ranmalsangji* v. *Kundankuwar* (1902) 26 Bom. 707, (1878) 1 All. 594; *Savitribai* v. *Radhakishan* (1947) Nag. 381.

(*c*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 624; *Lala Maheshwari Prasad* v. *Mst. Sahdei Kunwar* (1938) 13 Luck. 13, 165 I.C. 227, ('37) A.O. 16.

**569. Maintenance not a charge.**—The claim, even of a widow, for maintenance is not a charge upon the estate of her deceased husband, whether joint or separate [§ 559], until it is fixed and charged upon the estate. This may be done by a decree of a Court, or by an agreement between the widow and the holder of the estate, or by the will by which the property was bequeathed. Therefore, the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made *with the intention* of defeating the widow's right *and* the purchaser had *notice of such intention*. In fact, a widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists (*d*). But where *maintenance has been made a charge upon the property*, and the property is subsequently sold, the purchaser must hold it subject to the charge (*e*). No question, however, of *bona fides* can arise where a transfer is made for payment of debts as stated in § 570.

Section 27 of the Hindu Adoptions and Maintenance Act, 1956, lays down *inter alia* that a widow's claim for maintenance under the Act shall not be a charge on the estate of the deceased husband or any portion thereof, unless one has been created by the will of the deceased, by a decree of Court, by agreement between the widow and the holder of the estate, or otherwise.

*The Transfer of Property Act, 1882, sec.* 39.—A widow's right of maintenance not being a charge, it is but equitable that it should not be enforced against *transferee for value* unless the transfer was made in fraud of the right of maintenance. A transferee for value may be a purchaser, or he may be a mortgagee. The provisions of sec. 39 of the Transfer of Property Act, 1882, are to the same effect (*f*). That section is as follows:—

"Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

*Decree; death of judgment debtor.*—A decree for maintenance obtained against a member of an undivided family can be executed, after his death, against joint property in the hands of other members, if the decree created a *charge* against the joint family property (*g*); even when there is no charge, it may be executed against the son of the judgment debtor (*h*) to the extent of the ancestral property in his hands whether such maintenance was due at the time of the death of the deceased judgment debtor or became due since.

Where in execution of a decree creating a charge, the decree-holder herself purchases the charged property subject to her claim to future maintenance, it has been held that the judgment debtor's personal liability for future claims is not extinguished (*i*).

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(*d*) *Lakshman* v. *Satyabhamabai* (1878) 2 Bom. 494; *Bhartpur State* v. *Gopal* (1902) 24 All. 160, 163; *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260, 272; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 49; *Soorja Koer* v. *Nath Buksh* (1885) 11 Cal. 102 [mere notice immaterial]; *Prosonno* v. *Barbosa* (1866) 6 W.R. 253 [charge created by will]; *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292, 307; *Shri Beharilalji* v. *Bai Rajbai* (1899) 23 Bom. 342; *Bhagat Ram* v. *Mst. Sahib Devi* (1922) 3 Lah. 55, 67 I.C. 848, ('22) A.L. 273 [transfer not *bona fide*]. Reference may also be made to the Full Bench decision in *Mst. Satwati* v. *Kali Shanker* (1954) A.L.J. 645, ('55) A.A. 4 (case of a wife).

(*e*) *Kuloda Prosad* v. *Jageshar* (1900) 27 Cal. 194; *Prosonno* v. *Barbosa* (1866) 6 W.R. 253.

(*f*) See *Shri Beharilalji* v. *Bai Rajbai* (1899) 23 Bom. 342; *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 802, 59 I.C. 398, ('20) A.M. 722.

(*g*) *Subbanna* v. *Subbanna* (1907) 30 Mad. 324; *Minakshi* v. *Chinnappa* (1901) 24 Mad. 689.

(*h*) *Mt. Munnibibi* v. *Radhay Shiam* (1945) Luck. 641; *Muttia* v. *Virammal* (1887) 10 Mad. 283; *Bhagirathi* v. *Anantha* (1894) 17 Mad. 268.

(*i*) *Sanyasi Rao* v. *Suryanarayanamma* (1937) Mad. 324, 165 I.C. 647, ('36) A.M. 964.

*Possession of property by widow for her maintenance.*—It has been held that where a widow is in possession of specific property for the purpose of her maintenance, a purchaser buying with notice of her claim is not entitled to possession of the property without first securing proper maintenance for her (*j*). It is the settled practice of the High Court of Bombay not to allow even an heir to recover family property from a widow in possession without first securing a proper maintenance for her (*k*). In such a case the property may be sold subject to her right (*l*).

*Charge may be created by a will.*—*A* may bequeath his property to *B* subject to a charge for the maintenance of his widow out of the property (*m*).

*Alienation made in husband's lifetime.*—A Hindu widow is debarred from impeaching alienations of joint family property made *in her husband's lifetime*. The reason is that when her right of maintenance comes into existence (that is to say on her husband's death) she takes that right in the property as it stands at the time of her husband's death (*n*).

**570. Transfer for payment of debts.**—Debts contracted by a Hindu take precedence over the right of maintenance of his wife, or infant child (*o*), or his widow after his death (*p*). The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the debts were incurred for the benefit of the family (*q*). Similarly debts incurred by a joint family trading business take precedence over the widow's right to maintenance and residence (*r*). Therefore, if property belonging to the husband or to the joint family is sold in liquidation of such debts, the sale is binding on the widow, and she has no right of maintenance against the purchaser or against the property sold to him, even if the purchaser had notice of her claim for maintenance (*s*). But where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money-decree, though the decree was in respect of debts binding on the family (*t*). As the Privy Council has laid down in a case (*u*), of the two obligations which confront a joint family, *viz.*, (1) the obligation to pay family debts and (2) the duty to provide maintenance to the widows of the family, the first would have preference over the second so long as neither of these obligations has taken the form of a charge on the family property; but if either of them assumes the shape of a charge it would take precedence over the other. If the decree of a creditor against the members of a joint family based on a family debt is to be binding on a widow in the family entitled to maintenance, it is not necessary that she should be made a party to the suit so long as the family is joint. But if a partition is effected before the suit or during the

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(*j*) *Rachawa* v. *Shivayogapa* (1894) 18 Bom. 679; *Imam* v. *Balamma* (1889) 12 Mad. 334.

(*k*) *Yellawa* v. *Bhimangavda* (1894) 18 Bom. 452.

(*l*) *Ram Kunwar* v. *Amar Nath* (1932) 54 All. 472, 138 I.C. 863, ('32) A.A. 361.

(*m*) *Prosonno* v. *Barbosa* (1866) 6 W.R. 253. See also (1899) 23 Bom. 342, *supra*.

(*n*) *Ramzan* v. *Ram Daiya* (1918) 40 All. 96, 42 I.C. 944, ('18) A.A. 408.

(*o*) *Sunder Singh* v. *Ram Nath* (1926) 7 Lah. 12, 93 I.C. 1013, ('26) A.L. 167; *Jawahor Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I.C. 424, ('33) A.L. 116.

(*p*) *Adhiranee* v. *Shona Malee* (1876) 1 Cal. 365; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45; *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367; *Natchiarammal* v. *Gopalakrishna* (1878) 2 Mad. 126; *Jamiat Rai* v. *Mt. Malan* (1932) 13 Lah. 41, 133 I.C. 62, ('31) A.L. 718.

(*q*) *Lakshman* v. *Satyabhamabai* (1878) 2 Bom. 494; *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260; *Johurra* v. *Sreegopal* (1876) 1 Cal. 470.

(*r*) *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901.

(*s*) (1878) 2 Bom. 494; *supra*; (1889) 12 Mad. 260, *supra*; *Musammat Tara* v. *Sarup* (1929) 10 Lah. 706, 149 I.C. 707, ('30) A.L. 117.

(*t*) *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398. The *dicta* to the contrary in *Sham Lal* v. *Banna* (1882) 4 All. 296, 300 and *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367, are not supported by any text of Hindu law or by any decided case.

(*u*) *Mt. Dan Kuer* v. *Mt. Sarla Devi* (1946) 73 I.A. 208, (1946) All. 756, 51 C.W.N. 81; *Kaveri* v. *Parameswari* ('71) A. Kerala 216 [enhanced maintenance].

pendency of the suit in which a separate share is allotted to her in lieu of her maintenance she ought to be made a party to such a suit (*v*).

Section 27 of the Hindu Adoptions and Maintenance Act, 1956, as stated in the preceding paragraph, lays down the manner in which a charge may be created for securing maintenance payable to a *dependant*. Section 26 of that Act lays down that subject to the provisions of section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his *dependants* for maintenance under the Act.

*Illustrations*

(a) *A* and his brother *B* are members of a joint Mitakshara family. *A* dies leaving a widow. After *A*'s death *B* sells the property in order to satisfy debts binding on the family. *B*'s widow has no claim for maintenance either against the purchaser or against the property: *Lakshman* v. *Satyabhamabai* (1878) 2 Bom. 494.

(b) *A* dies leaving a widow *B*. After *A*'s death, *C*, a creditor of *A*, obtains a decree against *B* as *A*'s legal representative, and sells the family house in execution of the decree. *B* has no claim for maintenance either against the purchaser or against the property: *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(c) *A* and his sons *B*, *C* and *D*, are members of a joint family. *A* dies leaving a widow. After *A*'s death, *B*, as the manager of the family, sells the family house in order to pay debts binding on the family. *A*'s widow has no claim for maintenance either against the purchaser or against the property: *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260.

(d) *A* sells certain property belonging to him for the payment of his debts. Neither *A*'s wife nor his children have any claim for maintenance against the purchaser of the property: *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367.

**571. Right of maintenance against donees and devisees.**—A Hindu cannot dispose of his entire property by gift or by will, so as to defeat the right of his widow to maintenance. If he does so, the donee or devisee must hold the property subject to the widow's right of maintenance, and the widow may enforce her right against it (*w*).

Section 22(2) of the Hindu Adoptions and Maintenance Act, 1956, lays down that where a *dependant* has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act, the dependant shall be entitled subject to the provisions of the Act, to maintenance from those who take the estate. Reference may be made to the Notes under that section.

**572. Transfer of property pending suit for maintenance.**—If during the pendency of a suit instituted by a widow to establish a charge on specific immovable property for her maintenance, the property is transferred by any other party to the suit, and a decree is subsequently passed creating a charge on the property for the widow's maintenance, the transferee must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt which has priority over the widow's claim for maintenance (*x*). The same rule applies where the widow is a party to the suit and she has by her written statement claimed a charge on the property (*y*).

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(*v*) *Mt. Prabhawati Kuer* v. *Ram Saran Lal* (1934) 13 Pat. 785, 152 I.C. 691, ('34) A.P. 538.

(*w*) *Becha* v. *Mothina* (1901) 23 All. 86; *Joytara* v. *Ramhari* (1884) 10 Cal. 638; *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99; *Jamna* v. *Machul* (1879) 2 All. 315.

(*x*) *Dose Thimmanna* v. *Krishna* (1906) 29 Mad. 508.

(*y*) *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77.

The rule laid down in this section is an application of the doctrine of *lis pendens* as enunciated in the Transfer of Property Act, 1882, sec. 52. The rule does not apply where a widow claims maintenance without asking at the same time that it should be made a charge on the property (*z*).

## V.—TRANSFER OF FAMILY DWELLING-HOUSE AND ITS EFFECT ON THE RIGHT OF RESIDENCE

*Note.*—The position and rights of a widow, daughter, predeceased son's wife and certain other female heirs of a Hindu have been materially changed by the Hindu Succession Act, 1956, and the question of the right of residence of such persons must now be considered in the context of the provisions of that Act. Section 23 of that Act lays down a special provision respecting the family dwelling-house. In §§ 573 and 574 below the law has been stated as it stood prior to the coming into operation of that Act, under the decided cases.

**573. Widow of undivided coparcener.**—Where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving a widow, she is entitled to reside in the family dwelling-house in which she lived with her husband (*a*). If the house is sold by the surviving coparcener or coparceners *without necessity,* the sale does not affect her right, and the purchaser cannot evict her (*b*), at all events until another suitable residence is found for her (*c*). If the purchaser buys the house with full knowledge that the widow is residing and is being maintained in it, the purchaser is not entitled to oust her even though there may be other property belonging to the family out of which her maintenance can be derived (*d*). But if the sale is *for a family necessity,* she is liable to be evicted even though the purchaser had notice at the time of purchase that she was in occupation of the house (*e*). Similarly the right of residence cannot prevail against the husband's debts (*f*).

*Illustrations*

(a) *A* dies leaving a widow and a son. The son sells the family dwelling-house without family necessity. The purchaser is not entitled to evict the widow: 4 Beng. L.R.O.C. 72; 6 Mad. 130; 7 Bom. 282.

(b) *A* and *B*, two Hindu brothers, are members of a joint family residing together in the family dwelling-house. *A* dies leaving a widow *W*. After *A*'s death dispute arises between *B*'s wife and *W*. *B* offers *W* a residence in another house on condition of *W* vacating the part of the family house in her occupation. *W* refuses and *B* sues *W* to recover from her possession of the portion of the family house in her occupation. *B* is not entitled to possession. *W* is entitled to reside in the house: *Bai Devkore* v. *Sanmukhram* (1889) 13 Bom. 101.

(c) *A* and his nephew *B* are members of a joint family residing together in the family dwelling-house. *A* dies leaving a widow. After *A*'s death *B* sells the family dwelling-house without family necessity. The purchaser is not entitled to evict *A*'s widow: 1 All. 262.

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(*z*) *Manika* v. *Ellappa* (1896) 19 Mad. 271.

(*a*) *Bai Devkore* v. *Sanmukhram* (1889) 13 Bom. 101.

(*b*) *Venkatammal* v. *Andyappa* (1883) 6 Mad. 130; *Gauri* v. *Chandramani* (1876) 1 All. 262; *Talemand* v. *Rukmina* (1881) 3 All. 353.

(*c*) *Mangala* v. *Dinanath* (1869) 4 Beng. L.R.O.C. 72; *Ganga Dei* v. *Jagannath* (1947) 22 Luck. 518.

(*d*) *Dalsukhram* v. *Lalubhai* (1883) 7 Bom. 282.

(*e*) *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260. See also *Johurra* v. *Sreegopal* (1876) 1 Cal. 470, 475 [insolvency of manager]; *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 836, ('33) A.L. 901.

(*f*) *Jamiat Rai* v. *Mt. Malan* (1932) 13 Lah. 41, 133 I.C. 62. ('31) A.L. 718.

The widow of a deceased coparcener cannot impeach an alienation of the family dwelling-house made in her husband's lifetime. Thus a daughter-in-law cannot impeach an alienation of the dwelling-house made by her father-in-law in her husband's lifetime (*g*).

**574. Unmarried daughters of deceased coparcener.**—Where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving unmarried daughters, they are entitled to reside, until their marriage, in the family dwelling-house in which they lived with their father, and a purchaser of the family house is not entitled to evict them unless the sale was for a family necessity (*h*).

*Illustrations*

(a) *A* dies leaving a son, a widow *W*, and two unmarried daughters *D*1 and *D*2. On *A*'s death, the son enters into possession of the whole property including the family dwelling-house. The son then sells the house without family necessity. The purchaser is not entitled to oust the daughters. The daughters are entitled to reside in the house until their marriage.

(b) In the case put in ill. (a), the son dies leaving his mother *W* and his two unmarried sisters *D*1 and *D*2. After his death the dwelling-house is sold in execution of a money-decree passed against *W* on a *personal* debt of *W*, and is purchased by *P*. *P* is not entitled to oust *D*1 and *D*2: *Suriyanarayana* v. *Balasubramania* (1920) 43 Mad. 635, 56 I.C. 524. ('20) A.M. 106.

**575. Wife and unmarried daughters of sole owner.**—(1) Where a family consists only of a husband and wife, the wife cannot assert her right of residence in the family dwelling-house either against the purchaser in execution of a decree passed against her husband in his lifetime or against his estate after his death (*i*), or even against a purchaser under a private sale from her husband without necessity (*j*), though the purchaser had notice at the time of sale that she was residing in the house (*k*).

(2) The same rule applies to unmarried daughters. They too cannot resist the claim for possession of the purchaser at a court-auction or under a private sale (*l*).

*Illustrations*

(a) *N* executes a mortgage of the family dwelling-house to *M*. *M* obtains a decree on the mortgage against *N*. *N* then dies leaving a widow. *After M*'s death the house is sold in execution of the decree and purchased by *P*. *P* is entitled to the possession of the house free from the widow's right of residence: *Manilal* v. *Bai Tara* (1893) 17 Bom. 398; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45. In 17 Bom. 398, the learned judge observed that if the mortgage was not beneficial to and binding upon the wife or was in any way in fraud of her rights, her right of residence would not be affected by the sale. But these observations have been dissented from by Bhashyam Ayyangar, J., in 27 Mad. 45, at p. 51, and also by Shah, J., in *Gangabai* v. *Jankibai* (1921) 45 Bom. 337, at p. 342, 59 I.C. 583, ('21) A.B. 380, who agreed with the view taken by Bhashyam Ayyangar, J.

(b) *A* sells the family dwelling-house without any family necessity to *P*. *P* sues *A* and his wife for possession. *A* then dies leaving his widow. *P* is entitled to possession free from the widow's right of residence.

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(*g*) *Ramzan* v. *Ram Daiya* (1918) 40 All. 96, 42 I.C. 944, ('18) A.A. 408.

(*h*) *Suriyanarayana* v. *Balasubramania* (1920) 43 Mad. 635, 56 I.C. 524, ('20) A.M. 106.

(*i*) *Manilal* v. *Bai Tara* (1893) 17 Bom. 398; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(*j*) *Gangabai* v. *Jankibai* (1921) 45 Bom. 337, 59 I.C. 583, ('21) A.B. 380.

(*k*) 17 Bom. 398, *supra*; 45 Bom. 337, 59 I.C. 583, ('21) A.B. 380, *supra*.

(*l*) See *Suriyanarayana* v. *Balasubramania* (1920) Mad. 635, 56 I.C. 524, ('20) A.M. 106 and 27 Mad. 45, *supra*.

The reason of the distinction between the rights of the females mentioned in §§ 573 and 574 on the one hand and those mentioned § 575 on the other is that the right which a Hindu wife [§ 575] has of maintenance and residence during her husband's lifetime is a matter of personal obligation arising from the very existence of the relationship and quite independent of the possession by the husband of any property, ancestral or self-acquired. The same principle applies as between daughters and their father: see § 542 above. It is different, however, in the case of the widows and daughters of deceased coparceners [§§ 573-574], whose right depends on the possession of joint property by the surviving coparceners: see § 543.

## VI.—RIGHT OF MAINTENANCE NOT AFFECTED BY WILL

**576. Right of maintenance not affected by will.**—A Hindu cannot so dispose of his property by will as to affect the right of maintenance to which a person is entitled under the Hindu law (*m*).

See Restriction No. 1 of Schedule III of the Indian Succession Act, 1925.

## VII.—TRANSFER AND ATTACHMENT OF RIGHT OF MAINTENANCE

**577. Transfer of right of maintenance.**—A Hindu female cannot transfer her right to *future* maintenance in whatever manner arising, secured or determined (*n*).

This is sec. 6, cl. (dd), of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act, 1929.

The maintenance may be fixed by agreement or it may be fixed by a decree of Court. Before the amendment there was a conflict of opinion whether if the maintenance was fixed by a decree, it could be transferred by the widow, the High Court of Calcutta holding that it could (*o*), and the High Court of Madras that it could not (*p*). The Calcutta view is no longer law.

**577A. Death pending suit for maintenance.**—The right of a widow to claim maintenance when it has not crystallised into a definite sum is an inchoate right. In such a case if she dies pending her suit for maintenance it does not survive to her legal representative (*q*). But if the right has been declared, for instance, by a preliminary decree the position will be different (*r*).

**578. Attachment of right of maintenance.**—A right to *future* maintenance cannot be attached in execution of a decree, though *arrears* of maintenance may be so attached (*s*).

## VIII.—SUIT FOR MAINTENANCE

**579. Suit for maintenance.**—(1) A widow, who is entitled to maintenance may sue for all or any of the following reliefs:—

(1) for a declaration of her right to maintenance;

(2) for arrears of maintenance (*t*);

(3) for a charge on a specific portion of her husband's estate for her maintenance and residence (*u*).

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(*m*) *Sriramulu* v. *Anasuyamma* ('57) A. Andh. Pra. 21.

(*n*) *Narabadabai* v. *Mahadeo* (1881) 5 Bom. 99, 103, 104.

(*o*) *Asad Ali* v. *Haider Ali* (1911) 38 Cal. 13, 6 I.C. 826.

(*p*) *Ranee Annapurni* v. *Swaminatha* (1911) 34 Mad. 7, 9, 6 I.C. 439.

(*q*) *Muthalammal* v. *Veeraraghavalu* (1953) Mad. 527, ('53) A.M. 202.

(*r*) *Dhanapala* v. *Krishna Chettiar* (1955) Mad. 1122, ('55) A.M. 165.

(*s*) Code of Civil Procedure, 1908, sec. 60, cl. (n); *Haridas* v. *Baroda* (1900) 27 Cal. 38; *Hoymobutty* v. *Koroona* (1876) 8 W.R. 41.

(*t*) *Raja Pirthee Singh* v. *Rani Rajkoocr* (1874) 12 Beng. L.R. 238, I.A. Supp. Vol. 203.

(*u*) *Mohalakshmamma* v. *Venkataratnamma* (1883) 6 Mad. 83.

(2) Where a member of an undivided family comprising several branches dies, and a suit is brought by his widow for maintenance, she is entitled to a decree against all the members of the joint family, and not only against the branch to which her husband belonged and to which his share lapsed by survivorship (*v*).

**580. Limitation.**—(1) A suit for a declaration of a right to maintenance must be brought within twelve years from the time when the right is denied (*w*).

The refusal by a husband to maintain his wife on the ground of unchastity does not prevent a fresh cause of action arising to her on his death, if it is found that there is no unchastity. A suit within 12 years from the husband's death would be in time (*x*).

(2) A suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable (*y*). Therefore, past maintenance cannot be claimed for a period of more than twelve years.

Now see Article 105 of the new Limitation Act (3 years).

*Arrears.*—In order to recover arrears of maintenance, it is necessary to prove that there was a *wrongful withholding* of maintenance for the period for which arrears are claimed (*z*). It is not necessary to prove a *demand* for each year's maintenance as it became payable. At the same time it must be observed that *mere non-payment* of maintenance does not constitute *conclusive* proof of wrongful withholding. But it constitutes *prima facie* proof of wrongful withholding, and if it is coupled with a denial of the plaintiff's right to maintenance, it may constitute sufficient proof of wrongful withholding to entitle the plaintiff to arrears of maintenance (*a*).

*Declaration of right to maintenance.*—A suit by a Hindu widow for a declaration of her right to maintenance is not barred, merely because it is brought twelve years after the date of her husband's death. The period of limitation runs from the time when her right to maintenance is *denied*. The reason is that the right to maintenance is one accruing from *time to time* according to the wants and exigencies of the person entitled to maintenance (*b*).

**581. Execution of decree.**—(1) A decree which directs the *payment* of future maintenance from time to time can be enforced by execution (*c*), but a decree which *merely declares* a right of maintenance cannot be so enforced (*d*).

A decree which runs 'the plaintiff's maintenance is fixed at the rate of Rs. 30 per month which the defendant will be liable to pay her every month' is executable. An application by the defendant to reduce the rate of maintenance on the ground of diminution of income cannot be entertained by the executing court (*e*).

If a husband and wife resume co-habitation after a decree for maintenance the decree cannot be executed. If a fresh cause of action arises a fresh decree must be obtained (*f*).

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(*v*) *Subbarayalu* v. *Kamala Vallithayaramma* (1912) 35 Mad. 147, 10 I.C. 347.

(*w*) Limitation Act, 1908, Sch. I, art. 129.

(*x*) *Mt. Shibbi* v. *Jodh Singh* (1933) 14 Lah. 759, 148 I.C. 479, ('33) A.L. 747.

(*y*) Limitation Act, 1908, Sch. I, art. 128.

(*z*) *Seshamma* v. *Subbarayadu* (1895) 18 Mad. 403. However, see *Sidramappa* v. *Mahadevi* ('71) A. Mys. 145.

(*a*) *Raja Yarlagadda* v. *Raja Yarlagadda* (1901) 24 Mad. 147, 27 I.A. 151; *Parwatibai* v. *Chatru* (1912) 36 Bom. 131, 12 I.C. 708; *Chandrakunverba* v. *Randhirsinhji* ('65) Guj. 270.

(*b*) *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 6 I.A. 114; *Parwatibai* v. *Chatru, supra.*

(*c*) *Ashutosh* v. *Lukhimoni* (1892) 19 Cal. 139. The death of the husband does not alter the foundation of the decree, *Ramesh Chander* v. *Sh. Bibi Ved Kaur* ('51) A. Punj. 129.

(*d*) *Venkanna* v. *Aitamma* (1889) 12 Mad. 183.

(*e*) *Kallu Mal* v. *Barfo* (1938) All. 535, 176 I.C. 139, ('38) A.A. 362.

(*f*) *Vasantam Venkayya* v. *Vasantam Raghavamma* (1942) Mad. 24, 200 I.C. 794, ('42) A.M. 1; *Ansuya* v. *Rajaiah* ('71) A.A.P. 296. *Cf. Meenakshi Ammal* v. *P. S. Muthukrishna* ('61) A.M. 380.

## CHAPTER XXVI

# CONVERSION FROM HINDUISM, KHOJAS, CUTCHI MEMONS AND SOME OTHERS

**582. Khojas and Cutchi Memons [The whole of this section is subject to the provisions of the Shariat Act, 1937 (*g*)].**—(1) In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay State are governed, in matters of inheritance and succession, by the Hindu law; in other matters they are governed by the Mahomedan law (*h*). The only special usage opposed to the Hindu law of succession hitherto recognized is the usage of the Khojas according to which the mother is entitled to management of property and letters of administration in preference to the childless widow or sister of the deceased (*i*).

(2) It is now well-established that the theory of the joint Hindu family does not apply at all to Khojas and Cutchi Memons and that neither a Khoja (*j*) nor a Cutchi Memon son (*k*) acquires any interest by birth in property inherited by his father from his ancestors.

It was at one time held by the High Court of Bombay that the joint Hindu family system prevailed among Khojas and Cutchi Memons, but the decisions did not make it quite clear how far it prevailed and what incidents of joint property held by a Hindu family applied to joint property held by a Khoja or Cutchi Memon family. On the one hand it was held that a Khoja son was not entitled to a partition of ancestral property against his father in his lifetime (*l*). On the other hand it was held that the right of survivorship (*m*), the incapacity to dispose of ancestral property by will (*n*), and the powers of a father as manager of an ancestral business to borrow money for the business so as to bind the interest of his sons in the ancestral property (*o*), applied also to the joint property held by a Cutchi Memon family. The power of a Khoja father to mortgage family property for family purposes was also judicially recognized (*p*).

The Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 500 years ago, but retained the Hindu law of inheritance and succession. Hence the Hindu law of inheritance and succession is applied to them in the Bombay State on the ground of *custom*. This custom is so well established among them, that if a special rule of succession opposed to the Hindu law is alleged to exist among them, the burden of proof lies on the person setting up such rule (*q*). Note that customs overriding Mahomedan law are recognized by 37 Geo. III, c. 142, sec. 13, read with 4 Geo. IV, c. 71, sec. 9 (for Bombay), and by Bombay Regulation IV of 1827, sec. 26 (for the Mufassal of Bombay).

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(*g*) See Mulla's Mahomedan Law.

(*h*) *Khoja's and Memon's* case (1847) Perry O.C. 119; *Shivji Hasam* v. *Datu Mavji* (1875) 12 Bom. H.C. 281 [Khojas]; *Ashabai* v. *Haji Tveb* (1885) 9 Bom. 115 [Cutchee Memons]; *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1 [Cutchee Memons]; *Adv.-Gen.* v. *Karmali* (1905) 29 Bom. 133, 148; *Jan Mahomed* v. *Datu* (1914) 38 Bom. 449, 22 I.C. 195, ('14) A.B. 59; *Abdurahim* v. *Halimabai* (1916) 43 I.A. 35, 18 Bom. L.R. 635, 32 I.C. 413, ('15) A.PC. 86; *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565, ('14) A.B. 17; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I.C. 108, ('15) A.B. 151. Reference may also be made to *Abdul Hameed* v. *Provident Investment Co. Ltd.* (1954) Mad. 939, ('54) A.M. 961 (F.B.).

(*i*) *Rahimbhai, in the goods of* (1875) 12 Bom. H.C. 294 [Khojas].

(*j*) *Jan Mohomed* v. *Datu* (1914) 38 Bom. 449, 22 I.C. 195, ('14) A.B. 59.

(*k*) *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565, ('14) A.B. 17; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I.C. 108, ('15) A.B. 151; *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148.

(*l*) *Ahmedbhoy* v. *Cassumbhoy* (1889) 13 Bom. 534 [Khojas].

(*m*) (1885) 9 Bom. 115, *supra* [Cutchee Memons].

(*n*) *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1 [Cutchee Memons].

(*o*) *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189, 194 [Cutchee Memons].

(*p*) *Shivji* v. *Datu* (1875) 12 Bom. H.C. 281.

(*q*) *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1.

The following is a synopsis of decided cases:

I. *Khoja cases*—

1. The daughters of a deceased coparcener are entitled against the surviving coparceners to no more than maintenance until marriage and to marriage expenses, as among Hindus: *Khojas and Memon's* case (*r*).
2. A bequest in favour of *dharam* is void. But the word "charity" in a Khoja will made in the English form and language does not necessarily mean "*dharam*": *Gangabai* v. *Thavar Mulla* (*s*).
3. By the custom of Khoja when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her blood relations, but to the relations of her deceased husband: *Mulbai, in the goods of* (*t*).

*Note.*—The same is the rule of Hindu law in cases where the marriage is in an approved form.

4. *Shivji* v. *Datu* (*u*). This case is cited in sub-§ (2).
5. *Rahimbhai, in the goods of* (*v*). This case is cited in sub-§ (1).
6. There is no special usage prevailing among Khojas entitling a sister to succeed in preference to a widow: *Rahimbatbai* v. *Hirbai* (*w*).
7. *Ahmedbhoy* v. *Cassumbhoy* (*x*). This case is cited in sub-§ (2).
8. The widow of a deceased Khoja is entitled to maintenance out of his property: *Rashid* v. *Sherbanoo* (*y*). In this case the Court applied the Mayukha in determining the rights of the parties.
9. In *Advocate-General* v. *Karmali* (*z*) it was said that the will of a Khoja is to be construed on the basis of the testator having the testamentary powers of a Hindu. But the matter is not free from doubt (*a*).
10. A Khoja is not a Hindu within the meaning of the Hindu Wills Act, 1870: *Abdul Karim* v. *Karmali* (*b*).
11. A gift to a class some of whom are not in existence at the death of the testator is not void in its entirety. The gift in such a case enures for the benefit of those members of the class who were in existence at the testator's death: *Advocate-General* v. *Karmali* (*c*).
12. Khojas who had migrated to the former State of Hyderabad are governed by Mahomedan law (c1).

II. *Cutchi Memon cases*—

1. A Cutchi Memon is not a Hindu within the meaning of the Hindu Wills Act, 1870: *Haji Ismail, in the matter of the will of* (*d*).
2. *Ashabai* v. *Haji Tyeb* (*e*). This case is cited in sub-§ (2).

2A. *Abdul Hameed* v. *Provident Investment Co. Ltd.* (1954) Mad. 939, ('54) A.M. 961 (F.B.). In this case the parties claimed to be governed by Hindu law and the case was considered on that basis.

3. A bequest in favour of an unborn person is void: *Abdul Cadur* v. *Turner* (*f*).
4. *Mahomed Sidick* v. *Haji Ahmed* (*g*). This case is cited in sub-§ (2).
5. *Haroon Mahomed, in the matter of* (*h*). This case is cited in sub-§ (2).
6. When a Cutchi Memon testator bequeathed the residue of his property to his heirs to be divided among them "according to Mahomedan law," it was

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(*r*) (1847) Perry O.C. 110.
(*s*) (1863) 1 Bom. H.C. 71.
(*t*) (1866) 2 Bom. H.C. 292.
(*u*) (1875) 12 Bom. H.C. 281.
(*v*) (1875) 12 Bom. H.C. 294.
(*w*) (1879) 3 Bom. 84.
(*x*) (1889) 13 Bom. 534.
(*y*) (1905) 29 Bom. 85.
(*z*) (1905) 29 Bom. 133, 148-149. See also *Sallay Mahomed* v. *Lady Janbai* (1901) 3 Bom. L.R. 785.
(*a*) *Hassonally* v. *Popatlal* (1913) 37 Bom. 211, 214 215, 17 I C. 17; *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 231, 23 I.C. 565, ('14) A.B. 17; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I.C. 108, ('15) A.B. 151 [a Khoja case].
(*b*) (1920) 22 Bom. L.R. 708, 58 I.C. 270, ('20) A.B. 140.
(*c*) (1905) 29 Bom. 133.
(c1) *Noorbanu* v. *Dep. Cust. General* ('65) A.S.C. 1937.
(*d*) (1882) 6 Bom. 452.
(*e*) (1885) 9 Bom. 115.
(*f*) (1885) 9 Bom. 158.
(*g*) (1886) 10 Bom. 1.
(*h*) (1890) 14 Bom. 189.

held that the heirs including the testator's widow took their respective shares *absolutely*, and that she did not take merely a Hindu widow's estate in the property that came to her share: *Hoorbai* v. *Sooleman* (*i*).

7. For the purposes of succession to the *stridhana* of a Cutchi Memon woman her marriage, though performed according to the Mahomedan rites, is deemed to be in the approved form. In this case the Court applied the Mayukha: *Moosa* v. *Haji Abdul* (*j*).

8. A Cutchi Memon widow is entitled to maintenance out of the estate of her deceased husband, and a Cutchi Memon daughter is entitled to maintenance and marriage expenses out of the estate of her father, though he might have left a will which is silent about maintenance and marriage expense: *Haji Saboo Sidick* v. *Ayeshabai* (*k*).

9. As among Hindus, so among Cutchi Memons, an heir who gets into possession of the estate is not bound to pay the creditors rateably as under the Indian Succession Act, 1928, s. 323: *Haji Saboo Sidick* v. *Ally Mahomed* (*l*).

10. As regards maintenance, Cutchi Memons are governed by the Mahomedan law: *Mahomed Jusab* v. *Haji Adam* (*m*).

11. A Cutchi Memon son does not acquire by birth an interest in property inherited by his father from his ancestors: *Mangaldas* v. *Abdul* (*n*).

12. A Cutchi Memon in Bombay may dispose of the *whole* of his property by will. A Cutchi Memon will is to be interpreted according to Mahomedan law: *Advocate-General* v. *Jimbabai* (*o*). But see No. 14 below.

13. Hindu law of joint family property is not applicable to Cutchi Memons: Same ruling as in No. 11 above. *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148.

14. The will of a Cutchi Memon is to be construed according to the rules of Hindu law: *Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 127 I.C. 401, ('30) A.B. 191. *Abdulsattar Ismail* v. *Abdul Hamid Sait* (1945) Mad. 276.

*III. Other cases—*

*Memons of Mombasa.*—Where Memons migrate from India and settle among Mahomedans (*e.g.*, in Mombasa), the presumption that they have adopted the Mahomedan custom of succession should be readily made. The analogy in such a case is rather a proof of a change of domicile than a change of custom: *Abdurahim* v. *Halimabai* (*p*).

*Halai Memons of Porbandar in Kathiawar.*—They follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay: *Khatubai* v. *Mahomed* (*q*).

*Halai Memons of Morvi in Kathiawar.*—These Memons who have settled at Nadiad in the Kaira district, are governed by Hindu law and not Mahomedan law, in matters of inheritance, succession and wills (*r*).

*Sunni Bohras of Gujerat and Molesalam Girasias of Broach.*—These are governed by the Hindu law in matters of succession and inheritance. These communities were originally Hindus, and became subsequently converts to Mahomedanism (*s*).

*Sunni Bohras of Borsad.*—These cannot be differentiated from Sunni Bohras of Gujerat. The presumption is that they are governed by the Hindu law of inheritance and succession as applicable to a separated person. There is no presumption that the law relating to joint family is applicable to them (*u*).

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(*i*) (1901) 3 Bom. L.R. 790.
(*j*) (1906) 30 Bom. 197.
(*k*) (1903) 27 Bom. 485, 30 I.A. 127.
(*l*) (1906) 30 Bom. 270.
(*m*) (1913) 37 Bom. 71, 15 I.C. 520.
(*n*) (1914) 16 Bom. L.R. 224, 23 I.C. 565, ('14) A.B. 17.
(*o*) (1917) 41 Bom. 181, 283, 31 I.C. 108, ('15) A.B. 151.
(*p*) (1916) 43 I.A. 35, 18 Bom. L.R. 635, 32 I.C. 413, ('15) A.P.C. 86.
(*q*) (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.P.C. 414 affirmg. *Mahomed Haji Abu* v. *Khatubai* (1919) 43 Bom. 647, 51 I.C. 513, ('18) A.B. 39 (Porbandar); *Aisha Bee Bee* v. *Noor Mohamed* (1932) 10 Rang. 461, 140 I.C. 143, ('32) A.R. 179 (Gondal).
(*r*) *Adambhai* v. *Allarakhia* (1935) 37 Bom. L.R. 686, ('35) A.B. 417.
(*s*) *Bai Baiji* v. *Bai Santok* (1896) 20 Bom. 53; *Fatesangji* v. *Harisangji* (1896) 20 Bom. 181. Also see *Hajarkhan* v. *Kesarkhan* ('68) A. Guj. 229.
(*u*) *Bai Sakar* v. *Vora Ismail* (1936) 60 Bom. 919, 38 Bom. L.R. 1034, 167 I.C. 380, ('37) A.B. 65.

Most of the cases cited above were reviewed by Beaman, J., in *Jan Mahomed* v. *Datu* (*v*).

**583. The Cutchi Memons Act, 1920.**—It is now provided by the Cutchi Memons Act, 1920, and the Cutchi Memons (Amendment) Act, 1923, that any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be,

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, *and*

(c) that he is resident in India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants shall in matters of succession and inheritance be governed by the Mahomedan law.

A similar Act known as the Shariat Act has been passed with reference to all Muslims in India providing for the application of the personal law of Muslims instead of customary law (Act XXVI of 1937). See Mulla's Mahomedan Law.

(*v*) (1914) 38 Bom. 449, 22 I.C. 195, ('14) A.B. 59.

# CHAPTER XXVII

# IMPARTIBLE PROPERTY

## LAW PRIOR TO HINDU SUCCESSION ACT, 1956

*Note.*—The Hindu Succession Act, 1956, has brought about radical changes in the rules of Hindu law relating to impartible property. The effect of that enactment is to abolish impartible estates save those which are expressly saved by section 5(ii) of the same. Only estates which descend to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of the Act are exempted from the operation of the general law relating to succession and inheritance laid down in that Act. In §§ 584-595 below the law has been stated as it stood prior to the coming into force of the Hindu Succession Act, 1956, under the decided cases.

**584. Impartible Property.**—(1) Property, although partible by nature, may, by custom, or by the terms of a grant by Government, be impartible, in the sense that it always devolves on a single member of the family to the exclusion of the other members.

(2) An impartible estate may be ancestral, or it may be self-acquired.

The following are instances of impartible properties:—

(1) Ancient Zamindaries, which partake of the nature of a Raj or sovereignty; (2) Zamindaries which descend to a single member by special family custom (*w*); (3) Palayams in the Madras State (*x*); (4) royal grants of revenue for services, such as Jaghirs (*y*) and Saranjams (*z*) in Bombay; (5) service tenures such as Digwari tenure (*a*), and tenures attached to village offices in Madras (*b*). The discontinuance of services attached to an impartible watan does not make it partible (*c*). See also Bengal Regulations 11 of 1793, and 10 of 1800.

The Government has power in India by a grant of lands to limit their descent in any way it pleases, but a subject has no power to impose upon lands, or other property any limitation of descent at variance with the ordinary law applicable (*d*).

When such an estate is acquired by the Government and compensation is paid, the compensation received, retains the incident of impartibility (*e*).

There was some legislation relating to impartible estates in Madras: See Madras Impartible Estates Act 1904. Now see S. 5 Hindu Succession Act, 1956.

**585. Property impartible by custom.**—When there is a dispute with respect to an estate being impartible or otherwise the onus of proof lies on the

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(*w*) See *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 43 All. 228, 60 I.C. 534, ('21) A.PC. 62.

(*x*) *Kachi* v. *Kachi* (1905) 28 Mad. 508, 32 I.A. 261.

(*y*) See *Raghojirao* v. *Lakshmanrao* (1912) 36 Bom. 639, 39 I.A. 202, 16 I.C. 239.

(*z*) *Ramchandra* v. *Venkatrao* (1882) 6 Bom. 598; *Narayan* v. *Vasudeo* (1891) 15 Bom. 247.

(*a*) *Durga Prasad Singh* v. *Braja Nath Bose* (1912) 39 Cal. 696, 39 I.A. 133, 15 I.C. 219.

(*b*) *Bada* v. *Hussu Bhai* (1884) 7 Mad. 236.

(*c*) *Radhabai* v. *Anantrav* (1885) 9 Bom. 198 [Service Vatan]; *Mahatabsingh* v. *Badansingh* (1921) 48 I.A. 446, 461, 48 Cal. 997, 64 I.C. 194, ('22) A.PC. 146.

(*d*) *Rajindra* v. *Raghubans* (1918) 45 I.A. 134, 40 All. 470, 48 I.C. 213, ('18) A.PC. 25; *Ramrao* v. *Yeshvantrao* (1886) 10 Bom. 327 [Deshpande Vatan].

(*e*) *Rangarao* v. *State of Madras* (1953) Mad. 479, ('53) A.M. 185.

party who alleges the existence of a custom different from the ordinary law of inheritance, according to which the estate is to be held by one member and as such not liable to partition (*f*). The custom must be ancient and invariable, and established by clear and unambiguous evidence. Only an estate of considerable age can be considered as being governed by an ancient and invariable custom; it is doubtful whether an estate of which the origin dated back only to 1796 could be regarded at the settlement in 1863 as being so governed (*g*). As to custom, family custom and proof of custom see pp. 82-84: §§ 16 to 20 *ante*.

A settlement or regrant by the British Government of an estate which existed before the British rule must be presumed, in the absence of evidence to the contrary, to continue previously existing incidents of impartibility and descendibility to a single heir (*h*).

**586. Accretions to impartible property.**—It is open to the holder of an impartible estate to incorporate any self-acquired property of his with the estate, but an intention to do so either expressed or implied, must be established (*i*) and whereas in the case of a lunatic he is incapable of expressing his intention, the Court has to consider what is beneficial to him (*j*). The income of an ancestral impartible joint estate is not so affected by its origin that it should be assumed to accrete to the estate. The income when received is the absolute property of the holder of the estate. It differs in no way from property which he might have gained by his own effort, or acquired in circumstances entirely dissociated from the ownership of the estate. Therefore, the principle applicable to ordinary joint family estate that self-acquired moneys are to be regarded as joint property if mixed with the money of the joint family, does not necessarily apply to property acquired by the holder of an impartible estate out of the income (*k*).

Thus where the deceased holder of an ancestral impartible estate had applied savings out of the income to purchasing immovable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the estate, it was held by their Lordships of the Privy Council that the property so acquired had not become part of the impartible estate, but remained the separate property of the deceased holder (*l*). Whether any immovable property acquired out of the income has been incorporated with the impartible estate depends on the intention of the holder but movable property such as the income of the impartible estate cannot be so incorporated (*m*). This, however, does not mean that by a family custom family property cannot be treated as impartible. If a family custom is proved that certain category of movable property is treated by the family as impartible (*e.g.* jewels worn on ceremonial occasions), that custom would be recognised (*m*1). As to the doctrine of incorporation reference may be made to the decision of the Supreme Court mentioned below (*m*1).

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(*f*) *Chattar Singh* v. *Roshan Singh* (1946) Nag. 159.

(*g*) *Martand Rao* v. *Malhar Rao* (1928) 55 I.A. 45, 55 Cal. 403, 107 I.C. 7, ('28) A.P.C. 10.

(*h*) *Martand Rao* v. *Malhar Rao, supra.*

(*i*) See f.n. (*j*) below. Also see *Mahendrasinghji* v. *Ishwarshinghji* (1952) Bom. 615 ('52) A.B. 243, (1952) 54 Bom. L.R. 99.

(*j*) *Someshwari Prasad* v. *Maheshwari Prasad* (1936) 63 I.A. 441, 16 Pat. 1, 165 I.C. 347, ('36) A.P.C. 332.

(*k*) *Jagadamba Kumari* v. *Narain Singh* (1923) 50 I.A. 1, 2 Pat. 319, 77 I.C. 1041, ('23) A.P.C. 59; *Janki Prasad* v. *Dwarka Prasad* (1913) 40 I.A. 170, 181, 35 All. 391, 401, 20 I.C. 73; *Murtaza Khan* v. *Muhomed Yasin* (1916) 43 I.A. 269, 281, 38 All. 552, 567, 36 I.C. 299, ('16) A.P.C. 89; *Srimati Parbati* v. *Jagadis Chunder* (1902) 29 Cal. 433, 453, 29 I.A. 82, 98; *Raja of Vizianagram* v. *Vishweshwar* ('55) A.M. 219; *Jitendra Pratap* v. *Bhagwati Prasad* ('56) A.P. 457.

(*l*) (1923) 50 I.A. 1, 2 Pat. 319, 77 I.C. 1041, ('23) A.P.C. 59, *supra*; *Hargovind Singh* v. *Collector of Etah* (1937) All. 292, 169 I.C. 744, ('37) A.A. 377.

(*m*) *Shibaprasad Singh* v. *Prayagkumari Debee* (1932) 59 Cal. 1399, 59 I.A. 331, 138 I.C. 861, ('32) A.P.C. 216.

(*m*1) *Pushpavathi Vijavaram* v. *Pushpavathi Viswesvar* ('64) S.C. 118; *Thakur Hari Singh* v. *I. T. Comm.* ('68) Raj. 5 [crown grant: Marwar Land Revenue Act].

It follows from the principles laid down in the section that the right to recover arrears of rent, become due in the lifetime of the last holder, passes to his heirs, and not to the person who succeeds to the estate (*n*).

**587. Impartible property whether coparcenary property.**—An impartible estate is not held in coparcenary though it may be joint family property (*o*). But at times it is referred to as coparcenary and a distinction is drawn between present rights, that is, the right to demand a partition and the right to joint enjoyment, and future rights. In the case of an *impartible* estate, the right to *partition* and the right of joint enjoyment are from the very nature of the property incapable of existence, and there is no coparcenary to this extent. No coparcener, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will [§ 588], nor is he entitled to maintenance out of the estate [§ 589]. But as regards future rights, that is, the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rules stated in § 591 below (*p*). The right of a junior member to succeed to the estate by survivorship is not a mere *spes successionis* but a right of property which can be transferred (*q*).

The incidents of impartible estate were stated by the Privy Council in *Rani Prayag Kumari Devi's case* (*qq*) and as the Supreme Court observed in the undermentioned case (*qqq*) a full statement of the law on the subject is to be found there. The law as there stated was reaffirmed in subsequent decisions of the Privy Council. Some of the rules relating to the nature and incidents of an impartible estate and the right of survivorship were summarised by the Supreme Court in a recent decision (*q*1).

"Where property is held in coparcenary by a joint Hindu family, there are ordinarily three rights vested in coparceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition as the right of an undivided coparcener are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that that right remains" (*r*). The right of survivorship is not affected by the impartible nature of the property, so that if the family were joint and the last holder died intestate, the estate would devolve by survivorship according to the rules stated in § 591 below. A member of such impartible joint estate may renounce his rights of succession, but such renunciation must be in favour of all the members or of the head of the family as representing all the members (*s*).

The right to bring about a partition cannot be inferred from the power of alienation that the holder of the impartible estate may possess. From the existence of the one power the other cannot be deduced, as it is destructive of the very nature and character of the estate (*t*).

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(*n*) *Aparna* v. *Sree Shiba Prashad* (1924) 3 Pat. 367, 83 I.C. 623, ('24) A.P. 451.

(*o*) *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil* (1943) 70 I.A. 232, at p. 243.

(*p*) *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 211-213, 43 All. 228, 60 I.C. 534; *Konammal* v. *Annadana* (1928) 55 I.A. 114, 51 Mad. 189, ('28) A.P.C. 68.

(*q*) *Sellapa* v. *Suppan* (1937) Mad. 906, 171 I.C. 216, ('37) A.M. 496.

(*qq*) *Shibaprasad Singh* v. *Prayag Kumari Debi* f.n. (*m*) *supra*.

(*qqq*) *Thyagsundardoss* v. *Sevuga Pandia* ('65) A.S.C. 1730. Also see *Pushpavathi* v. *P. Viswes-*

*war* ('64) A.S.C. 118.

(*q*1) *Krishna* v. *Sarvagna Krishna* ('70) A.S.C. 1795. Reference may also be made to *State of U.P.* v. *Rukmini Raman* ('71) A.S.C. 1687 (maintenance and survivorship).

(*r*) *Naraganti* v. *Venkatachalapati* (1882) 4 Mad. 250, 266, approved in *Kachi Kalitana* v. *Kachi Yuva* (1905) 32 I.A. 261, 28 Mad. 508; and *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 43 All. 228, 60 I.C. 534, ('21) A.P.C. 62.

(*s*) *Chinnathayi* v. *Kulasekarapandia* (1946) Mad. 599.

(*t*) *Chinnathayi* v. *Kulasekara Pandiya Naicker* (1952) S.C.R. 241, (1952) S.C. 29.

**588. Alienation of impartible property.**—The impartibility of an estate, does not as a matter of law make it inalienable. The holder of an impartible estate has power to alienate the estate, though ancestral, by gift or by will, unless the power of alienation is excluded by special family custom or by the nature of the tenure (*u*). The absence of any instance in which a previous holder has alienated the estate by gift or will is not by itself sufficient evidence to establish such a custom (*v*).

Where the estate is by custom inalienable, the holder cannot alienate it except for legal necessity (*w*) [§ 528].

Soon after some of the Privy Council decisions referred to above the Madras Legislature stepped in because they rudely disturbed the view held in Madras on the subject of alienations and passed the *Madras Impartible Estates Acts of 1902, 1903 and 1904 and the Arni Jagir Act, 1909.* The result of those Acts is that the question of alienability of impartible estates does not depend in Madras on family custom but is governed by those statutes. Reference may be made to decisions under those Acts. Reference may also be made to *Madras Impartible Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1948.* Also see *Pushpavathi* v. *P. Visweswar* ('64) A.S.C. 118.

**589. Right to maintenance out of impartible property.**—(1) No coparcener has any present rights in an impartible estate [§ 587]. Apart, therefore, from custom and relationship to the holder, the junior members of the family have no right to maintenance out of such estate (*x*). The Judicial Committee has held that the illegitimate sons of a junior member are not, under the Law, entitled to maintenance. In the particular case the claim was also based on a deed of maintenance. Their Lordships held that the words "Purusha santhathi either by way of Aurusa or by way of adoption" do not include an illegitimate son (*y*).

(2) Where an impartible estate is held as ancestral or joint family property, the *sons* of the holder thereof are entitled, by custom, to maintenance out of the estate. This custom has so often been judicially recognized that it is not necessary to prove it in each case (*z*). But where the impartible property is the self-acquired property of the holder, his son is not entitled to maintenance out of it (*a*).

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(*u*) *Sartaj Kuari* v. *Deoraj Kuari* (1888) 15 I.A. 51, 10 All. 272 [gift]; *Sri Raja Rao Venkata Surya* v. *Court of Wards* (1899) 26 I.A. 83, 22 Mad. 383; *Protap Chandra* v. *Jagadish Chandra* (1927) 54 I.A. 289, 54 Cal. 955, 102 I.C. 599, ('27) A.P.C. 159; *Raja Madhusudan* v. *Kheshtabasi* (1929) 8 Pat. 932, 121 I.C. 462, ('30) A.P. 137, where it was held dissenting from *Gopal Prosad* v. *Raghunath* (1905) 32 Cal. 158, that the Killajat Mahal of Orissa known as Patia Killah was alienable; *Rao Bhimsingh* v. *Fakirchand* (1947) Nag. 649. Also see *Thyagsundardoss, supra* [Will: On construction held to be absolute estate].

(*v*) *Protap Chandra* v. *Jagadish Chandra, supra.*

(*w*) *Gopal* v. *Raghunath* (1905) 32 Cal. 158.

(*x*) *Raja Rama Rao* v. *Raja of Pittapur* (1918) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A.P.C. 81, affirmg. *Sri Rajah Row* v. *Rajah of Pittapur* (1916) 39 Mad. 396, 29 I.C. 356, ('16) A.M. 27, (1927) 54 I.A. 289, 54 Cal. 955, 102 I.C. 599, ('27) A.P.C. 159, *supra.*

(*y*) *Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu* v. *Raja Rajeswara Rao & Ors.* (1942) Mad. 419, 198 I.C. 166, 68 I.A. 181, ('42) A.P.C. 3; *Chelladorai* v. *Chinnathambiar* (1960) Mad. 880, ('61) A.M. 42 [custom].

(*z*) *Sri Rama Rao* v. *Raja of Pittapur* (1921) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A.P.C. 81; *Sartaj Kuari* v. *Deoraj Kuari* (1888) 15 I.A. 51, 10 All. 272; *Raja Yarlagadda* v. *Yarlagadda* (1900) 27 I.A. 151, 24 Mad. 147; *Kachi Kalitana* v. *Kachi Yuva* (1905) 32 I.A. 261, 28 Mad. 508.

(*a*) *Subbayya Thevar* v. *Marudappa Pandian* (1937) Mad. 42, ('36) A.M. 828; *Hargovind Singh* v. *Collector of Etah* (1937) All. 292, 169 I.C. 744, ('37) A.A. 377.

As regards maintenance of wife see the undermentioned case (*a*1).

(3) There is no invariable custom by which any member of the family beyond the first generation from the last holder [*e.g.*, the last holder's grandsons] can claim maintenance as of right (*b*).

*Illustration*

The holder of an impartible Raj adopts a son to him. He then devises the Raj by will to a son born of one of his wives after the adoption. After the Raja's death a son of the adopted son sues the devisee for maintenance. No evidence is given of any special custom by which grandsons of the last holder can claim maintenance as of right. Is the plaintiff entitled to maintenance? No. He cannot claim maintenance as a coparcener, for no coparcener has any *present* rights in an impartible property [§ 587]. He is not entitled to maintenance on the ground of personal relationship, for a Hindu is under no personal obligation to maintain a *grandson* [§ 542]. Nor is he entitled to maintenance by custom, there being no evidence of any special custom: *Raja Rama Rao* v. *Raja of Pittapur* (1918) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A.P.C. 81.

Grants made out of the revenues of an impartible estate for the maintenance of the junior members of the family and their direct male line revert, on the death of the last male heir of the grantee, to the estate (*c*).

The amount of maintenance payable to a junior member of a family holding an impartible estate as such is not assessable to income-tax (*d*).

The income of the house property (part of an impartible estate) to which the assessee has succeeded by the rule of *primogeniture* is not chargeable in his hands for the purposes of section 9 of the Income-tax Act as an individual. But interest is so chargeable for purposes of sections 8 and 12 (*e*).

An illegitimate son of the holder of an impartible estate may by operation of a custom to that effect be entitled to maintenance out of the estate (*e*1).

*Succession to impartible estate*

**590. General principles.**—(1) The general principles in regard to succession to an impartible estate are well established. The *first principle* is that the succession is governed by the rules which govern the succession to *partible* property, subject to such modifications only as flow from the character of the property as an impartible estate. *The second principle* is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. *The third principle* is that, in the absence of a special custom, the rule of primogeniture furnishes a ground of preference. In determining the single heir, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible, regard being had to its nature as joint or separate property, and we have next to select the single heir, applying the special rule (*f*).

(*a*1) *Chandrakunverba* v. *Randhirsinhji* ('65) A. Guj. 270.

(*b*) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A.P.C. 81, *supra*; *Nilmony* v. *Hingoo Lall* (1880) 5 Cal. 256, 259. In Madras the rule is now modified by Madras Act XII of 1934.

(*c*) See *Durgadut* v. *Rameshwar* (1909) 36 I.A. 176, 36 Cal. 943, 4 I.C. 2 [Babuana grant]; *Ekradeshwar* v. *Janeshwari* (1914) 41 I.A. 275, 42 Cal. 582, 25 I.C. 417, (1914) A.P.C. 76 [Sohag grant] *Someshwari Prasad* v. *Mahaeshwari Prasad* (1936) 63 I.A. 441, 16 Pat. 1, 165 I.C. 347, ('36) A.P.C. 332.

(*d*) *Commissioner of Income-tax* v. *Zamindar of Chemudu* (1934) 57 Mad. 1023, 151 I.C. 926, ('34) A.M. 608; *Vijayananda Gajpatiraj* v. *Commissioner of Income-tax* (1934) 56 All. 1009.

(*e*) *Commissioner of Income-tax, Punjab* v. *Krishna Kishore* (1942) Lah. 1, 196 I.C. 707, 68 I.A. 155, ('41) A.P.C. 120.

(*e*1) *Chelladorai* v. *Chinnathambiar* ('61) A.M. 42.

(*f*) *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316, 325, cited with approval in *Parbati Kunwar* v. *Chandarpal Kunwar* (1909) 36 I.A. 125, 31 All 457, 475-476, 4 I.C. 25; *Katama Natchiar*

These principles were reiterated in a recent decision of the Supreme Court (*f*1).

(2) *Sons.*—According to the rule of primogeniture, if the last owner dies leaving sons, the eldest son is entitled to succeed. The eldest son is the son who was born first, not the first born son of the senior wife (*g*), unless there is a family custom that the sons take rank according to the seniority of their mothers (*h*). Therefore the son of a junior wife succeeds in preference to the later born son of a senior wife, or of the first married wife.

So long as the line of the eldest son continues in possession, the estate will pass in that line. That is to say, on the death of the eldest son, leaving sons, it will pass to his eldest son and not to his brother (*i*). See ill. to § 591. As to the effect of adoption in families owning impartible estate on other branches see §§ 472 and 506.

If an aurasa son is born after the adoption, the former alone succeeds to the impartible estate (*j*).

(3) *Illegitimate son of a Shudra.*—If the holder of an impartible estate, belonging to the Shudra caste, dies leaving a legitimate son and also an illegitimate son, the legitimate son would be preferred to the illegitimate son; this seems to follow from the fact that on a partition the legitimate son is so largely preferred (*k*). If there has been no partition between the sons, and the legitimate son dies without leaving male issue, but leaving a widow and daughters, the illegitimate son would, as in the case of partible property, succeed by survivorship in preference to the widow and daughters of the legitimate son (*l*) [§ 312]. It has been held by the Madras High Court that in the case of an impartible estate descendible to a single heir, the widow excludes the illegitimate son from inheritance (*m*).

(4) *Whole and half blood.*—Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to *coparcenary* property which is partible, and it is likewise no ground of preference when such property is impartible. Therefore, in a *joint* family, an elder brother of the half-blood is entitled to succeed to an impartible ancestral estate in preference to a younger brother of the whole blood. But the latter would succeed in preference to the former, if the estate was separate or self-acquired property of the last holder (*n*), or if the case was governed by the Dayabhaga (*o*).

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v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 2 W.R.P.C. 31; *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 212, 43 All. 228, 244, 60 I.C. 534, ('21) A.P.C. 62; *Muttuvaduganadha Tevar* v. *Periasami* (1896) 23 I.A. 128, 137, 19 Mad. 451, 457; *Raja Jogendra* v. *Nitayanund* (1891) 17 I.A. 128, 131, 18 Cal. 151, 154.

(*f*1) *Dayaram* v. *Dawlatshah* ('71) A.S.C. 681.

(*g*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M.I.A. 570, 17 W.R. 553; *Jagdish Bahadur* v. *Sheo Partab* (1901) 28 I.A. 100, 23 All. 369.

(*h*) *Ramasami* v. *Sundaralingasami* (1894) 17 Mad. 422, affmd. in *Sundaralingasami* v. *Ramasami* (1899) 26 I.A. 55, 22 Mad. 515.

(*i*) (1894) 17 Mad. 422, 434, *supra.*

(*j*) *Sahebgouda* v. *Shiddangouda* (1939) Bom. 314.

(*k*) *Ramasami* v. *Sundaralingasami* (1894) 17 Mad. 422, 434-435.

(*l*) *Raja Jogendra* v. *Nityanund* (1891) 17 I.A. 128, 131, 18 Cal. 151, 154.

(*m*) *Thangavelu* v. *The Court of Wards, Madras,* (1947) Mad. 334.

(*n*) *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316, also 17 Mad. 422, *supra.*

(*o*) *Neelkisto Deb* v. *Beer Chunder* (1869) 12 M.I.A. 523, 12 W.R.P.C. 21 [the Tipperah Raj case].

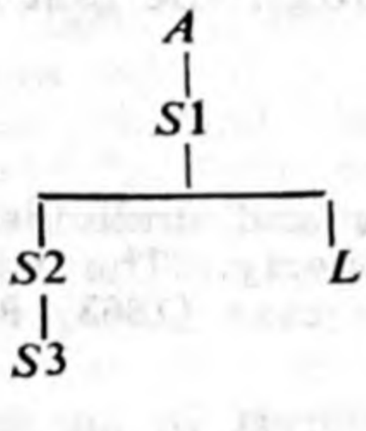
(5) *Fresh stock of descent.*—As in the case of succession to partible property, so in the case of impartible property each male owner becomes a fresh stock of descent (*p*).

**591. Where estate ancestral, and last owner undivided.**—(1) Where the impartible estate is ancestral, the successor to the estate in a joint family governed by the Mitakshara is designated by survivorship. The estate passes by survivorship from one line to another according to primogeniture, and devolves not on the member nearest in blood, but on the eldest member of the senior branch (*q*).

(2) In the absence of custom a female cannot inherit an impartible ancestral estate belonging to a joint family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed to the estate (*r*). But where she is the widow of the last survivor, the law of succession to separate property applies, and she can succeed as in the case of partible property (*s*) [§ 592].

*Illustration*

In the accompanying diagram, *A* stands for the last holder; *S*1 is his son, *S*2 and *L* are two sons of *S*1, *L* being the younger of the two; *S*3 is the son of *S*2. *A* dies leaving *S*3 and *L*. *S*3, being the surviving member of the *senior line*, is entitled to succeed in preference to *L*, though *L* is one degree nearer to the common ancestor (*A*) than *S*3: *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 43 All. 228, 60 I.C. 534, ('21) A.P.C. 62.




**592. Where estate ancestral, but last owner divided.**—(1) Where the impartible estate is ancestral, but the last holder was separated, the estate in cases governed by the Mitakshara will descend according to the ordinary rules of succession applicable to partible property (*t*). Thus if the last holder dies without leaving male issue, but leaving a widow, the estate will pass, in the absence of any custom to the contrary, to the widow (*u*), and, if there be no widow to his daughter (*v*). If there be none of these, the estate will, if there be no indication to the contrary, descend according to the rule of primogeniture. In that case if there are more persons than one standing in the same degree of relationship to the last holder, the eldest, if all belong to the same line, and the eldest in the senior branch, if there are more branches than one, will be the preferable heir [§ 43].

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(*p*) *Muttuvaduganadha Tevar* v. *Periasami* (1896) 23 I.A. 128, 19 Mad. 451.

(*q*) *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 43 All. 228, 60 I.C. 534, ('21) A.P.C. 62 affmg. 38 All. 590, 38 I.C. 894; *Kachi Kalitana* v. *Kachi Yuva* (1905) 32 I.A. 261, 28 Mad. 508; *Naraganti* v. *Nayanivaru* (1882) 4 Mad. 250; *Sahebgouda* v. *Basangouda* (1931) 33 Bom. L.R. 580, 133 I.C. 847, ('31) A.B. 378; *Shibaprasad Singh* v. *Prayagkumari Debee* (1932) 59 Cal. 1399, 59 I.A. 331, 138 I.C. 861, ('32) A.P.C. 216; *Rao Bhimsingh* v. *Fakirchand* (1947) Nag. 649.

(*r*) *Hiranath Koer* v. *Baboo Ram* (1872) 9 Beng. L.R. 274; *Chowdry Chintamun* v. *Mussmut Nowlukho* (1875) 2 I.A. 263, 1 Cal. 153.

(*s*) See *Sri Rajah Yenumula* v. *Sri Rajah Yenumula* (1870) 6 Mad. H.C. 93, 109.

(*t*) *Chuni Lal Official Receiver* v. *Jai Gopal* (1936) 17 Lah. 378, 163 I.C. 103, ('36) A.L. 55.

(*u*) *Thakurani Tara Kumari* v. *Chaturbhuj* (1915) 42 I.A. 192, 42 Cal. 1179, 30 I.C. 833, ('15) A.P.C. 30. See also *Sri Rajya Lakshmi Devi* v. *Sri Raja Surya* (1897) 24 I.A. 118, 20 Mad. 256.

(*v*) See *Mst. Parbati Kunwar* v. *Chandrapal Kunwar* (1909) 36 I.A. 125, 31 All. 457, 4 I.C. 25 [custom applicable both to partible and impartible estates].

(2) The onus of proving a custom excluding females from succession to a separate impartible estate rests upon the person who sets up the custom (*w*). Such a custom may not be valid after the Constitution of India came into force in 1950 as Arts. 14 and 15 thereof guarantee equality before law and non-discrimination on account of sex.

In some cases another rule of selection and not primogeniture may be the governing rule of the family (*x*).

**593. Proof of separation where estate ancestral.**—In order to establish that an impartible estate has ceased to be joint property for the purpose of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family, to give up their chance of succeeding to the estate. A mere separation in general status is not sufficient (*y*). The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the estate or a relinquishment of the right of succession and an intention to impress upon the estate the character of separate property (*z*).

**594. Where estate self-acquired.**—Where an impartible estate is self-acquired property, the estate in cases governed by the Mitakshara follows the course of succession as to separate property [§ 592], though the last holder was undivided at the time of his death (*a*) [§ 43].

*Illustration*

The holder of an impartible Zamindari dies leaving a widow and undivided nephews. It is proved that the Zamindari was his self-acquired property. The widow is entitled to succeed in preference to the nephews: *The Shivagunga* case (1863) 9 M.I.A. 539.

A Hindu governed by Mitakshara law who took a vested interest in an ancestral impartible estate under a deed of settlement executed by his father while his elder brother was alive and before the coming into force of the Madras Impartible Estates Act took the estate as self-acquired property. His widow succeeds to him as heir in preference to his half-brother (*b*).

**594A. Execution of decree against successor.**—A decree was passed against the holder of an impartible estate for compensation in lieu of specific performance of a contract to transfer a part of the estate. It was held that as the decree was passed against the defendant in a representative capacity it could be executed against his son and successor (*c*).

**595. Dayabhaga school.**—In cases governed by the Dayabhaga, the heir will be the eldest member of the class of persons which is nearer of kin to the last owner than any other class [§ 88].

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(*w*) *Amarendra* v. *Banamali* (1931) 10 Pat. 1, 123 I.C. 770, ('30) A.P. 417; *Chattar Singh* v. *Roshan Singh* (1946) Nag. 159.

(*x*) *Ishri Singh* v. *Baldeo Singh* (1884) 11 I.A. 135, 10 Cal. 792; *Achal Ram* v. *Udai Partab* (1884) 11 I.A. 51, 10 Cal. 511; *Mohesh Chunder* v. *Satrughan* (1902) 29 I.A. 62, 29 Cal. 343.

(*y*) *Konammal* v. *Annadana* (1928) 55 I.A. 114, 51 Mad. 189, 108 I.C. 354, ('28) A.P.C. 68; *Jagadamba Kumari* v. *Narain Singh* (1923) 50 I.A. 1, 2 Pat. 319, 77 I.C. 1041, ('23) A.P.C. 59; *Ram Sundar* v. *Collector of Gorakhpur* (1930) 52 All. 793, 126 I.C. 237, ('30) A.A. 797, affirmed by P.C. in *Collector of Gorakhpur* v. *Ram Sundar Mal* (1934) 56 All. 468, 61 I.A. 286, 150 I.C. 545, ('34) A.P.C. 157; *Lingappa-alias Rayappa* v. *Kadappa Bapurao* (1940) Bom. 721, 191 I.C. 504, ('41) A.B. 345.

(*z*) *Chinnathayi* v. *Kulasekara Pandiya Naicker* (1952) S.C.R. 241, (1952) S.C. 29; *Jitendra Pratap* v. *Bhagwati Prasad* ('56) A.P. 457; *Gangadhar* v. *Dindayal* (1954) Orissa 57, ('54) A. Orissa 142.

(*a*) *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 2 W.R.P.C. 31; *Periasami* v. *Periasami* (1878) 5 I.A. 61, 1 Mad. 312; *Rao Bhimsingh* v. *Fakirchand* (1947) Nag. 649.

(*b*) *Ulagalum Perumal Sethurayar* v. *Rani Subbalakshmi Nachiar* (1939) Mad. 443.

(*c*) *Rao Bhimsingh* v. *Gangaram* (1941) Nag. 632, 193 I.C. 598, ('40) A.N. 278. Affirmed by the Privy Council in *Rao Bhimsingh* v. *Shersingh* (1947) Nagpur 830 (P.C.).

## CHAPTER XXVIII

# THE LAW OF DAMDUPAT

**596. The rule of damdupat.**—The rule of *damdupat* is a branch of the Hindu law of Debts. According to this rule, the amount of interest recoverable *at any one time* cannot exceed the principal (*d*). See § 600 below for the places in which the rule of damdupat applies. In a decision of the High Court of Rajasthan (*e*) the opinion was expressed that the rule is hit by Article 14 of the Constitution. The operation of the rule does not appear to have been questioned in any other State and effect continues to be given to it in places where it was applied prior to the coming into force of the Constitution. In some States recent legislation affecting transactions of moneylenders prohibits recovery of interest in excess of the principal amount.

*Illustration*

*A* lends Rs. 1,000 to *B* at interest at 15 per cent per annum. *A* allows the interest to run into arrears until it amounts to Rs. 1,200, that is, until it *exceeds* the principal (Rs. 1,000). *A* then sues *B* to recover Rs. 2,200, that is, Rs. 1,000 for principal and Rs. 1,200 for interest. *A* is not entitled to more than Rs. 1,000 for interest, as that is the amount of the principal. But if *B* pays *A* Rs. 400 for interest before suit, and *A* then sues *B* to recover Rs. 1,800, that is, Rs. 1,000 for principal and Rs. 800 for interest *A* is entitled to Rs. 800 for interest, for it *does not exceed* the principal Rs. 1,000, though he will thereby be getting Rs. 1,200 in all for interest. The reason is that the payment of Rs. 400 and the payment of Rs. 800 would be payments *at different times*, and all that the rule of damdupat says is that a creditor is not entitled *at any one time* to recover interest exceeding the amount of the principal. The rule of damdupat does not say that a creditor shall not *in any case* be entitled to interest exceeding the principal. The result is that part payments of interest made before suit cannot be added to the amount of interest claimed in the suit so as to attract the application of the rule of damdupat.

*Reason of the rule.*—The Hindu law did not recognise any rule of limitation for the recovery of debts. Every debt which was lawful was binding and recoverable from the debtor irrespective of the period which may have elapsed since the original liability was incurred. It thus became necessary to impose a restriction on the amount of interest recoverable by the creditor, and such a restriction has been imposed by the rule of damdupat (*f*).

*The Usury Laws Repeal Act,* 1855.—The rule of *damdupat* is not superseded by the Usury Laws Repeal Act, 1855. According to that Act, the Court is bound to award interest at the contract rate, *whatever the rate of interest may be.* But in cases to which the rule of *damdupat* applies, the creditor cannot at any one time recover interest exceeding the amount of the principal (*g*).

*The Limitation Act,* 36 of 1963. The rule of *damdupat* is not affected by the Limitation Act. According to that Act, the period of limitation for a suit for money lent is three years from the date of the loan. A creditor, therefore, may sue for the loan and for arrears of interest for three years, *whatever the interest may amount* to. But in cases to which the rule of *damdupat* applies, he cannot at any one time recover interest exceeding the amount of the principal (*h*).

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(*d*) *Dhondu* v. *Narayan* (1863) 1 Bom. H.C. 47; *Hariram* v. *Madan Gopal* (1928) 33 C.W.N. 493, 497, 114 I.C. 565, ('29) A.P.C. 77.

(*e*) *Sheokaransingh* v. *Daulatram* ('55) A. Raj. 201. Also see I.L.R. (1963) Raj. 385.

(*f*) *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 782, 80 I.C. 684, ('24) A.A. 551 [F.B.]; *Bapurao* v. *Kashinath* (1946) Nag. 407.

(*g*) *Khushalchand* v. *Ibrahim* (1866) 3 Bom. H.C.A.C. 23; *Hakma Manji* v. *Meman Ayab* (1870) 7 Bom. H.C.O.C. 19; *Ganpat* v. *Adarji* (1879) 3 Bom. 312, 338; *Ramconnoy* v. *Johur Lall* (1880) 5 Cal. 867.

(*h*) (1879) 3 Bom. 312, 332, *supra; Hari* v. *Balambhat* (1885) 9 Bom. 233.

The rule cannot apply to case of a trustee who has utilised funds of a temple in his business (*h*1). A trustee is under a pecuniary liability to make good trust funds of which he may personally have made use (breach of trust) but he is not a *debtor* and cannot benefit by the rule of *damdupat* (*h*2).

**597. Where part of the principal has been paid.**—Where a loan is repayable by instalments, and some of the instalments have been paid, or even where it is not payable by instalments but a part thereof has been paid the principal for the purpose of the rule of *damdupat* is the *balance* of principal remaining due when the interest claimed in the suit accrued (*i*).

*Illustration*

*A* lends Rs. 200 to *B* at interest at the rate of 10 per cent per annum. The loan is payable by four instalments of Rs. 50 each. *B* pays the first three instalments and all interest due thereon. *A* then sues *B* to recover the last instalment of Rs. 50 and interest *thereon* amounting to Rs. 65. *A* is not entitled to more than Rs. 50 for interest, that being the amount of principal *remaining due* when the interest accrued. It does not matter that the original principal was Rs. 200.

**598. Capitalization of interest by subsequent agreement.**—The rule of damdupat does not forbid the conversion, by *subsequent* agreement between the debtor and the creditor, of the interest in arrear into capital. Therefore, when a *fresh* bond is passed by the debtor for the *aggregate* amount of the principal and interest due under the *old* bond, the principal for the purpose of the rule of *damdupat* is the amount of the *fresh* bond (*j*).

*Illustration*

*B* borrows Rs. 500 from *A* at interest at the rate of 10 per cent per annum and passes a promissory note to *A* for that amount. No interest is paid by *B* for two years. At the end of the second year, the interest due to *A* is Rs. 100. *A* demands Rs. 500 *plus* Rs. 100 from *B*. *B* is unable to pay the amount, and he passes a *fresh* promissory note to A for Rs. 600, that is, Rs. 500 (principal) *plus* Rs. 100 (interest in arrear), promising to pay interest on the Rs. 600 at the same rate as before. *A* subsequently files a suit against *B* to recover Rs. 600, the principal amount secured by the second promissory note, and Rs. 550, the interest in arrear on that amount. What is the *principal* for the purpose of the rule of damdupat, is it Rs. 500, the amount of the first note, or is it Rs. 600, the amount of the second note? The answer is that it is Rs. 600, the amount of the *second* note. Therefore *A* is entitled to Rs. 550 for interest, for though it exceeds the original principal sum of Rs. 500, it does not exceed the principal payable under the second note, namely, Rs. 600. It does not matter that a part of the principal of Rs. 600 consisted originally of interest. It was quite competent to *A* and *B* *at any time after the date of the first promissory note* to agree that the sum of Rs. 100, which represented the interest in arrear, should be treated as capital so as to carry interest on it. But if *A* and *B* had agreed, when *the original loan of Rs. 500 was made*, that all interest in arrear should be capitalized and should carry interest on it as if it was a principal sum, the agreement could not affect the operation of the rule of damdupat, and *A* would not entitled to more than Rs. 500 for interest.

**599. The rule of damdupat does not apply after suit.**—Where a suit has been instituted to recover a loan, the rule of *damdupat* ceases to operate. The result is that though the Court is bound to apply the rule of *damdupat* up to the date of the suit, it is free to award interest to the creditor at such rate as

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(*h*1) *Phulchand* v. *Hukumchand* ('60) A.B. 438.
(*h*2) *Hukum Chand* v. *Fulchand* ('65) A.S.C. 1692.
(*i*) *Dagdusa* v. *Ramchandra* (1896) 20 Bom. 611; *Nusserwanji* v. *Laxman* (1906) 30 Bom. 452, 454, 62 Bom. L.R. 308.
(*j*) *Sukalal* v. *Bapu* (1900) 24 Bom. 305; *Nawanneetdas* v. *Gordhandas* ('55) A.M.B. 113.

it thinks proper from the date of the suit up to the date of decree or payment upon the total amount that may be found due to him after applying that rule (*k*).

*Illustration*

*A* lends Rs. 1,000 to *B* at interest at the rate of 25 per cent per annum. *A* then sues *B* to recover Rs. 2,500 of which Rs. 1,000 is for principal and Rs. 1,500 is for interest. *A* is not entitled to a decree for more than Rs. 2,000 but the Court may, under section 34 of the Code of Civil Procedure, 1908, award interest on Rs. 2,000 at such rate as it thinks proper *from the date of the suit* up to the date of the decree and it may award further interest on the *aggregate sum* consisting of Rs. 2,000 plus the interest between date of suit and the date of decree at such rate as it thinks proper.

The rule of *damdupat* does not apply to interest recoverable in execution of a decree. The reason is that the rule ceases to operate *after* suit (*l*).

The principle of this section applies not only to a suit brought by a creditor, but to a suit for redemption brought by a mortgagor (debtor).

In a mortgage suit the relation of creditor and debtor subsists between the parties till the date of payment fixed under the preliminary decree. The operation of *damdupat* consequently is from the date of mortgage to the date fixed for payment in the preliminary decree. If on any intermediate date the limit imposed by the rule of damdupat is reached no further interest can be granted under O. 34, rule 11, because the interest cannot be said to be legally recoverable within the meaning of the rule (*m*).

**600. Places in which the rule of damdupat applies.**—The rule of *damdupat* applies in the Bombay State (*n*). It applies also in the town of Calcutta (*o*), but not in any other part of Bengal (*p*). The rule is not given effect to in the State of Rajasthan (*q*); or in any part of the Madras State (*r*); or the Uttar Pradesh (*r*1). The rule is applied by section 6 of the Sonthal Parganas Settlement Regulation to money debts in the Sonthal Parganas (*s*). It applies to Berar when the creditor and debtor are Hindus (*t*).

**601. Persons entitled to claim benefit of the rule.**—(1) According to the Calcutta High Court, the rule of *damdupat* applies only where both the original contracting parties are Hindus (*u*).

(2) According to the Bombay High Court all that is necessary for the application of the rule is that the original *debtor* should be a Hindu. The result is that the rule does not apply if the *original* debtor was a Mahomedan, though the debt might be subsequently transferred to a Hindu (*v*).

The rule does not apply if the original *debtor* was a Mahomedan, though the creditor might be a Hindu (*w*). But the rule does apply if the original debtor was a Hindu, though the creditor might be a Mahomedan (*x*).

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(*k*) Code of Civil Procedure, 1908, section 34; *Dhondshet* v. *Ravji* (1898) 22 Bom. 86; *Majmundar Hiralal* v. *Narsilal* (1913) 37 Bom. 326, 40 I.A. 68, 73, 18 I.C. 909; *Achyut* v. *Ramachandra* (1925) 27 Bom. L.R. 492, 87 I.C. 719, ('25) A.B. 362; *Hari Lall, in the matter of* (1906) 33 Cal. 1269, 1276; *Nanda Lal* v. *Dhirendra Nath* (1913) 40 Cal. 710, 21 I.C. 974.

(*l*) *Balkrishna* v. *Gopal* (1875) 1 Bom. 73; *Lall Behary* v. *Thacomoney* (1896) 23 Cal. 899.

(*m*) *Bapurao* v. *Anant* (1946) Nag. 407.

(*n*) *Narayan* v. *Satvaji* (1872) 9 Bom. H.C. 83, 85.

(*o*) *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781.

(*p*) *Het Narain* v. *Ram Dein* (1883) 9 Cal. 871.

(*q*) *Sheokaransingh* v. *Daulatram* ('55) A. Raj. 201 (F.B.).

(*r*) *Annaji* v. *Ragubai* (1871) 6 Mad. H.C. 400.

(*r*1) *Kamta Prasad* v. *Parbati* (1958) 56 All. L. J. 920.

(*s*) *Kunja Behari* v. *Tarapada* (1919) 4 Pat. L.J. 49, 49 I.C. 374, ('19) A.P. 324.

(*t*) *Bapurao* v. *Anant* (Supra).

(*u*) *Wooma* v. *Sreebarinath* (1897) 1 C.W.N. (short notes) 178, Page cixxviii; cf. (1887) 14 Cal. 781, *supra*.

(*v*) *Harilal* v. *Nagar* (1897) 21 Bom. 38.

(*w*) *Nanchand* v. *Bapusaheb* (1879) 3 Bom. 131. See *Dawood* v. *Vullubhdas* (1894) 18 Bom. 227.

(*x*) *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

Where there are two debtors, a Hindu and a non-Hindu, the rule applies so far as the Hindu debtor is concerned. But this does not prevent the non-Hindu debtor from claiming contribution from the former on the basis of the actual payment made by him to the creditor (*y*).

When the original debtor is a Hindu, and the interest is allowed to accumulate so that it exceeds the principal, and the debt is then transferred to a Mahomedan, the rule of *damdupat* will apply so long as the debtor was a Hindu, but it will cease to operate from the date the debt was assigned to the Mahomedan (*z*). [ill. (2)].

*Illustrations*

(1) A Mahomedan, *M* borrows, Rs. 61 at interest from a Hindu, *X*, and mortgages his property to *X* as a security for the loan. *M* then sells his equity of redemption to a Hindu, *H*, *X* sues *H* to recover Rs. 270, Rs. 61 being principal and Rs. 209 for interest. *H* contends that he and *X* being Hindus, the rule of *damdupat* applies, and that *X* is not entitled to more than Rs. 61 for interest. The rule of *damdupat* does not apply, for the *original* debtor was a Mahomedan, and *X* is entitled to a decree for Rs. 270; *Harilal* v. *Nagar* (1897) 21 Bom. 38.

(2) A Hindu, *H*, borrows Rs. 150 at interest at the rate of 12 per cent per annum from a Mahomedan, *X*, on a mortgage of his immovable property. *H* then sells his equity of redemption to a Mahomedan, *M*. *X* sues *M* to recover Rs. 750, Rs. 150 being principal and Rs. 600 for interest from the date of the mortgage up to the date of the suit. *X* is entitled to Rs. 300 (*i.e.*, double the principal Rs. 150) *and the interest thereon* at the aforesaid rate from the date of the sale to *M*. If *H* had not sold his equity of redemption to *M*, and the suit had been brought against *H*, *X* would not have been entitled to more than Rs. 300: *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

**602. To what transactions the rule applies.**—(1) The rule of damdupat applies not only to unsecured loans, but to loans secured by a pledge of movable property and those secured by a mortgage of immovable property (*a*).

(2) In the case of a mortgage with possession a distinction has to be made between two classes of cases, namely—

(a) where the amount of the annual rents and profits is fixed beforehand by the parties and it is agreed between the parties that the mortgagee is to receive that amount *in lieu* of interest or a part thereof, irrespective of the *actual* amount of rents that may be recovered by the mortgagee;

(b) where no such amount is fixed, and there is no such agreement between the parties, so that the mortgagee is under a *liability to account* to the mortgagor for the rents and profits received by him from the mortgaged property.

In the first case no account is to be taken of the rents and profits, and all that has to be done is to ascertain what amount is due to the mortgagee for principal and interest as in the case of a simple loan. To such a case the rule of *damdupat* applies as it does in the case of an ordinary loan (*b*).

In the second case the mortgagee is under a liability to account for the rents and the profits received by him from the mortgaged property, and the

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(*y*) *Maha Maya Dasee* v. *Abdur Rahim* (1937) 1 Cal. 450, 172 I.C. 731, ('37) A.C. 752.

(*z*) See *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

(*a*) *Nathubhai* v. *Mulchand* (1868) 5 Bom. H.C.A.C. 196, 198; *Narayan* v. *Satraji* (1872) 9 Bom. H.C. 83.

(*b*) *Sundarabai* v. *Jayavant* (1900) 24 Bom. 114; *Nathubhai* v. *Mulchand* (1868) 5 Bom. H.C.A.C. 196; *Vithal* v. *Daud* (1869) 6 Bom. H.C.A.C. 90; *Narayan* v. *Satraji* (1872) 9 Bom. H.C. 83; *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85, 87; *Ganpat* v. *Adarji* (1879) 3 Bom. 312.

rule of *damdupat* does not apply (*c*). "As the mortgagee is to be charged with rents and profits it would not be just to stop his interest and consequently the rule of [*damdupat*] cannot be applied" (*d*).

*Illustrations*

(1) *A* borrows Rs. 1,000 from *B* at interest at the rate of 20 per cent per annum. As a security for the loan *A* mortgages his house to *B* and puts *B* in possession of the house. At the date of the mortgage the house is occupied by *A*'s tenants. It is agreed between *A* and *B* that *B* should receive the rents from the tenants, that the yearly rents should be taken at Rs. 150, and that *A* should pay to *B* every year Rs. 50, being the balance of interest on Rs. 1,000 [Rs. 200 interest — Rs. 150 rent = Rs. 50]. *B* sues *A* to recover Rs. 2,200 being Rs. 1,000 for principal and Rs. 1,200 for interest. Is *B* entitled to recover Rs. 1,200 for interest? No, for as no accounts are to be rendered by *B*, the rule of *damdupat* applies, and *B* is therefore entitled to Rs. 1,000 only for interest. The decree will therefore be for Rs. 1,000 + Rs. 1,000 = Rs. 2,000.

(2) The facts are the same as in ill. (1), except that there is no agreement between *A* and *B* that *B* should take the rents in lieu of interest. In such a case, if *B* sued *A* on the mortgage, *B* would be *liable to account* for the rents received by him and the rule of *damdupat* would not therefore apply. The result is that if it be found on the taking of accounts that the amount due to *B*, after giving credit to *A* for the rents, is Rs. 2,300, *B* will be entitled to a decree for Rs. 2,300, and not merely for Rs. 2,000 as in ill. (1).

**603. Mortgages executed after the passing of the Transfer of Property Act, 1882.**—It has been held by the High Court of Madras that the rule of *damdupat* does not apply to mortgages executed after the Transfer of Property Act, 1882, came into force (*e*). A different view has been taken by the High Courts of Bombay (*f*), Calcutta (*g*) and Nagpur (*h*). In any case the effect of the rule is exhausted when the matter passes into the domain of judgment. Hence in a suit on mortgage, the Court can allow interest after the date fixed for redemption even though the amount which the plaintiff may ultimately recover in execution may exceed *damdupat* (*l*).

It has been stated above in section 5 that the rule of *damdupat* is not in force in the Madras State. In the case cited above, the High Court of Madras held that even assuming that rule to be in force in the town of Madras, it did not apply to mortgages executed *after* the Transfer of Property Act, 1882, came into force, the reason given being that under sections 86 and 88 of that Act a mortgagee was entitled to the principal and interest in arrears *at the contract rate*, even if it exceeded the principal. Section 86 of that Act provided for a decree *inter alia* for what was due to the mortgagee for "principal and *interest* on the mortgage." See now the Code of Civil Procedure, 1908, O. 34 rr. 2 and 4.

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(*c*) *Gopal* v. *Gangaram* (1896) 20 Bom. 72, [F.B.]; *Dhondshet* v. *Ravji* (1898) 22 Bom. 86.

(*d*) Per Couch, C.J., in *Nathubhai* v. *Mulchand* (1868) 5 Bom. H.C.A.C. 196, 199.

(*e*) *Madhwa* v. *Venkatramanjulu* (1903) 26 Mad. 662.

(*f*) *Jeewanbai* v. *Manordas* (1911) 35 Bom. 199, 8 I.C. 649.

(*g*) *Kunja Lal* v. *Narsamba* (1915) 42 Cal. 826, 31 I.C. 6, ('16) A.C. 542.

(*h*) *Bapurao* v. *Anant* (1946) Nag. 407.

(*i*) *Devidas* v. *Yeotmal Central Bank* ('56) A.N. 239.

## CHAPTER XXIX

# BENAMI TRANSACTIONS

**604. Benami transaction.**—Where a person buys property with his own money, but in the name of another person or buys property in his own name, but subsequently transfers it into the name of another person, *without any intention in either case to benefit such other person,* the transaction is called "benami", and the person in whose name the transaction is effected is called "benamidar".

The benami system in India is not a speciality of Hindu law. Within its legitimate scope it accords with the ideas and habits of the people and the Court recognises and gives effect to benami transactions on the principle that recognition should be given to the real and not the nominal title to property unless to do so would be contrary to any provisions or policy of law. Benami transactions among Mahomedans are more commonly known as *furzee.* The word *benami* is a Persian compound word, made up of *be* which means *without* and *nam* which means *name.* It means literally *without a name,* and denotes a transaction effected by a person *without* using his own *name,* but in the name of another. The practice of putting property into a false name, that is, the name of a person other than the real owner, is not uncommon. This practice has arisen partly from superstition—some persons and some names being considered as lucky, and others as unlucky. Partly also the practice is due to a desire to conceal family affairs from public observations. But many transactions originate in fraud; and many of them which did not so originate are made use of for a fraudulent purpose; more especially for the purpose of keeping out creditors who are told when they come to execute a decree, that the property belongs to the fictitious owner, and cannot be seized (*j*).

Benami transactions are not confined solely to *purchases* by one person in the name of another. Thus a person may take a *lease* of property in the name of another, or he may buy property in his own name and subsequently *convey or mortgage* it to another for a fictitious consideration.

## TRANSACTIONS

**605. Effect given to real title.**—Where a transaction is once made out to be benami, effect will be given to the real and not to the nominal title, unless the result of doing so would be—

(i) to violate the provisions of a statute [§ 606 below]; *or*

(ii) to defeat the rights of innocent transferees for value from the benamidar [§ 607 below]; *or*

(iii) the object of the benami transaction was to defraud the creditors of the real owner, and that object has been accomplished [§ 608 below]; *or*

(iv) the transaction is against public policy [§ 609 below].

*Effect given to real title.*—There is no law which prohibits benami transactions: in other words, it is not an offence or a crime for *A* to buy property in the name of *B.* Therefore, where *A* has bought property in the name of *B,* and *B* subsequently chooses to say that he is the real owner, it is quite competent to *A* to bring a suit against *B* to establish his title and to recover possession of the property from *B,* and if it is proved that the purchase-money came out of *A's* funds the Court will pass a decree declaring that *A* is the real owner, and direct *B* to deliver possession of the property to *A* (*k*). Similarly, if property is bought by *A* in *B's* name, and *C,* a creditor of *A,* subsequently obtains a

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(*j*) Markby's "Hindu and Mahomedan Law," p. 103.

(*k*) *Thukrain* v. *Government* (1871) 14 M.I.A. 112.

decree against *A*, it is competent to *C* to show that the property really belongs to *A*, and if this fact is proved, the property may be attached and sold to satisfy *C*'s decree (*l*).

*Resulting trusts and advancement of wife and children.*—It is important to note that the law of benami is in no sense a branch of Hindu law. It is merely an application of the equitable rule that where there is a purchase by *A* in the name of *B*, there is a resulting trust of the whole to *A*. In this respect the general rule of the Indian law, which is laid down in the Indian Trusts Act, 1882, sec. 82 differs but little, if at all, from the general rule of English law on the subject. In both systems of law, the fact to be first determined is *from what source the money came with which the purchase-money was paid.* But in England there is an exception when a purchase is made by a person in the name of his *child* or *wife*, though with his own money. In such a case, the transaction is presumed to have been made by way of advancement or gift to the child or wife, and the burden of proving that there was no advancement or gift lies on the person who so alleges it. But this exception is not recognised in India. In this country, where a purchase is made by a person with his own money—it is *prima facie* assumed to be for his benefit, whether it is made in the name of a child (*m*), wife (*n*), or a stranger, and there is no presumption in favour of an advancement or gift such as there is in the English law. The burden therefore of proving an advancement or gift lies on the person alleging that there was an advancement or gift. In *Gopeekrist* v. *Gungapersaud* (*o*), their Lordships of the Privy Council said: "Benami purchases in the names of children, without any intention of advancement, are frequent in India." But this rule of Indian law does not apply to transactions where both parties are English, not even if they were born in India (*p*), though the transactions may have taken place in India and the property may be situated in India (*q*). The general rule in India in the absence of all other relevant circumstances in thus stated by Lord Campbell in *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah* (*r*): "The *criterion in these cases in India is to consider from what source the money came with which the purchase-money is paid.*"

In cases of this kind it is material to enquire who enjoyed the income of the property, whether the real owner or the person in whose name the property was bought. Thus where property was purchased by *A* with his money in the name of *B*, and the question arose whether the purchase was benami as alleged by *A* or intended to be a gift for *B* in return for his services as alleged by *B*, their Lordships of the Privy Council held that evidence of *B*'s possession for nine and a half years without being called on by *A* to account for the rents, and of *B*'s performance of valuable services sufficient to establish a claim on *A*'s generosity, was decisive in favour of a gift (*s*). It is also material in cases of this kind to inquire into the position of the parties and their relation to one another and the motives which could govern their actions. Thus where property was purchased by a Mahomedan lady in her daughter's name and the transfer was impeached by her son after death as benami, their Lordships held that the resulting inference that it was a benami transaction was rebutted by the evidence of gift, and by the proved intention of mother to exclude the son with whom she was on hostile terms from inheritance (*t*).

*Deposit by husband of his own money in bank in the names of himself and his wife.*—The deposit by a Hindu of his own money in a bank in the joint names of himself and wife, and on the terms that it is to be payable to either or the survivor does not in his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife (*u*).

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(*l*) *Musadee Mahomed* v. *Meerza Ally* (1854) 6 M.I.A. 27; *Gopi Wasudev* v. *Markande* (1879) 3 Bom. 30; *Abdul Hye* v. *Mir Mahommed* (1884) 10 Cal. 616, 11 I.A. 10.

(*m*) *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 557, 133 I.C. 628, ('31) A.L. 419; *Gopal* v. *Kesheosa* (1936) Nag. 65, 165 I.C. 350, ('36) A.N. 185; *Jetharam* v. *Hazarimal* ('52) A. Raj. 28.

(*n*) *Dharani Kant* v. *Kristo Kumari* (1886) 13 Cal. 181; *Mst. Thakro* v. *Ganga Pershad* (1888) 15 I.A. 29, 10 All. 197.

(*o*) (1854) 6 M.I.A. 53, at p. 79; *Moulvi Sayyued* v. *Mussumat Bebee* (1869) 13 M.I.A. 232, 247; *Bissesur* v. *Luchmessur* (1880) 5 Cal. L.R. 477, 6 I.A. 233, (1886) 13 Cal. 181, 13 I.A. 70, *supra* [purchase in *wife's* name]; *Chunder Nath* v. *Kristo Komul* (1871) 15 W.R. 357.

(*p*) *Kerwick* v. *Kerwick* (1920) 47 I.A. 275, 48 Cal. 260, 57 I.C. 834, ('21) A.P.C. 56 [purchase by husband of land in Rangoon and transferred into wife's name—advancement disapproved].

(*q*) *Panton* v. *Administrator-General* (1926) 28 Bom. L.R. 11, 93 I.C. 161, ('26) A. Journal 158 [no advancement].

(*r*) (1843) 3 M.I.A. 229; *Ram Narain* v. *Muhammad* (1899) 26 I.A. 38, 39, 26 Cal. 227, 230; *De Silva* v. *De Silva* (1903) 5 Bom. L.R. 784; *Motivahu* v. *Purshotum* (1904) 6 Bom. L.R. 975.

(*s*) (1899) 26 I.A. 38, 26 Cal. 227, *supra*.

(*t*) *Ismail* v. *Hafiz Boo* (1906) 33 I.A. 86, 33 Cal. 773.

(*u*) *Guran Ditta* v. *Ram Ditta* (1928) 55 I.A. 235, 55 Cal. 944, 109 I.C. 723, ('28) A.P.C. 172; *Shambhunath Shivpuri* v. *Pushkaranath*, 71 I.A. 197; *Shiva Kumari* v. *Uday Pratap* (1947) All. 642; *Nagarajamma* v. *State Bank of India* ('62) A.A.P. 260.

*Deposit by father in the names of himself and his son.*—See the undermentioned case (*u*1).

*Burden of proof.*—Where *A* purchases property in the name of *B*, and subsequently sues *B* for a declaration that he is the real owner of the property, the burden lies heavily on him to show that he is the real owner. The reason is that what *A* has really to do in such a case is to show that the apparent state of things is not the real state of things, in other words, that the person who appears as the owner on the face of the deed is not the real owner. The Courts should look with jealousy on benami transactions, and they should require from him a strict proof of his title before holding that *B* is merely a *benamidar*. And although there may be with respect to benami transactions, circumstances which might create suspicion and doubt as to the truth of the case of the benamidar, yet the Courts should not decide upon mere suspicion, but upon legal grounds established by evidence (*v*). When evidence on neither side is wholly convincing, and when the evidence given and withheld is open to adverse criticism, the Courts must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motive which could govern their actions, and their subsequent conduct (*w*).

*Ante-nuptial agreement.*—When it is alleged that a purchase of property in India by an Indian out of his own money, but in the name of his wife, was made in pursuance of an ante-nuptial agreement, and that consequently it is not to be regarded as a benami transaction, the alleged ante-nuptial agreement, if oral, must be proved by the clearest and most satisfactory evidence of credible witnesses: it would be unwise to act upon oral evidence, unless there was contemporaneous written evidence to corroborate it (*x*).

We now proceed to note the cases in which the Courts have refused to give effect to the real title. They form the subject-matter of the next four sections.

**606. Exception I: Sale under a decree of Court or for arrears of revenue.**—Where a property is sold under a decree of Court or for arrears of revenue, and it is purchased benami and the benamidar is certified to be the purchaser the real purchaser cannot maintain a suit against the benamidar to establish his title to the property or to recover possession thereof from him. It is so provided by several statues.

*Illustration*

*A* obtains a decree against *B* for Rs. 5,000. In execution of the decree *B*'s property is sold, and it is purchased by *C* in *D*'s name. *D* then obtains a certificate of sale from the Court. *C* cannot sue *D* for a declaration that he was the real purchaser at the sale. The law is the same where property held by *B* is sold for arrears of revenue payable to Government, and it is bought by *C* in *D*'s name.

See the Code of Civil Procedure, 1908, sec. 66 (*y*); the Bengal Land Revenue Sale Act, 1859, sec. 36; United Provinces Land Revenue Act, 1901, sec. 178; the Madras Revenue Recovery Act, 1864, sec. 38.

The provisions of the above Acts do not affect the rights of *third parties*. Therefore in the case put above it is open to a creditor of *C* to sue *C* and *D* for a declaration that the property belongs to *C*, and that it is liable to satisfy his (*C*'s) creditor's claims (*z*). Nor does the purchase made by a member of a joint Hindu family in his name, but *with funds belonging to the family*, come within the meaning of those Acts. Therefore it is open to the other members of the family to maintain a suit against him for a declaration that the purchase was made on behalf of the family (*a*).

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(*u*1) *Indranarayan* v. *Roop Narayan* ('71) A.S.C. 1962.

(*v*) *Sreemanchunder* v. *Gopaulchunder* (1866) 11 M.I.A. 28; *Nawab Azimut* v. *Hurdwaree Mul* (1870) 13 M.I.A. 395; *Facz Buksh* v. *Fukeerooden* (1871) 14 M.I.A. 234; *Uman Prashad* v. *Gandharp* (1888) 15 Cal. 20, 14 I.A. 127; *Prince Suleiman* v. *Nawab Mehndi* (1898) 25 I.A. 15, 25 Cal. 473; *Nirmal Chunder* v. *Mahommed* (1899) 26 Cal. 11, 25 I.A. 225. Also see *Radha Gobinda Roy* v. *Durgarani Dassi* (1933) 1 Cal. 207.

(*w*) *Dalip Singh* v. *Chaudhrain* (1908) 35 I.A. 104, 30 All. 258; *Sitamma* v. *Sitapathirao* (1938) Mad. 220, 176 I.C. 535, ('38) A.M. 8.

(*x*) *Sura Lakshmiah Chetty* v. *Kothandarama Pillai* (1925) 52 I.A. 286, 48 Mad. 605, 88 I.C. 327, ('25) A.PC. 181.

(*y*) *See Ganga Sahai* v. *Kesri* (1915) 42 I.A. 177, 182, 37 All. 545, 30 I.C. 265, ('15) A.PC. 81.

(*z*) *Kanizak* v. *Monohur* (1886) 12 Cal. 204; *Sublna Bibi* v. *Hara Lal* (1894) 21 Cal. 519.

(*a*) *Bodh Singh* v. *Gunesh Chunder* (1874) 12 Beng. L.R. 317 [P.C.].

A Hindu son taking assignment of a decree against his father to safeguard his own interest is not a benamidar (*a*1).

**607. Exception II: Transfer by benamidar for value.**—Where a benamidar sells, mortgages or otherwise transfers for value property held benami by him without the knowledge of the real owner (*b*), the real owner is not entitled to have the transfer set aside, unless the transferee had notice actual or constructive that the transferor was merely a benamidar (*c*).

*A* buys certain property in the name of *B*. *B* then sells the property to *C*, and misappropriates the purchase-money. *A* sues *B* and *C* to have the sale set aside, alleging that he is the real owner of the property. The sale will not be set aside unless *A* shows that *C* has notice actual or constructive that *B* was not the real owner.

*Constructive notice.*—It is the duty of a purchaser not merely to ascertain in whose name the property stands, but also to ascertain who is in actual possession of the property at the time of the sale to him. If he fails to do so, and it turns out that the real owner, and not the benamidar, was in possession and receipt of the rents of the property, he will be deemed to have constructive notice of the fact that the benamidar was not the real owner. Thus if in the case put above, *A* was in possession, and *C* omitted to enquire as to who was in possession, *A* would be entitled to have the sale set aside (*d*).

Note in this connection the provisions of sec. 41 of the Transfer of Property Act, 1882, which runs as follows:—"Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

**608. Exception III: Fraud upon creditors.**—Where property has been placed in a false name for the express purpose of defrauding creditors, and that purpose has actually been effected, the real owner is not entitled to recover back the property from the benamidar (*e*). But if the contemplated fraud is not effected, the real owner is entitled to get back the property from the benamidar (*f*).

*A*, who is indebted to several persons, executes a deed purporting to be a conveyance of his property to *B* for Rs. 30,000. No purchase-money is paid by *B* to *A*, and the object of the transaction is to defraud *A*'s creditors. After some time *A* compounds with his creditors and pays them a composition of four annas in the rupee. *A* then sues *B* to recover back the property from *B*. Here the object of the fraud is effected, and the maxim applies, "*In pari delicto potior est conditio possedentis*", that is to say, "in equal fault the condition of the possessor is the more favourable." Both *A* and *B* are *equally guilty* of a confederacy to defraud *A*'s creditors; but the possession being in *B*, the Court will not disturb him in his possession. In such a case the Court will say "Let the estate lie where it falls." But if *A* sues *B* to recover the property *before* the contemplated fraud is committed, the Court will not punish *A* merely because he at one time intended to defraud his creditors, and it will direct *B* to deliver the property to *A*. Where the purpose of the fraud is not effected, there is nothing to prevent the real owner from repudiating the entire transaction, removing all authority of his confederate to carry out the fraudulent scheme and recovering possession of the property (*g*).

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(*a*1) *Sangameswara* v. *Krishna* ('60) A. Kerala 108.

(*b*) *Sarju Parshad* v. *Bir Bhaddar* (1893) 20 I.A. 108.

(*c*) *Ramcoomar Koondoo* v. *Macqueen* (1873) 11 Beng. L.R. 46, 18 I.A. Sup. Vol. 40; *Mahomed Mozuffer* v. *Kishori Mohun* (1895) 22 Cal. 909, 22 I.A. 129.

(*d*) *Mancharji* v. *Kongseoo* (1869) 6 Bom. H.C. O.C. 59; *Vyankapacharya* v. *Yamanasami* (1911) 35 Bom. 269, 10 I.C. 817; *Imambandi* v. *Kamleswari* (1887) 14 Cal. 109, 117, 13 I.A. 160, 165.

(*e*) *Nawab Singh* v. *Daljit Singh* (1936) 58 All. 842, 162 I.C. 958, ('36) A.A. 401.

(*f*) *Petherpermal* v. *Muniandi* (1908) 35 I.A. 98; *Honapa* v. *Narsapa* (1899) 23 Bom. 406; *Raghavalu* v. *Adinarayana* (1909) 32 Mad. 323, 2 I.C. 616; *Jadu Nath* v. *Rup Lal* (1906) 33 Cal. 967; *Girdharlal* v. *Manikamma* (1914) 38 Bom. 10, 20 I.C. 50, ('14) A.B. 283.

(*g*) (1908) 35 I.A. 98, 103, *supra*.

Note in this connection the provisions of sec. 84 of the Indian Trusts Act, 1882, which runs as follows:—"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution . . . the transferee must hold the property for the benefit of the transferor." [Note—To transfer property for the purpose of defrauding creditors is to transfer it for an illegal purpose within the meaning of sec. 84 of the Trusts Act.]

*Collusive decree.*—Where a collusive decree is obtained by a benamidar against the real owner with the object of defrauding the latter's creditors, the decree is binding on the real owner even if no creditor has been defrauded. The reason is that *where a person has suffered judgment to pass against him, the matter is then placed beyond his control.* *A* buys a house in *B*'s name with the object of protecting the property against the claims of his creditors, and occupies it as *B*'s tenant. Subsequently *B* in collusion with *A* sues *A* to recover possession of the house from him, and obtains a decree *ex-parte* against *A*. *A* cannot impeach the decree on the ground that the object of the decree was to defraud his creditors. The result is that if *B* applies for execution of the decree the Court will order *A* to deliver possession of the property to *B* (*h*). But the decree may be challenged by *A*'s creditors (*i*).

**609. Exception IV: Transaction against public policy.**—Where a purchase of property, which if made by a person in his own name, would be illegal, as being opposed to public policy, is made by him in the name of another person, the real purchaser is not entitled to recover the property from the benamidar (*j*).

In the case cited above, the Kanungo of a district, who was prohibited on penalty of dismissal from office from acquiring property in his own district, purchased property in the name of his brother's son. After the Kanungo's death his heirs sued his brother's son for recovery of the property. It was held that they were not entitled to recover the property.

**610. Decree against benamidar.**—In the absence of any evidence to the contrary, it is to be presumed that a suit instituted by the benamidar has been instituted by him with the full authority of the real owner, and any decision come to in the suit is as much binding upon the real owner as if the suit had been brought by the real owner himself (*k*).

*Illustration*

*A* buys a house benami in *B*'s name. *C* is in possession of the house at the date of purchase. *B* sues *C* to recover possession of the house, but the suit is dismissed. *A* alleging that he is the real owner, and that *B* was negligent on the conduct of the suit against *C*, sues *C* to recover possession. The Court finds that the suit by *B* against *C* was instituted with the knowledge of *A*. *A* is, therefore, bound by the decree in that suit as if he himself had instituted the suit, and the suit is barred as *res judicata: Shangara* v. *Krishnan* (1892) 15 Mad. 267.

**611. Right of benamidar to sue.**—A benamidar fully represents the true owner, and so far as the outside world is concerned can maintain all suits whether arising out of contract or out of title to immovable property (*l*).

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(*h*) *Chenvirappa* v. *Puttappa* (1887) 11 Bom. 708; *Venkatramanna* v. *Viramma* (1887) 10 Mad. 17.

(*i*) *Gopi* v. *Markande* (1879) 3 Bom. 30.

(*j*) *Sheo Narain* v. *Mata Prasad* (1905) 27 All. 73.

(*k*) *Gopi Nath* v. *Bhagwat* (1884) 10 Cal. 697, 705; *Shangara* v. *Krishnan* (1892) 15 Mad. 267; *Baroda Kanta* v. *Chunder Kanta* (1902) 29 Cal. 682; *Kaniz* v. *Wali Ullah* (1908) 30 All. 30; *Ravji* v. *Mahadev* (1898) 22 Bom. 672.

(*l*) *Gur Narayan* v. *Sheo Lal Singh* (1919) 46 I.A. 1, 46 Cal. 566, 49 I.C. 1, ('18) A.PC. 140 [benami purchase]; *Vaitheswara* v. *Srinivasa* (1919) 42 Mad. 348, 50 I.C. 309, ('19) A.M. 524 [benami mortgage], [F.B.]; *Ramasamy Chettiar* v. *Adaikammai* ('60) A.M. 341.

*Suits arising out of contract.*—A benamidar can maintain a suit on a contract entered into in his name. Thus if *A* lends money to *B* on a mortgage of *B*'s property and the mortgage is taken in *C*'s name, *C* may sue *B* on the mortgage in his own name (*m*). Similarly if *A* lends money to *B* on a promissory note, but the note is taken in *C*'s name, *C* is the proper person to sue upon it (*n*). *A* can sue *B* only if he ensures that *B* is protected from further liability to *C*. This object is attained if *C* is made a party to the suit, appears in Court and states that he does not claim on the note (*o*).

As regards suits for recovery of land upon title, there was a conflict of decisions. On the one hand, it was held by the High Courts of Calcutta (*p*) and Madras (*q*) that a benamidar, as such, was not entitled to maintain a suit in his name for possession of land of which he was merely a benamidar. On the other hand, it was held by the High Courts of Allahabad (*r*) and Bombay (*s*), that he was entitled to maintain such suit. The Judicial Committee held that a benamidar *can sue in his own name* to recover immovable property vested in him as benamidar. He has the title and right of possession which the real owner has given him, which is apparently enough to support the suit (*t*).

*Illustration*

*A* purchases a house benami in *B*'s name. At the date of the purchase *C* is in possession of the house. *B* sues *C* for possession of the house. The defence is that *B* is not the real owner. *B*, though a mere benamidar, is entitled to maintain the suit. It is open to *A* to apply to be joined in the suit. It is also open to *C* to apply to have *A* joined in the suit.

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(*m*) *Bhola* v. *Ram Lall* (1897) 24 Cal. 34; *Sachitananda* v. *Baloram* (1897) 24 Cal. 644 [suit for foreclosure]; *Yad Ram* v. *Umrao Singh* (1899) 21 All. 380; *Kamta Prasad* v. *Indomati* (1915) 37 All. 414, 417-418, 29 I.C. 593, ('15) A.A. 264.

(*n*) *Ramanuja* v. *Sadagopa* (1905) 28 Mad. 205; *Subba Narayana* v. *Ramaswami* (1907) 30 Mad. 88, on app. from 28 Mad. 244.

(*o*) *Sree Krishna Jana* v. *Seeta Nath Bera* (1938) 1 Cal. 450, ('37) A.C. 753.

(*p*) *Hari Gobind* v. *Akhoy Kumar* (1889) 16 Cal. 36[illegible]; *Issur Chandra* v. *Gopal Chandra* (1898) 25 Cal 98; *Baroda Sundari* v. *Dino Bandhu* (1898) 25 Cal. 874; *Mohendra Nath* v. *Kali Proshad* (1903) 30 Cal. 265; *Atrabannesa* v. *Safatullah* (1916) 43 Cal. 504, 31 I.C. 189, ('16) A.C. 645 [suit for partition].

(*q*) *Kuthaperumal* v. *Secretary of State for India* (1907) 30 Mad. 245.

(*r*) *Nand Kishore* v. *Ahmad Ata* (1896) 18 All. 69; (1899) 21 All. 380, *supra*; *Bachcha* v. *Gajadhar Lal* (1906) 28 All. 44.

(*s*) *Ravji* v. *Mahadev* (1898) 22 Bom. 672; *Dagdu* v. *Balvant* (1898) 22 Bom. 820.

(*t*) *Gur Narain* v. *Sheo Lal Singh* (1919) 46 I.A. 1, 46 Cal. 566, 49 I.C. 1, ('18) A.PC. 140.

# CHAPTER XXX

# JAINS

## 1. *Jain tenets and Jain law*

**612. Jains and their tenets.**—Jainism flourished several centuries before Christ. The Jain religion refers to a number of Tirthankars the last of whom was Maha Veera, who was a contemporary of Buddha and died in about 527 B.C. Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of various ceremonies which Hindus consider essential. The Jains are numerous in the southern parts of India and Canara and especially in Gujarat, Mewar and Marwar.

Amongst them there is no belief that a son, either by birth or adoption, confers spiritual benefit on the father. They also differ from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried (*u*). There are, however, among them castes which still observe Hindu customs, and perform the monthly, six-monthly and anniversary ceremonies of the dead. In cases such as these, the right to perform the ceremonies is governed by the ordinary Hindu law, that is to say, the son of the deceased has the preferential right to perform the ceremonies, and if there be no son (which term includes grandson and great-grandson), it is duty of the widow to get them performed provided the husband was divided at his death and the widow succeeds to his estate as his heir (*v*).

The Jains agree with the Hindus in other points such as division into castes. This exists in full force in the south and west of India, and can only be said to be dormant in the north-east. A Jain converted into orthodox faith returns to the caste from which he traced his first descent (*w*). Jains are mostly of Vaishya origin and they themselves have numerous divisions of their own of which the principal ones are (1) Porwad, (2) Oswal, (3) Agarwal and (4) Khandewal (*x*).

**613. Law applicable to Jains.**—It is too late in the day to contend that Jains are not included in the term 'Hindus'. The Jains are governed by all the incidents relating to the Hindu Joint Family, as was very recently held by the Supreme Court (*y*1). The ordinary Hindu law is to be applied to Jains, in the absence of proof of special customs and usages varying that law. Those customs and usages must be proved by evidence, as other special customs and usages varying the general law should be proved (ss. 16-20), and in the absence of proof the ordinary law must prevail (*z*). There is, however,

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(*u*) *Bhagvandas v. Rajmal* (1873) 10 Bom. H.C. 241, 246-249.

(*v*) *Sundarji* v. *Dahibai* (1905) 29 Bom. 316.

(*w*) *Ambabai* v. *Govind* (1899) 23 Bom. 257.

(*x*) *Ambabai* v. *Govind, supra.*

(*y*1) *Commissioner of Wealth Tax* v. *Champa Kumari* ('72) A.S.C. 2119; (1972) 1 Supreme Court Cases 508.

(*z*) *Munnalal* v. *Rajkumar* ('62) A.S.C. 1493, 1497; *Chotay Lall* v. *Chunnoo Lall* (1879) 6 I.A. 15, 22 W.R. 496; *Sheo Singh Rai* v. *Mussmut Dakho* (1878) 5 I.A. 87, 1 All. 688; *Lala Rup Chand* v. *Jambu Prasad* (1910) 37 I.A. 93, 103-104, 32 All. 247, 6 I.C. 272; *Bulagan* v. *Ratan Lal* (1928) 26 All. L.J. 1196, 110 I.C. 546, ('28) A.A. 656, (1927) 50 Mad. 228, 99 I.C. 503, ('27) A.M. 228 *supra*; *Jaiwanti* v. *Anandi Devi* (1938) All. 196, 173 I.C. 356, ('38) A.A. 62; *Pemraj* v. *Chand*

nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom reside. Judicial decisions recognising the existence of a disputed custom among the Jains of one place are relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind are equally admissible (*a*). Where, however, a custom is negatived by a judicial decision in one place, *e.g.*, Madras, the fact that among Jains in the other States such a custom has been upheld by Courts does not warrant a general presumption of the prevalence of the custom in the Madras State (*b*).

**614. Jains in Bombay State.**—In *Bhagwandas* v. *Rajmal* (*c*), Westroppe, C.J., said: "Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persons of the Jain sect."

### 2. *Succession*

**615. Law of succession.**—(1) Until a special custom to the contrary is established, the ordinary Hindu law governs succession amongst the Jains. The ordinary Hindu law is that of the three superior castes (*d*).

(2) The Hindu Women's Rights to Property Act, 1937, applied to the Jains as well as all Hindus (*e*).

(3) The Hindu Succession Act, 1956, applies to all 'Hindus' which expression includes Jains.

**616. Interest taken by Jain widow in her husband's estate.**—(1) In the absence of a custom to the contrary, a Jain widow takes a limited interest in her husband's estate similar to the "widow's estate." A custom, however, to the contrary has been proved in several cases, and it has been held in cases from Meerut (*f*), Saharanpur (*g*), and Arrah in the district of Shahabad (*h*), that amongst Agarwala Jains the widow takes an absolute estate in the self-acquired property of her husband, and that she has full power of alienation in respect of such property. But there is no custom which entitles her to an absolute estate in ancestral property left by her husband. In the latter case she takes only a widow's estate (*i*).

The Hindu Women's Rights to Property Act, 1937, applied to Jain widows although in some provinces, where Jain widows held absolute interest in husband's property by special custom, it operated to their detriment by recognizing in their favour only a limited interest (*j*).

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*Kunwar* (1947) 74 I.A. 254, (1947) All. 748, ('48) A.PC. 60; *Milapchand* v. *Gulabchand* ('57) A.M.B. 19.

(*a*) *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 379, 391.

(*b*) *Gettappa* v. *Eramma* (1927) 50 Mad. 228, 237-238, 99 I.C. 503, ('27) A.M. 228.

(*c*) (1873) 10 Bom. H.C. 241, 256; *Amava* v. *Mahadgauda* (1898) 22 Bom. 416.

(*d*) *Ambabai* v. *Govind* (1899) 23 Bom. 257; *Mt. Lado* v. *Banarsi Das* (1933) 14 Lah. 95, 139 I.C. 721, ('32) A.L. 546 [case from Delhi].

(*e*) *Panalal* v. *Sitabai* ('53) A.N. 70, (1954) Nag. 30.

(*f*) *Sheo Singh Rai* v. *Mussumut Dakho* (1878) 5 I.A. 87, 1 All. 688.

(*g*) *Shimbhu Nath* v. *Gayan Chand* (1894) 16 All. 379.

(*h*) (1900) 27 Cal. 379, *supra*.

(*i*) *Phool Chand* v. *Gopal Lal* ('67) A.S.C. 1470; *Pahar Singh* v. *Shamsher Jang* (1931) 29 All. L.J. 314, 133 I.C. 785, ('31) A.A. 695; *Nekram Singh* v. *Sriniwas* (1926) 24 All. L.J. 751, 96 I.C. 639, ('26) AA. 586.

(*f*) See f.n. (*e*) above.

In Bombay it has been held that there is no custom among the Dasha Shrimali Shwetambar Jains of Khandesh under which a widow takes an absolute interest in her husband's estate or a mother in her son's estate (*k*). These females in that community take only a "woman's estate."

**616A. Succession to stridhana.**—(1) According to the custom and usages of the Agarwala community, the son is entitled to succeed to his mother's stridhana (*l*).

(2) In matters of succession and inheritance Jains are now governed by the Hindu Succession Act, 1956.

### 3. *Adoption*

*Note.*—The law on the subject of adoptions has now been modified and amended by the Hindu Adoptions and Maintenance Act, 1956. The rules stated in the following paragraphs must be read in the context of the provisions of that enactment.

**617. Adoption secular in character.**—The Agarwala Jains do not believe that a son whether by birth or adoption, confers any spiritual benefit on the father; the adoption, therefore, is entirely secular in character (*m*).

**618. Adoption by widow.**—The custom prevails among all Jains, except in Madras and the Punjab, that a sonless widow can adopt a son to her husband without his authority or the consent of his sapindas and the onus now lies upon those who deny the custom (*m*1). In *Munnalal* v. *Rajkumar* (*m*2) the Supreme Court pointed out that this custom has become a part of the law applicable to Jains in India (except in Madras and the Punjab) by a long and uninterrupted course of acceptance and held that it governed Digambar Jains of the Porwal sect residing in Madhya Pradesh.

There is no such custom in the Madras State (*m*3).

In the Punjab the law of adoption is complicated by the local customs of the province (*m*4).

A Jain widow in Bombay can adopt without her husband's authority (*m*5). Amongst the Agarwala Banias of the Sarogi sect a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's sapindas (*n*). If the family is joint, he becomes a coparcener (§ 472) (*o*).

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(*k*) *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I.C. 628, ('30) A.B. 517.

(*l*) *Hariram* v. *Madan Gopal* (1928) 33 C.W.N. 493, 114 I.C. 565, ('29) A.PC. 77.

(*m*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 242, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118 [a case from Amraoti in the C.P.]. Also see *Shuganchand* v. *Prakash Chand* ('67) A.S.C. 506; *Mst. Gulab* v. *Devilal* ('51) A. Raj. 136.

(*m*1) *Pemraj* v. *Chand Kunwar* (1947) 74 I.A. 254, (1947) All. 748, ('48) A.P.C. 60; *Mst. Gigi* v. *Mst. Panna* ('56) Assam 100; *Laxmibai* v. *Pushpabai* ('53) A.M.B. 193.

(*m*2) ('62) A.S.C. 1493, 1497.

(*m*3) *Peria Ammani* v. *Krishnasami* (1893) 16 Mad. 182; *Gateppa* v. *Eramma* (1927) 50 Mad. 228, 99 I.C. 503, ('27) A.M. 228.

(*m*4) *Pemraj* v. *Chand Kunwar supra.*

(*m*5) *Yamashetti Bhaushetti* v. *Ashok Bhomshetti* (1940) Bom. 819, 191 I.C. 488, ('40) A.B. 391; *Suganchand Bhikamchand* v. *Mangibai Gulabchand* (1942) Bom. 467, 201 I.C. 759, ('42) A.B. 185.

(*n*) *Sheo Singh Rai* v. *Mussamut Dakho* (1878) 5 I.A. 87, 1 All. 688; *Manik Chand* v. *Jagat Settani* (1890) 17 Cal. 518; *Lakhmi Chand* v. *Gatto* (1886) 8 All. 319; *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 379; *Manohar Lal* v. *Banarsi Das* (1907) 29 All. 495; *Asharfi* v. *Rup Chand* (1908) 30 All. 197; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I.C. 1047, ('36) A.A. 641.

(*o*) *Sundar Lal* v. *Baldeo Singh* (1933) 14 Lah. 78, 138 I.C. 151, ('32) A.L. 426.

**619. Second adoption by widow.**—As under the Hindu law, so among Jains, a Jain widow has power after the death of an adopted son to make a second adoption (*t*).

**620. Age of boy to be adopted: adoption of married man.**—The Agarwala Jains belong to the twice-born classes, and by the general Hindu law applicable thereto a boy cannot be adopted after his marriage, except in the case of persons governed by special custom duly proved. In a case from Saharanpur it was held by the Courts in India, that according to the custom of which evidence was given in the case there was no restriction of *age or marriage*, and that a married man could be adopted. This decision was confirmed by the Privy Council on appeal, but their Lordships observed that having regard to the fact that the custom alleged was very wide and the evidence was limited to a comparatively small number of centres of Jain population, the case should not be taken as a satisfactory precedent if in any future instance further evidence regarding the alleged custom should be forthcoming (*u*). In a later case (*v*), it was held by the Privy Council that in the Sitambari sect of Jains the adopted son may at the time of his adoption be a grown up and married man. The High Court of Allahabad has also held that among Jains a married man may lawfully be adopted (*w*). In *Dhanraj* v. *Soni Bai* (*x*) the parties belonged to the caste or sect of Agarwalas, who, as their Lordships of the Privy Council observed, generally adhere to Jainism and repudiate the Brahminical doctrines as to obsequial ceremonies, shraddhas and offerings of oblations for the salvation of the soul of the deceased, and do not believe that a son either by birth or by adoption confers spiritual benefit on the father. Their Lordships further observed that among these people the qualifying age of adoption extends to the thirty-second year.

**621. Adoption of orphan.**—Under the Hindu law it is essential to the validity of an adoption that the child should be "given" to the adopter by the father, or if he be dead, by the mother. No other person has this right, nor can such right be delegated to any other person. Consequently a boy who has lost both his parents cannot be adopted. This rule applies also to the Agarwala Banias of the Sarogi sect (*y*).

In a Bombay case where the question arose whether there was a custom of adopting an orphan among Jains in Western India, it was held that the evidence given in the case was sufficient as between the parties to the suit and those claiming through and under them to entitle the Court to say that there was such a custom (*z*).

**622. Adoption of daughter's son.**—A daughter's son may be adopted amongst the Agarwala Banias of the Sarogi sect (*a*).

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(*t*) (1886) 8 All. 319, *supra*.

(*u*) *Lala Rup Chand* v. *Jambu Prasad* (1910) 37 I.A. 93, 32 All. 247, 6 I.C. 272.

(*v*) *Sheokuarbai* v. *Jeoraj* (1920) 25 C.W.N. 273 [P.C.], 61 I.C. 481, ('20) A.P.C. 77.

(*w*) *Manohar Lal* v. *Banarsi Das* (1907) 29 All. 495.

(*x*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 242, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118 [a case from Amraoti in the C.P.].

(*y*) (1925) 52 I.A. 231, 236, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118, *supra*; *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H.C. 241.

(*z*) *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 61 I.C. 492, ('21) A.B. 147.

(*a*) *Sheo Singh Rai* v. *Mussamut Dakho* (1878) 5 I.A. 87, 1 All. 688.

**623. Adoption of sister's son.**—Under Jain law the adoption of a sister's son is valid (*b*).

**624. Ceremonies incidental to adoption.**—Among Agarwala Jains the only ceremony necessary for an adoption is the giving and receiving of the boy in adoption. It is not necessary that the boy should be placed on the lap of the widow (*c*).

Among Agarwala Banias of the Sarogi sect the practice has been at the time of adoption to tie a turban round the head of the boy who is being adopted in the presence of the principal men of the community (the punchas) and give them a feast (*d*).

Amongst the Agarwala Banias of Zira (in the Punjab), the general rules of Hindu law as to adoption do not apply, and by the custom applicable to them an unequivocal declaration by the adopted father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption (*e*).

There is no general law relating to the ceremonies necessary for a valid adoption among the Jains. The decided cases show that among certain sects of Jains adoption is a temporal arrangement and there is no religious ceremony (*f*).

**624A. Adoption cannot be cancelled.**—An adoption among the Jains like an adoption among other Hindus cannot be cancelled after it has been lawfully made (*f*1).

**625. Share of adopted son.**—As amongst orthodox Hindus so among Jains an adopted son is entitled in the Bombay State to one-fourth of the estate of the adoptive father if a natural son is born after the adoption (*g*).

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(*b*) *Hassan Ali* v. *Naga Mal* (1876) 1 All. 288.

(*c*) (1920) 25 C.W.N. 273, 61 I.C. 481, ('21) A.P.C. 77, *supra;* (1925) 52 I.A. 231, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118, *supra.*

(*d*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 52 Cal. 482, 87 I.C. 357, ('25) A.P.C. 118.

(*e*) *Chunan Lal* v. *Hari Chand* (1913) 40 I.A. 156, 40 Cal. 879, 19 I.C. 669.

(*f*) *Mst. Gulab* v. *Devi Lal* ('51) A. Raj. 136.

(*f*1) *Asa Bai* v. *Prabhu Lal* ('60) A. Raj. 304; 10 Raj. 194.

(*g*) *Rukhab* v. *Chunilal* (1891) 16 Bom. 847.

# CHAPTER XXXI

# SHUDRAS

*Note.*—The rules now laid down in the Hindu Succession Act, 1956, the Hindu Marriage Act, 1955, and the Hindu Adoptions and Maintenance Act, 1956, do not draw any distinction between the regenerate castes and the Shudras. The effect of the changes in the law in so far as they affect the law previously applied in case of Shudras has been pointed out in the Notes under those enactments. The rules stated in this Chapter relate to the law prior to those enactments under decided cases.

**626. Who are Shudras.**—The Hindus are divided into two main divisions, namely, (1) the regenerate castes, and (2) the Shudras. Legally Shudras merely denotes one of the two main genera among Hindus. In *Subrao* v. *Radha* (*h*), Madgavkar, J., observed as follows: "The Sanskrit texts which lay down certain functions and duties of the four main castes in Hindu society as it might have existed many centuries ago, are not applicable to the present day when function and legal caste do not coincide. . . . The origin of caste is likewise not very relevant. It is generally agreed that castes arose, partly from the division of classes and functions and partly from the contest between the fairer Aryan with the darker Dravidian, as is sufficiently proved by the Sanskrit word *varna* or colour for caste. But colour, no more than function, is a test of caste, the Shudra of the North being often fairer than the Brahmin of the South. The tendency of occupations to be hereditary in a society which ceased to progress and the crystallization of the idea of caste and its abnormal growth over a large area such as India, are matters of sociological interest but throw little legal light on the question in issue. Even at the present day, the principle that caste springs from birth and cannot be changed is not unchallenged by ethnologists, who point out that miscegenation and the absorption of the aboriginal inhabitants into Hinduism have existed for centuries and have not stopped. This process has also been recognised by the Courts. It suffices to refer to cases such as *Sahdeo Narain Deo* v. *Kusum Kumari* (*i*) where such a process of absorption including the custom of adoption barely a century old was recognised by their Lordships of the Privy Council."

In a Calcutta case (*j*), the question was whether Kayesthas were of the Shudra caste and the Court applied four tests, (1) wearing the sacred thread; (2) ability to perform the homa; (3) the rule as to the period of impurity; and (4) the rules as to the incompetence of illegitimate sons to inheritance. By the application of these tests the Courts came to the conclusion that the Kayesthas were Hindus of the Shudra caste. In a Patna case (*k*), on the other hand, it was held that the mere non-observance of the orthodox practices could not take away the rights of a Kayestha in matters of inheritance, marriage and adoption and that the Kayesthas of Bihar belonged to the twice-born classes.

In *Maharaja of Kolhapur* v. *Sundaram Ayyar* (*l*) the Court accepted the principle that the consciousness of a community is a good test of caste. This accords with the view of Dr. Sarvadhikari (*m*) who says that "the only safe rule to follow in all cases where the determination of the caste of a person is in question, is to ascertain the customs and

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(*h*) (1928) 52 Bom. 497, 501, ('28) A.B. 295.
(*i*) (1932) 50 I.A. 58, 2 Pat. 230, 71 I.C. 769, ('23) A.P.C. 21.
(*j*) *Raj Coomar Lall* v. *Bissessur Dyal* (1884) 10 Cal. 688, 695.
(*k*) *Ishwari Prashad* v. *Rai Hari Prashad* (1927) 6 Pat. 506, 106 I.C. 620, ('27) A.P. 145.
(*l*) (1925) 48 Mad. 1, 52, 93 I.C. 705, ('25) A.M. 497.
(*m*) Tagore Law Lectures (1880), 2nd Ed., p. 830.

usages by which the social conduct of the person given is regulated. The remarriage of widows, and equal rights and privileges of legitimate and illegitimate sons, and similar customs and usages, are marks by which a Shudra can be distinguished." In the Bombay case referred to above, Madgavkar, J., said: "The popular view lays down three tests: (1) the consciousness of the caste, (2) its customs and (3) the acceptance of that consciousness by the other castes." After referring to the above tests the learned judge said as follows: "Speaking for myself, I confess, therefore, that I am unable to discover any authoritative principle or test or text which could be applied to decide the present question. The difficulty is so great as perhaps to justify a doubt if the ordinary Courts of law are fitted to decide such questions, unless the Legislature is prepared to lay down general rules for application in cases such as the present. But failing such a principle or rule, the Courts, it seems to me, have at present necessarily to fall back upon the only possible test remaining, namely, the test of custom—a test not inconsistent either with the spirit of Hindu Jurisprudence, which itself lays down that custom is even more powerful than the Shastras or with the view of the British Courts on important matters such as succession, primogeniture and impartibility" (*n*).

**627. Lingayats.**—The Lingayats who are originally Hindus are a body of dissenters and the founder of their religion was one Basava who was born about A.D. 1100. They acknowledge only one God, Shiva, and reject the other two of the Hindu Triad. They revere the Vedas, but disregard the later commentaries on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticisms. They deny the supremacy of Brahmans, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the Image which has always been regarded as symbolical of the God Siva. Mysore, the Southern Mahratta country, and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their eighth year but as in the case of Upanayanam it is often performed much later. The sacred Mantra is whispered in the ear by their Guru and this ceremony corresponds to Upanayanam among the Brahmans. Lingayats whose only God is Shiva and who acknowledge the authority of the Vedas, are bound by Hindu law except in so far as it is modified by custom (*o*). As to Lingayats in Mysore see the under mentioned case (*o*1).

In the Madras case cited above the Lingayats of Madras were apparently not regarded as Shudras. In Bombay, however, it has been held that the Lingayats of the Bombay State are Shudras, and not Vaishyas (*p*).

**628. Kayesthas.**—The Kayesthas of Bengal are Shudras (*q*). As regards Kayesthas of Bihar it has been held that they belong to the three regenerate classes, and are not Shudras (*r*). Kayesthas: Karans in Orissa belong to the regenerate classes (*r*1).

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(*n*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 502, 113 I.C. 497, ('28) A.B. 295.

(*o*) *Somasekhara* v. *Mahadeva* (1930) 53 Mad. 297, 303-305, 130 I.C. 744, ('30) A.M. 496.

(*o*1) *Sangannagouda* v. *Kalkangouda* ('60) A. Mys. 147.

(*p*) *Gopal* v. *Hanmant* (1879) 3 Bom. 273; *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277.

(*q*) *Asita Mohan* v. *Nirode Mohan* (1916) 20 C.W.N. 901, 904, 35 I.C. 127, ('17) A.C. 292; *Biswanath* v. *Shorashibala* (1921) 48 Cal. 926, 934, 66 I.C. 590, ('21) A.C. 48; *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 492-493, 81 I.C. 709, ('24) A.C. 616.

(*r*) *Ishwari Prashad* v. *Rai Hari Prashad* (1927) 6 Pat. 506, 106 I.C. 620, ('27) A.P. 145; *Rajendra* v. *Gopal* (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51.

(*r*1) *Priyanath* v. *Indumati* ('71) A. Orissa 211.

**629. Rajas of Tanjore.**—The Tanjore branch of the Marathas descended from Shivaji are Shudras, and not Kshatriyas (*s*).

**630. Marathas of Bombay State.**—There are three classes among the Marathas in the Bombay State namely, (1) the five families, (2) the ninety-six families, and (3) the rest. Of these first two classes are Kshatriyas; the last class consists of Shudras (*t*).

**631. Converts to Hinduism.**—Converts to Hinduism are regarded as Shudras (*u*).

**632. Whether a Shudra can be a Sanyasi.**—A Shudra, it has now been held in a decision of the Allahabad High Court (*u*), can become a Sanyasi (ascetic) and is not incompetent to become the Mahant of a Math. Even though as a result of custom, usage or practice of sacramental precept, Shudras might have been considered to be incapable of entering into the Order of *Sanyasam* at one time, such disqualification can now no longer be held to exist. In some earlier decisions it had been held that a Shudra cannot enter the Order of *Yati* or *Sanyasi* (ascetic). Hence a Shudra though he has renounced the world and purports to lead the life of an ascetic, is entitled to inherit to his relations, and on his death his estate will pass to his natural (as distinguished from religious) heirs (*v*1).

### *Ceremonies incidental to adoption*

**633. Ceremonies incidental to adoption.**—Adoption amongst Shudras is a purely secular transaction, and no ceremonies are necessary in addition to the giving and taking the boy in adoption. The giving and taking ceremony, however, is absolutely necessary for the validity of an adoption (*w*).

**634. Who may adopt:—**

(1) *Adoption by leper.*—No ceremonies being necessary for an adoption among Shudras, even a leper may adopt (*x*).

(2) *Adoption by woman under pollution and adoption by unchaste woman.*—No ceremonies being necessary for an adoption among Shudras, a woman under pollution may adopt (*y*). So also an unchaste woman (*z*).

**635. Who may be adopted:—**

(1) *Adoption of daughter's son, sister's son, sister's grandson, and mother's sister's son.*—Among Shudras the adoption of a daughter's son,

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(*s*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*t*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I.C. 497, ('28) A.B. 295.

(*u*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I.C. 42.

(*v*) *Krishna Singh* v. *Mathura Ahir* ('72) A.A. 273.

(*v*1) *Dharmapuram* v. *Virapandiyam* (1899) 22 Mad. 302; *Harish Chandra* v. *Atir Mahomed* (1913) 40 Cal. 545, 18 I.C. 474; *Somasundaram* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I.C. 546, ('18) A.M. 794.

(*w*) *Indromoni* v. *Behari Lal* (1880) 7 I.A. 24, 5 Cal. 770; *Mahashoya* v. *Srimati Krishna* (1880) 7 I.A. 250, 6 Cal. 381; *Asita Mohan* v. *Nirode Mohan* (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292; *Bhala* v. *Parbhu Hari* (1878) 2 Bom. 67.

(*x*) *Sukumari* v. *Ananta* (1901) 28 Cal. 168.

(*y*) *Thangathanni* v. *Ramu* (1882) 5 Mad. 358.

(*z*) *Basvant* v. *Mallappa* (1921) 45 Bom. 459, 59 I.C. 800, ('21) A.B. 301.

sister's son (*a*), sister's grandson (*b*), and mother's sister's son (*c*), is valid.

(2) *Adoption of boy of different Gotra.*—There is nothing to prevent a Shudra from adopting a boy from a different gotra (*d*).

(3) *Adoption of married man.*—In Western India where the Mayukha is the prevailing authority, a Shudra may be adopted even after his marriage (*e*).

In other parts of India, however, where the authority of the Dattaka Chandrika is supreme, such an adoption is invalid (*f*).

**636. Second adoption during lifetime of first adopted son.**—A second adoption of a son, the first adopted son being alive, and retaining the character of a son, is illegal (*g*).

**637. Son born after adoption.**—In the case of Shudra in the Madras State (*h*) and Bengal (*i*), an adopted son on partition of the family property shares equally with a son or sons of the adoptive father born after the adoption (*ii*).

*Marriage*

**638. Marriage as a samskara.**—Among Shudras marriage is as much a *samskara* as among the twice-born classes. Therefore, a debt contracted for the marriage of a member of a joint Shudra family is debt contracted for a family purpose and is binding on the joint family property (*j*).

The daughter of a Shudra is entitled to be paid her marriage expenses out of the father's estate in the hands of her step-mother in the same way as she is entitled to be paid her maintenance; this rule applies as much to Shudras as to the twice-born classes (*k*).

**639. Identity of caste.**—It is a general principle of the Hindu law that a marriage between persons who do not belong to the same caste is invalid, unless it is sanctioned by custom. Therefore a marriage between a Thakur (Shudra) and a Brahmin woman is invalid (*l*). So also a marriage between a Shudra and a Vaishya woman. The offspring of such marriages are illegitimate (*m*). Marriages, however, between a Vaishya and a Kayestha (Sudra) woman are recognised by local custom in the District of Tipperah and are therefore valid (*n*).

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(*a*) *Raj Coomar* v. *Bissessur* (1884) 10 Cal. 688; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364; *Kahandas* v. *Jivan* (1923) 25 Bom. L.R. 510, 73 I.C. 1023, ('23) A.B. 427; *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I.C. 497, ('28) A.B. 295.

(*b*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*c*) *Chinna* v. *Pedda* (1876) 1 Mad. 62.

(*d*) *Rungama* v. *Atchama* (1846) 4 M.I.A. 1.

(*e*) *Nathaji* v. *Hari* (1871) 8 Bom. H.C. A.C. 67; (1875) 12 Bom. H.C. 364, *supra*.

(*f*) *Lingayya Chetty* v. *Chengalammal* (1925) 48 Mad. 407, 89 I.C. 923, ('25) A.M. 272, *Somasekhara* v. *Mahadeva* (1930) 53 Mad. 297, 133 I.C. 744, ('30) A.M. 496; *Damodarji* v. *Collector of Banda* (1910) 7 All. L.J. 927, 7 I.C. 418; *Nanjegowda* v. *Channamma* ('52) A. My. 40.

(*g*) (1846) 4 M.I.A. 1, *supra*.

(*h*) *Perrazu* v. *Subbarayadu* (1921) 48 I.A. 280, 44 Mad. 656, 61 I.C. 690, ('22) A.P.C. 71.

(*i*) *Asita Mohan* v. *Nirode Mohan* (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292.

(*ii*) This question was considered in a very recent decision of the Supreme Court: *Guramma* v. *Mallappa* (1964) A.S.C. 510.

(*j*) *Sundrabai* v. *Shivnarayana* (1908) 32 Bom. 81; *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I.C. 195.

(*k*) *Bapayya* v. *Rukhamma* (1909) 19 Mad. L.J. 666, 4 I.C. 1069.

(*l*) *Sespuri* v. *Dwarka Prasad* (1912) 10 All. L.J. 181, 16 I.C. 222.

(*m*) *Munni Lal* v. *Shiama* (1926) 48 All. 670, 97 I.C. 347, ('26) A.A. 656.

(*n*) *Ram Lal* v. *Akhoy Charan* (1903) 7 C.W.N. 619.

But a marriage between persons belonging to different sub-divisions of the same caste is valid. It has accordingly been held that the following marriages are valid, they being marriages between persons belonging to different sub-divisions of the Shudra caste:—

(a) A marriage between a Zamindar of Malava caste with a woman of the Vellala class of Shudras (*o*).

(b) A marriage between a Kayestha of Bengal and a Dom woman (*p*).

(c) A marriage between a Kayestha of Bengal and a Tanti woman (*q*).

(d) A marriage between a Shudra, and a Christian woman converted to Hinduism (*r*).

In the last mentioned case (*s*) it was held that such marriages were valid as they were common among and recognised as valid by the custom of the caste to which the man belonged. At the same time the opinion was expressed that such marriages were valid even under the Hindu law.

*Lingayats of Bombay State.*—According to the Lingayat religion, as well as according to Hindu law, marriages between members of different classes of Lingayats are not illegal (*t*).

**640. Anuloma marriage.**—Under the Hindu law as administered in the Bombay State, a marriage between a Vaishya male and a Shudra female is an *anuloma* marriage and is valid (*u*). So also the marriage of a Brahman male with a Shudra female (*v*).

**641. Presumption as to form of marriage.**—It has been held in Bombay that even among Shudras the law will presume the marriage to have been according to the approved form if the parties belonged to a respectable family (*w*).

*Inheritance and Partition*

**642. Inheritance and Partition.**—The texts of the Mitakshara bearing on the subject are contained in chap. I, sec. 12, paras. 1 and 2:—

"1. The author next delivers a special rule concerning the partition of a Shudra's goods. Even a son begotten by a Shudra on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share, and one, who has no brothers, may inherit the whole property, in default of daughter's sons" (*x*).

"The son, begotten by a Shudra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after (the demise of) the father, if there be son of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him (as much as is the amount of one brother's) allotment. However,

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(*o*) *Ramamani Ammal* v. *Kulanthai* (1871) 14 M.I.A. 347; *Inderun* v. *Ramaswamy* (1869) 13 M.I.A. 141; *Upoma* v. *Bholaram* (1888) 15 Cal. 708.

(*p*) *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 81 I.C. 709, ('24) A.C. 616.

(*q*) *Biswanath Das* v. *Shorashibala* (1921) 48 Cal. 926, 66 I.C. 590, ('21) A.C. 48.

(*r*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I.C. 42; *Rajammal* v. *Mariyammal* ('54) A. My. 38.

(*s*) (1910) 33 Mad. 342, 5 I.C. 42, *supra*.

(*t*) *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277.

(*u*) *Bai Gulab* v. *Jiwanlal* (1922) 46 Bom. 871, 65 I.C. 602, ('22) A.B. 32.

(*v*) *Natha* v. *Mehta Chotalal* (1931) 55 Bom. 1, 130 I.C. 17, ('31) A.B. 89.

(*w*) *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I.C. 459.

(*x*) Yajnyavalkya, 2; 134-135.

should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But if, there be such, the son of the female slave participates for half a share only."

The whole law on the subject of inheritance is dealt with in § 43, Nos. 1-3, note (4), and of partition in § 312.

*Maintenance*

**643. Maintenance of illegitimate sons.**—The whole law on the subject of maintenance of the illegitimate sons of a Shudra by a dasi is dealt with in § 551 above.

# THE HINDU MARRIAGE ACT, 1955

## No. 25 of 1955

## ARRANGEMENT OF SECTIONS

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# INTRODUCTORY NOTE

Marriage and sonship constitute some of the unique chapters in the *literaleges* of ancient Hindu law. As early as the time of Rig-Veda marriage had assumed the sacred character of a sacrament and sanction of religion had heightened the character and importance of the institution of marriage (*a*). The basal thought was that marriage was a prime necessity for that alone could enable a person to discharge properly his religious and secular obligations. The earliest records show that rules of inheritance depended on the rules of marriage and it was obligatory on the father to give the daughter in marriage as a gift is given. The smritis deal with the subject of marriage with meticulous care and make fascinating study. Apastamba treated of certain aspects of the law of marriage (*b*). Manu expounded the subject; so also did many other smritikars and commentators. Medhatithi wrote: "A girl should be married after giving her raiments and ornaments and she should also be given a portion (*saudayika*)".

**Marriage, a sacrament.**

Marriage is necessarily the basis of social organisation and the foundation of important legal rights and obligations. The importance and imperative character of the institution of the marriage needs no comment. In Hindu law marriage is treated as a samskara or a sacrament. It is the last of ten sacraments, enjoined by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of a Sanyasi. It must have been noticed from the Chapter on Marriage that in Hindu law there were no less than eight different forms of marriage, different from one another in no slight degree, being in fact typical of different stages of social progress (*c*). In consequence of the varying rates at which society had advanced in different parts of India, the forms of marriage prevailing among the Hindus and the semi-Hindu races, mostly of non-Aryan origin, were of the most varied description. So that Indian life presented almost every possible form of the conjugal relation, from the grossest polyandry to the purest and the most rational form of monogamy (*d*). Of the eight forms of marriage recognised by the ancient Hindu law four were approved forms and four unapproved. The only forms recognised under the law in force before the commencement of this Act were the *Brahma* which was one of the approved forms and the *Asura* which was one of the unapproved forms. What distinguished the one from the other was that in the Brahma form it was a gift of the girl pure and simple whereas in the other consideration was received by the father or other guardian for giving the girl in marriage. The essential ceremonies for both these forms of marriage were the same. The importance of the distinction lay in this that when a woman died without

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(*a*) The Rig-Veda pronounces some impressive texts: After completing the seventh step (*saptapadi*) the bridegroom said. "With seven steps we have become friends (*sakha*). May I attain to friendship with thee: May I not be separated from thy friendship." Shatapatha Brahmana speaks of the wife as the half of one's self—*Ardho ha va esha atmano.*

(*b*) Apastamba has stated that from time of marriage the husband and wife were united in religious ceremonies and likewise in rewards of acts of spiritual merit—*Panigrahanaddhi sahatvan karmasu; tatha punyafaleshucha.*

(*c*) See § 428 *ante.*

(*d*) Banerjee, *Law of Marriage and Stridhan,* (1923) 5th Ed., p. 32.

leaving issue, if her marriage was in Brahma form her stridhan devolved in one way, and if in Asura form, it devolved in another way. It was desirable that there should be only one form of ceremonial marriage and that rules of succession should be uniform. A very great drawback of the existing law was that a Hindu could marry another wife although he had a wife living. This and some other rules relating to the conditions of a valid marriage called for substantial changes in the law of marriage.

Need for codification.

A stage had been reached when codification, at least of the law of marriage and succession, had become virtually indispensable. Far-reaching and fundamental changes had become inevitable for they alone could furnish fair and equable solutions to some of the most controversial questions relating to the law of marriage and succession. It had been generally recognised for a long time that the rules of marriage should be materially altered and turned into a body of law, compact in form and easily accessible. A uniform and comprehensive system governing all Hindus and containing a series of coherent propositions carefully considered and stated by the authority of the supreme legislature was a long-felt desideratum.

The protagonists of Hindu law reform in matters of marriage were on strong ground when they assailed the law as it stood. Alterative conditions had arisen in matters social, economic and political. There was no justification for permitting plurality of wives and the time had certainly come for enforcing monogamy by law. According to early Hindu society monogamy was the approved rule. Polygamy was an exceptional provision and taking of more than one wife required legal justification. The weight of evidence, adduced before the Hindu Law Committee, was preponderantly in favour of monogamy as a rule of law.

Divorce, however, is a thorny question. Hindu law, strictly so called, did not allow divorce except in certain communities, in the lower social strata, where it was permitted by custom; and there was deep-rooted sentiment against any provision for divorce in the new legislation which was being forged. It may be of some interest to note that some of the smritikars although they did not deal with divorce in the sense it is now understood did declare that a woman could take a second husband in certain events. The celebrated text of Narada is: "If the husband be missing, or dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband" (*e*). Statements to the same effect are made by Devala and are also ascribed to Katyayana (*f*). The practice of remarriage appears, however, to have fallen in disuse in case of the three regenerate castes during the Smriti period itself. But different conditions had arisen and fair and equable solutions had to be found in case of matters affecting formation as also dissolution of marriage. While marriage for life is the most natural form of marriage and best adapted to a civilized society there can be little justifica-

Divorce, a thorny question.

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(*e*) *Nashte mrite pravrajite kleebe cha patite patau; panchatsvapatsu nareenam patrianyo vidheeyate*—XII, 37. Vaishtha laid down that a damsel at the death of her husband may marry again if the marriage had not been consummated—XVII, 74.

(*f*) The texts of Devala and Katyayana are cited in Ratnakara and Parashara Madhaveeya.

tion for legally insisting upon the union as indissoluable, even under circumstances of exceptional hardship or cases of exceptional depravity on the part of one of the spouses. Considerable evidence was adduced before the Hindu Law Committee that there were thousands of cases of desertion of women by their husbands and many hard cases were brought to its notice in which remarriage had been desired and possible but could not be effected by reason of the existing law against divorce. Grounds other than desertion also required serious consideration and the Committee made a strong report in favour of the proposed legislation providing for relief by way of divorce in appropriate cases. The recommendations in the Report of the Rau Committee on the questions of marriage and divorce were substantially accepted by the Parliament. One additional factor in favour of providing uniform rules for divorce by Central legislation was that in some of the States, divorce had already been allowed on certain grounds as the result of legislation.

Wide and extensive application of the Act.

The Hindu Marriage Act came into force on 18th May 1955. It amends and codifies the law relating to marriage among Hindus. Section 2 rules that the Act applies to any person who is a Hindu by religion in any of its forms and developments. Thus, for instance, Lingayats, Brahmos and Aryasamajists and others who have deviated from orthodox standards of Hinduism in matters of ceremonial observances are Hindus within the ambit of the Act. So are Buddhists, Jains and Sikhs as also persons who are converts or re-converts to any of these four religions. A person, therefore, though not strictly a Hindu by religion is included in the class of persons governed by the Act by virtue of this rule which gives wide application to the provisions of the Act. One effect of this is that every person who comes within the broad connotation of the term Hindu can now enter into a valid 'Hindu Marriage' with any other person who is also within that expansive category. It is not a mere laconism to observe that it is easier to say who are not Hindus or that the practical separation of Hindus from non-Hindus is not a matter of much difficulty. Clause (c) of sub-sec. (1) of section 2 adopts the negative form and in effect lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose obviously is to avoid as far as possible detailed and at times complex inquiries into the matter. Section 4 is of vital importance and gives over-riding effect to the provisions of the Act. It abrogates all the rules of the law of marriage hitherto applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. The Act also supersedes any other law, contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in the Act. Rules relating to matters for which no provision is made are not, however, over-ridden by the Act. So also matters affecting marriage and divorce expressly saved from the operation of the Act continue to be governed by the previous law. Thus for instance sec. 29(4) lays down in terms that: "Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954), with respect to mar-

Overriding effect of the Act.

riages between Hindus solemnized under that Act, whether before or after the commencement of this Act". Another instance is furnished by the rule laid down in sub-section (2) of the same section which enacts that nothing contained in the Act is to be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

Special Marriage Act, 1954.

The Special Marriage Act of 1954 was enacted by the Parliament to provide a special form of marriage in certain cases, for the registration of marriages and for divorce, and was made applicable to all citizens of India domiciled in the country. It is, therefore, permissible to a Hindu, by virtue of that Act, to have his marriage with another Hindu or a person belonging to any other community solemnized in accordance with the requirements of that Act and the rights, obligations and status of the parties to such civil marriage in matters relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce are regulated by the provisions contained in that enactment. It may be noticed that succession to property of two Hindus married under that enactment as also to the property of the issue of such marriage is governed by the relevant provisions of the Indian Succession Act, 1925, and not by the Hindu law of succession.

Ceremonial marriage: 'Hindu marriage.'

Under the Indian law, therefore, it is now open to two Hindus if they desire to contract civil marriage to have it solemnized under the Special Marriage Act of 1954. But if they prefer marriage in a sacramental form or to state it more precisely a ceremonial marriage it must be solemnized in accordance with requirements of the present Act. Succession to the property of persons married under the present Act is governed by the Hindu law of succession and after the coming into force of the Hindu Succession Act of 1956 by that enactment. It seems convenient to refer to the former as a Special or a Civil marriage and to the ceremonial marriage regulated by the present enactment as a Hindu marriage. The Legislature uses the expression 'Hindu marriage' in this Act in the context of such a ceremonial marriage, e.g. when it lays down the conditions for a Hindu marriage in section 5 and speaks of ceremonies for a Hindu marriage in section 7 and registration of Hindu marriages in section 8.

Sections 5 and 7 of the Act treat of the conditions and ceremonial requirements of a Hindu marriage. They are:

Conditions for a valid marriage.

(1) The marriage must be solemnized in accordance with the customary rites and ceremonies of either party and where such rites and ceremonies include *saptapadi* (taking of seven steps by the parties before the sacred fire) that requirement must be observed [S. 7];

(2) There should not be valid subsisting marriage of either of the parties with any other person [S. 5(i)];

(3) The parties should as regards age and mental capacity be competent to have a marriage solemnized between them [S. 5(iii), (vi) and (ii)];

(4) The parties should not by reason of degrees of prohibited relationship or sapinda relationship be debarred from marrying one another [S. 5(iv) and (v)].

The Hindu marriage contemplated by the Act is a ceremonial marriage and it must be solemnized in accordance with the customary rites and ceremonies of one of the two parties. Non-observance of the essential customary rites and ceremonies of at least one of the parties would amount to failure to solemnize the marriage. A marriage not duly solemnized by performance of the essential ceremonies is, under the Act, no marriage at all. The condition that neither party must have a spouse living at the time of marriage is absolute with the result that monogamy is now the rule. The condition about prohibited degrees of relationship and the bar arising from sapindaship are also basic and cannot be ignored except that where there is a custom or usage governing both the parties which dispenses with the bar arising from prohibited degrees of relationship and sapindaship, such custom or usage will prevail. As to mental capacity the marriage is voidable if at the time of the marriage either party was an idiot or a lunatic. The age prescribed for the bridegroom is eighteen and for the bride fifteen but in case the bride has not completed the age of eighteen there must be the consent of the guardian in marriage of the bride. Child marriages are discouraged now both by law and society but the evil had been there for a long time and the legislature has stopped short of declaring them as null and void or even voidable. The legal deterrent, however, is that a breach of the condition relating to age is punishable as an offence (S. 18). It will be seen that non-fulfilment of every one of the conditions and requirements enacted in section 5 does not *ipso facto* render the marriage null and void or even voidable.

Ceremonial requirements.

Incapacity affecting validity of marriage.

Marriage under the Act, therefore, is the union of one man with one woman to the exclusion of all others satisfied by the solemnization of the marriage in accordance with requisite ceremonies and, directly it exists, creates a relation between the parties and what is called a status of each (*g*). "The status of an individual, used as a legal term, means the legal position of the individual, in or with regard to the community: the relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage, are not imposed or defined by contract or agreement but by law." Hindu marriage, under the Act, is a monogamous marriage which must be solemnized by performance of the essential rites and ceremonies and there must be no incapacity in the parties to marry one another arising from prohibited degrees of relationship or *sapinda* relationship.

Conception of Hindu Marriage under the Act.

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(*g*) Reference may be made to Notes under S. 5 "Conception of a Hindu marriage under the Act."

After laying down the requirements relating to solemnization of a Hindu marriage and stating the conditions appurtenant to the same and stressing that only a monogamous marriage is now permissible in case of Hindus the Act proceeds to make provision for the reliefs that can be granted by the Court in matrimonial causes and the grounds on which any such relief may be obtained.

The reliefs which can be obtained under the Act are:

(1) Decree for nullity of marriage—where the marriage is void *ipso jure* (S. 11);

Reliefs in matrimonial causes.

(2) Decree for nullity of marriage—where the marriage may be annulled by the Court on grounds which render it voidable (S. 12);

(3) Decree for divorce on grounds specified in S. 13;

(4) Judicial separation on grounds specified in S. 10;

(5) Restitution of conjugal rights—where one of the spouses has, without reasonable excuse, withdrawn from cohabitation from the other, the aggrieved spouse can obtain from the Court a decree pronouncing restitution of conjugal rights (S. 9).

A Hindu marriage solemnized after the commencement of the Act is void *ipso jure* in case of bigamy or where the parties were within the prohibited degrees of relationship or were sapindas of each other unless in case of any of the two last mentioned conditions the custom and usage governing both the parties to the marriage permits of a marriage between them. Any marriage in contravention of any of these three conditions is null and void from its inception and either party to such marriage can obtain a decree of nullity from the Court (S. 11). Parties to a marriage solemnized before this Act came into force are not, however, affected by this rule. In respect of matters dealt with by this rule they are governed by the previous law. But the prohibition imposed against bigamy is equally applicable to them in the sense that a Hindu husband cannot, after the Act came in force, marry another wife as long as his previous marriage is subsisting.

Marriage void *ipso jure.*

A decree for nullity of marriage may also be obtained by a party on grounds which render the marriage voidable at his or her instance (S. 12). Briefly stated the grounds are: impotency of the respondent; mental incapacity of the respondent at the time of the marriage; that the consent of the petitioner or of the guardian in marriage of the petitioner had been obtained by force or fraud; that the respondent was at the time of the marriage pregnant by some person other than the petitioner and the petitioner was at the time of the marriage ignorant of that fact. This relief by way of annulment of a voidable marriage is obtainable by a party in case of any Hindu marriage whether solemnized before or after the commencement of the Act.

Voidable marriage.

The scheme of the Act considered from the point of the validity or otherwise of a marriage is to lay down at the outset the conditions relating to the formation of a valid marriage and then to deal with marriages which are void and those which are not void but voidable at the instance of one of the parties to the same and the various reliefs that may be granted. A decree for nullity of marriage can be granted in case of a marriage which is void *ab initio* and also in case of a marriage which is voidable on grounds to which reference has already been made. A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be treated as void by both parties to it without the necessity of any decree annulling it. Of course, it is open to a party to a void marriage to have recourse to the court for declaration that it is null and void, but that would be for the purpose of precaution or record. A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. The expression "divorce" is sometimes broadly used as comprehending both decree for nullity of marriage and dissolution of marriage in the sense of its complete abrogation but this is not in consonance with modern legislative practice. The expression as used in the Act has limited connotation and is predicated on an existing marriage which during its subsistence was valid in the eye of the law and which it operates to dissolve. Decree for nullity of marriage on the other hand is to be granted when the marriage was void *ab initio* or when it was voidable at the instance of an injured spouse. In case of a marriage void *ab initio* it did not at any time have any legal existence; in case of a marriage voidable it was valid as long as it was not successfully impeached by the party who had in his or her power to avoid it. In case of a marriage which is void *ab initio* an ostensible marriage which was void from the inception is stripped of its colour of legality by declaring its nullity for reasons existing at the time of the marriage. In case of divorce the marriage having been duly solemnized and itself not being void or voidable is dissolved by the court usually for any reason arising after the marriage.

**Distinction between void and voidable marriage.**

**Distinction between nullity of marriage and divorce.**

A decree of divorce dissolving marriage whether solemnized before or after the commencement of the Act, may be obtained by the husband or the wife on the ground that the other party (i) is living in adultery; or (ii) has ceased to be a Hindu by conversion to another religion; or (iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or (iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or (v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

**Divorce.**

Either party to a marriage whether solemnized before or after the commencement of the Act, may obtain a decree of divorce on the ground that there has been no resumption of cohabitation as between them for a period of two years or upwards after the passing of a decree for judicial separation; or that there has been no restitution of conjugal rights between them for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

In addition to these grounds a wife can seek dissolution of the marriage on the grounds (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner provided that in either case the other wife is alive at the time of the presentation of the petition; or (ii) that the husband has since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

Judicial separation.

Judicial separation can be obtained by either party to a marriage whether solemnized before or after the commencement of the Act, on the ground that the other spouse (1) is guilty of desertion; or (2) is guilty of cruelty; or (3) is suffering from virulent leprosy; or (4) is suffering from venereal disease; or (5) is of unsound mind; or (6) is guilty of an act of adultery.

Every matrimonial offence—it must have been seen from the grounds for divorce stated above—is not treated under the Act as immediately furnishing a ground for an action of divorce. Adultery, to mention only one instance, which under the Special Marriage Act, 1954, is a ground for immediate divorce, may comprise even one act of infidelity. But adultery as a ground for divorce under the present Act can be established only by showing that the other party is living in adultery and one act of infidelity to the marriage tie furnishes only a ground for judicial separation.

Distinction between divorce and judicial separation.

Without going into the historical and other aspects of 'divorce' which prior to the English Matrimonial Causes Act, 1857, could be of two distinct types—absolute or a *viculo matrimonii* and limited or *a mensa at thoro*—it will suffice to observe that it is the divorce *a mensa at thoro* which is historically the background of the action for judicial separation. The distinction between a decree for divorce and one for judicial separation may be briefly stated. A decree for divorce has the effect of dissolving the marriage and puts an end to the marriage tie and the separation is absolute and final. A decree for judicial separation is one for legal separation and does not of itself result in dissolution of the marriage though it may furnish a ground for divorce where cohabitation has not been resumed for a space of two years after the passing of the same. It is in affirmance of the marriage and has the effect of suspending as it were the matrimonial and certain mutual rights and obligations of the parties. The separation is not absolute and final and the marriage tie continues to subsist. There is always a *locus poenitentiae* and the parties may at any time resume cohabitation.

A comparison of the grounds on which divorce may be decreed with those which permit only judicial separation shows that the object and scheme of the Act is not to render divorces easy and even while giving relief in cases of matrimonial offences so to frame the law as would provide opportunities for mutual adjustment between the parties. The scheme adopted in the Special Marriage Act is different in certain respects. Section 28 of that enactment permits a decree of divorce being granted by mutual consent of the parties in the manner there provided. Section 23 of that Act lays down that a decree for judicial separation may be passed on grounds on which a decree for divorce may be granted under the Act. The approach of the Legislature to the problems of judicial separation and divorce is not the same in the two enactments and it would seem that the Legislature did not deem it desirable that in the present enactment the grounds for judicial separation and grounds for divorce should be identical or that they should in all respects be the same as in the Special Marriage Act, 1954.

Scheme of the Special Marriage Act is different.

The grounds on which dissolution of marriage should be permissible must to some extent vary even in case of systems of law which recognize only a monogamous marriage and must remain a debatable subject. In a sense the grounds are bound to be somewhat arbitrary. The nature of the grounds and what should be regarded as matrimonial offences or misconduct on the part of one or both the parties must inevitabily raise some problems not easy of solution. The Legislature, it must have been seen, has sought to follow a middle course by not adopting any of the two extreme views one of which favours dissolution of the tie depending simply on the consent of the parties and the other which insists upon very stringent grounds. Divorce in case of Hindu marriage is not favoured; nor is it encouraged. It is discouraged but without enforcing conditions which may cause great hardship or drive parties to act in collusion with one another.

The Act, it must have been noticed, brings about some fundamental and salutary changes in the law of marriage. Even if the Act seems to break violently with the past it has to be conceded that it is characteristic of the age which is one of great ideals and fast changing social, economic and political theories. The following *changes brought about by the Act* in the law of marriage are particularly notable.

Changes in law brought about by the Act.

I. A Hindu marriage, by which is meant a marriage solemnized in accordance with the requirements of the Act, can take place between any two persons who come within the broad connotation given by the Act to the expression 'Hindu' (S. 2). Inter-marriage between persons of different castes—Brahmin, Kshatriya, Vaishya and Sudra—or persons professing the Hindu, Buddhist, Jain or Sikh religion is not prohibited. Section 29 of the Act gives retrospective effect to this rule and lays down that a ceremonial marriage solemnized before the commencement of the Act between persons who come within the broad connotation of the expression 'Hindu', if otherwise valid, shall not be deemed to be or to have

been invalid by reason only of the fact that the parties belonged to these different religions or different castes. The division of Hindus formerly made by reference to their castes Brahmin, Kshatriya, Vaishya and Sudra has now no bearing on the subject of marriage.

II. Monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all others, is now enforced by legislation [S. 5(ii)]. Any marriage between two Hindus solemnized after the commencement of the Act is null and void if at the date of such marriage either party had a husband or wife living (S. 17).

III. Bigamy is rendered punishable as an offence under the Penal Code (S. 17).

IV. The conditions and requirements of a valid Hindu marriage are considerably simplified (Ss. 5 and 7).

V. Reliefs by way of judicial separation, declaration of nullity of marriage and divorce are recognized (Ss. 10 to 13).

VI. Provision is made for legitimacy of children of void and voidable marriages (S. 16).

VII. Provision is made for alimony *pendente lite*, permanent alimony and maintenance (Ss. 24 and 25).

VIII. Wide discretionary powers are conferred on the court in any proceeding under the Act, to pass orders relating to the custody, maintenance and education of minor children of the parties (S. 26).

An examination of the scheme and various provisions of the Act will show considerable similarity with the arrangement adopted and the language employed in the Special Marriage Act, 1954. Where the provisions are *in pari materia*, cases on the construction of the analogous provisions of that enactment will render assistance in construing the provisions of the present Act. But as the Joint Committee has itself observed their approach to the problems of judicial separation and divorce was not entirely the same in case of the two enactments and that it was neither necessary nor desirable that the grounds for judicial separation and grounds for divorce should under the present Act be identical as in the Special Marriage Act. Moreover, it was felt that in case of the ceremonial marriage under this Act divorce should not be made easy and the law should be so framed as to provide the maximum opportunities for mutual adjustment and therefore the scheme of the present Act should in some respects be different. It is submitted that while the importance of decisions that may be given under the Special Marriage Act need not be minimised it will be necessary always to bear in mind that the scheme of the two enactments is not identical.

Decisions under Special Marriage Act, 1954.

A comparison of a number of provisions including those relating to grounds for relief in matrimonial cases in the present enactment as also the

**Decision of Courts in England.**

Special Marriage Act, 1954, with analogous provisions in the English Matrimonial Causes Act, 1950, will show that they are based mainly on the English Act. The main principles are the same and likewise some important details. The deviations in principles are not on any major points and are introduced in order to adapt the law to Indian conditions. The wording of clearly defined principles in the English Act have been freely adopted in the present Act though the scheme of the present Act is in some respects materially different. On analogous provisions unaffected by the specialities of the English Act and on fundamental concepts and broad general principles decisions of courts in England can be helpful if utilised with due care. In a case under the Bombay Hindu Divorce Act (*h*) the Supreme Court drew largely on the English law in stating a number of broad general principles relating to desertion as a matrimonial offence. In a branch of law rules of which are inspired by the broad general principles of the English law on the subject, decisions of Courts in England in so far as they enunciate and expound those principles can always be of considerable guidance and assistance. Danger, however, lies in phrases used aptly enough, no doubt, in a particular context and opinions useful in their own sphere being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. The rule of construction relating to provisions of enactments *in pari materia* is one of importance and great convenience and aid from outside may legitimately be derived when any doubtful point of interpretation of any provision has to be solved, but resort to it simply on the ground of similarity must be avoided. In a field such as is covered by the present enactment great care is required when examining the decisions of Courts in England on the question of construction of any similar provisions. It will be noticed that despite the similarity there are in some cases changes in the language and the terminology employed. There are also differences in the scheme and framework of the two enactments. Even when examining provisions which may seem to be *in pari materia* it will be necessary to note that having regard to the scheme of the present Act and the framework in which any particular rule under consideration is enacted, the rule may require broader or restricted interpretation and it need not necessarily be construed in precisely the same way.

**Duty of the Court.**

Before proceeding to grant any relief under this Act, it is the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. In proceedings under the Act, whether defended or not, it is also the duty of the Court to see that the petitioner is not taking advantage of his or her own wrong and to satisfy itself that the evidence does not disclose any statutory bar such as connivance, condonation, collusion, unnecessary delay in instituting proceedings or any other legal ground why relief should not be granted even though the matrimonial offence on the part of the other spouse may have been proved (S. 23). It is with jealous care that the Court interferes with the obligations of the

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(*h*) *Bipin Chander* v. *Prabhawati* (1956) S.C.R. 838, (1957) 59 Bom. L.R. 322, ('57) A.S.C. 176.

marriage vow. It must not lose sight of the fact that dissolution of marriage is a matter of grave import and the last expedient of the law. The Court must not overlook that unlike the English enactment the Act leaves little discretion with it in the matter of granting or withholding relief. It must, therefore, refrain from analogy drawn from cases decided under other enactments which confer unfettered discretion on the Court by recognising that certain bars to relief are discretionary and not absolute (*i*). At the same time it is the duty of the Court to act with sound discernment and where a ground for relief is established it must act on it; and while applying any of the statutory bars laid down in sec. 23 it must not act on any preconceived classification of circumstances but on the broad principles on which those statutory bars rest and must see that it does not apply them in a manner as would result in any unreasonable withholding of the relief which it is its duty to grant.

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(*i*) See Notes under S. 23, *infra*.

# THE HINDU MARRIAGE ACT, 1955

No. 25 OF 1955

[18th *May*, 1955]

**An Act to amend and codify the law relating to marriage among Hindus.**

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

**Preamble.**—A preamble to an enactment of the Legislature was formerly regarded as key to open the mind of the makers of the Act, and mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of the Legislature has disappeared and it is now regarded as well settled law that a preamble cannot either restrict or extend the enacting part when the language and the scope of an Act are not open to doubt. It sometimes happens that a preamble is narrow but the enacting words large. The preamble to the present Act speaks only of the law relating to marriage. Under the legislative practice followed in India it is not unusual to lay down the law relating to the formation of marriage as also its dissolution and other allied matters in the same enactment. The Act lays down rules relating to the solemnization and requirements of a valid Hindu marriage. It also lays down rules relating to restitution of conjugal rights, judicial separation, nullity of marriage, divorce, legitimacy of children and other allied matters.

**Codifying Act.**—It is clear from the preamble that it is intended by the Act not merely to amend but to *amend and codify* the law relating to marriage among Hindus. The object of codification of a particular branch of law is that, on any matter specifically dealt with by it, such law should be sought for in the codified enactment itself. Where a statute is expressly said to codify the law, the Court, as a general rule, is not at liberty to go outside the law so created simply because before the existence of that enactment another law prevailed. The following observations of Lord Herschell in *Bank of England* v. *Vagliano* (*j*) in a passage which has now become *locus classicus*, were cited with approval by the Judicial Committee of the Privy Council in *Norendra Nath* v. *Kamalbasini Dasi* (*k*): "The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point

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(*j*) (1891) A.C. 107.

(*k*) 23 Cal. 563, 571, 572 (P.C.).

specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions. . . ."

A codifying statute does not, however, altogether exclude reference to earlier law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute, where they are open to rival constructions. In respect of matters specifically dealt within the statute earlier law cannot be invoked otherwise than for this limited purpose; it cannot be relied on for the purpose of adding to it something which is not there. The following general observations of the House of Lords in England in *Quebec Railway Co.* v. *Vandry* (*l*) may be found useful. "The first step, the indispensable starting point, is to take the codifying enactment itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior source. Of course it must not be forgotten what the enactment is, namely a code of systematised principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate sections, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expressions may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature." Question may arise whether this Act is a complete code in the sense of comprehensive legislation dealing with every phase and aspect of the law of marriage. In an Act intituled an Act to amend and codify a particular branch of law, in so far as there is express enactment, that alone must be looked at since the Court is bound by it and can look to nothing else and the express enactment must govern the rights of the parties even though it has radically altered or modified the prior law. The Act both amends and codifies the law of marriage and, as has already been pointed out (*m*), has made a number of fundamental and important changes in the prior law. Reference in this connection may be made to S. 4 which gives over-riding effect to the provisions of the Act. It follows that with respect to matters for which provision is made in the Act the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable though such matters are indeed few.

When law has been codified, it cannot be modified gradually from day to day as the changing circumstances of the community require, by rules made to meet those imperceptibly changing conditions and any modification however small must be made by the Parliament.

**Rules of interpretation of statute.**—The following are the principal rules relating to the interpretation of statutes. The fundamental principle

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(*l*) (1920) A.C. 662.

(*m*) See pp. 661-662, *supra*.

of interpretation of a statute is that it should be construed according to the intent of the Legislature which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. There is another rule, however, which must not be overlooked in this connection. It is to the effect that the Court must not create or imagine an ambiguity where it really does not exist. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature (*n*).

Intention of the Legislature.

As a general rule, the intention of the Legislature is to be gathered from the language used and the Court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant. As was observed by Lord Watson in *Salomon* v. *Salomon & Co.* (*o*), "Intention of the Legislature is a common but very slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

Literal construction.

One of the most important rules of construction is the rule of literal construction, and Courts are bound to construe provisions of the Statute according to their plain and obvious meaning. If there is nothing to modify, nothing to alter, nothing to qualify, the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences (*p*). It has been repeatedly observed that in construing enacted words the Court is not concerned with the policy involved or with the result, injurious or otherwise, which may follow from giving effect to the language used by the Legislature (*q*).

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further (*r*).

When the language of a section is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise. *Absoluta sententia expositore non indiget.* Such language best declares without more

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(*n*) See per Lord Davey in *Powell* v. *Kepton Park Race Course Co.* (1899) A.C. 143, 185; *Nepra* v. *Sayer* (1928) 55 Cal. 67, 75; *Finch* v. *Finch* (1943) Lah. 765, 776.

(*o*) (1897) A.C. 22, 38; also see *In re Hungerford Investment Trust Ld.* (1935) 62 Cal. 133; *Bishunlal* v. *Jagarnath* (1943) 22 Pat. 148.

(*p*) *Cox* v. *Hakes* (1890) 15 App. Cas. 506, 542. Also see *Muhammad* v. *Commissioner of Income-tax* (1931) 12 Lah. 129 (F.B.); *Gurmukh Singh* v. *Intazamia Committee* (1942) Lah. 217 (F.B.).

(*q*) *Attorney-General of Alberta* v. *Attorney-General of Canada*, A.I.R. (1945) P.C. 76; *Tukino* v. *Aotea Dist. M.L. Board*, A.I.R. (1941) P.C. 109.

(*r*) *Grey* v. *Pearson* (1857) 6 H.L. Ca. 61, 106; *Badsha Mia* v. *Rajjab Ali*, A.I.R. (1946) Cal. 348 (F.B.); *Shiv Charan* v. *Ram Saran* (1943) Lah. 497 (F.B.); *L.H. Sugar Factories* v. *Moti* (1941) All. 471 (F.B.); *In re Krishnamurthi Ayyar* (1942) Mad. 9.

the intention of the law-giver and is decisive of it (*s*). It would be contrary to all rules of construction to read words into a statute unless it is absolutely necessary to do so (*t*). The Court cannot appropriate to itself the duty of supplying any deficiencies in the statute. It will not add or amend or by construction make up such deficiencies. Whether the omission appears to have flowed from forgetfulness of the draftsman or is intentional is no concern of the Court and it is well settled that a *casus omissus* cannot be supplied by a Court of Law, for that would be to make laws (*u*).

If, however, the words of provision are sufficiently flexible, it can be construed in the sense which if less correct grammatically, is more in harmony with the intention of the Legislature; and to arrive at the real meaning, it may be necessary to get an exact conception of the aim, scope and object of the whole Act (*v*). The true meaning of any passage of the statute is that which best harmonises with the object and with every other passage of the statute, and it is a well settled rule that the same words are to be *prima facie* construed in the same sense in the different parts of the same statute (*w*). A Court should not deal separately with the terms of an enactment which is in its nature composite. It should avail itself, as an aid to construction. of the light thrown upon each of its expressions by the presence within it of the others. Further in its construction of words it should pay sufficient regard to the setting in which they are found (*x*). A well-established rule applicable to all statutes is the rule of construction *ex viserribus actus*. The Court is bound to see that the interpretation it puts on a particular provision makes a consistent enactment of the whole statute.

In general it is true that in dealing with matters relating to the general public, a statute is presumed to use words in their popular sense—*uti loquitur vulgus*. But it has to be remembered that the meaning of words is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular sense, as in the subject or in the occasion on which they are used, and the object to be attained. General words, however wide in the abstract, are more or less elastic, and admit of restriction or expansion to suit the subject-matter (*y*). It is sometimes said that words in a statute are to be understood in a legal sense. That principle is of cogency when the words in question represent only legal conceptions. The popular use of such words may not represent the primary meaning of the words, but some half understanding of them (*z*).

The Court cannot look into the proceedings of the Legislature to see what took place there during the passage of the Bill which passed into the law; it cannot seek the assistance of the debates in the Legislative Council, or the

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(*s*) *Maxwell on Interpretation of Statutes*, (1962) 11th Edition, p. 4.

(*t*) *Renulu Bose* v. *Manmatha Nath* (1945) 49 Cal. W.N. 491 (P.C.).

(*u*) *Kamalaranjan Roy* v. *Secretary of State*, A.I.R. (1938) P.C. 281; *Gurdial Singh* v. *The Central Board, Local Committee, Amritsar* (1928) 9 Lah. 689, 698, 699.

(*v*) *In re Mayfair Property Co.* (1898) 2 Ch. 28 35.

(*w*) *Ganpat* v. *Vithal* (1941) 43 Bom. L.R. 976; *Spencer* v. *Metropolitan Board of Works* (1883) 22 Ch.D. 142; *Khan Gul* v. *Lakha Singh*, A.I.R. (1928) Lah. 609 (F.B.); *Turquand* v. *Board of Trade* (1886) 55 L.J.Q.B. 417.

(*x*) *Vacuum Oil Co.* v. *Secretary of State* (1932) 56 Bom. 313 (P.C.).

(*y*) *Wandsworth Board of Works* v. *United Telephone Co.*, 13 Q.B.D. 904, 920; *Maxwell, Interpretation of Statutes*, (1962) 11th Edition, p. 59.

(*z*) *Lord Advocate* v. *Stewart* (1902) A.C. 344.

report of the Select Committee for the purpose of interpreting a statute. Nor will it, for such a purpose, refer to any statements of objects and reasons annexed to a Bill brought before the Legislature (*a*).

Reference to previous law.

Another rule of construction which must not be overlooked in dealing with an Act like the present one is that the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view (*b*).

Headings.

The heading of a chapter can be looked at for the purpose of interpreting a section in the statute (*c*).

Marginal notes.

It has been observed by the Judicial Committee of the Privy Council, that marginal notes to the sections cannot be referred to for the purpose of construing an Act of the Legislature (*d*). There is no reason, however, why marginal notes may not be looked at in order to see the general trend of a section (*e*).

**Recent Enactments.**—It is a sound principle of interpretation of statutes that whenever it is possible to do so the Court will construe provisions which appear to conflict so that they harmonise. This principle is also applicable to provisions in different statutes which form part of a scheme of legislation as in case of the recent four enactments.

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(*a*) *Aswini Kumar* v. *Arabinda Bose*, A.I.R. (1952) S.C. 369; *Mahalakshmi* v. *Sham Rangini* (1941) 1 Cal. 499; *Krishna Ayyangar* v. *Nalla Perumal* (1920) 43 Mad. 550, 565 (P.C.); *Raj Mal* v. *Harnam Singh* (1928) 9 Lah. 260; *Dina Nath* v. *Sati Prosad* (1922) 27 Cal. W.N. 115; *Gopal Pandey* v. *Parsotam* (1883) 5 All. 121 (F.B.): *Administrator-General* v. *Premlal* (1895) 22 Cal. 788 (P.C.); *Tamijannessa* v. *Purna Chandra*, A.I.R. (1927) Cal. 821. Also see *Shantanand* v. *Basudevanand* (1930) 52 All. 619 (F.B.).

(*b*) *Bank of England* v. *Vagliano* (1891) A.C. 107, 144, 145; *Despatie* v. *Tremblay* (1921) 1 A.C. 702, 709; *Norendra Nath* v. *Kamalabasini* (1896) 23 Cal. 563 (P.C.); *Raghumull* v. *Official Assignee of Calcutta* (1924) 28 Cal. W.N. 34, 42, 43.

(*c*) *Eastern Counties, etc. Co.* v. *Marriage* (1860) 9 H.L.C. 32, 41; *Dwarkanath* v. *Tafazar* (1917) 44 Cal. 267.

(*d*) *Balraj* v. *Jagatpal* (1904) 26 All. 393, 406 (P.C.). But see *Ram Saran* v. *Bhagwat Prasad* (1929) 51 All. 411 (F.B.).

(*e*) *Secretary of State* v. *Bombay Municipality* (1935) 37 Bom. L.R. 499, 508; *Abdul Hakim* v. *Fazu Miya* (1935) 62 Cal. 266. Also see *Dharwar Urban Bank Ltd.* v. *Krishnarao* (1937) 39 Bom. L.R. 203, 209, 210; *Brijmohan* v. *Tulsiram* (1942) Nag. 53.

## CHAPTER I

## PRELIMINARY

**1.** (1) This Act may be called the Hindu Marriage Act, 1955.

Short title and extent.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

**Commencement and extent.**—The Act received the assent of the President on 18th May 1955 and came into operation on that day (*f*).

The Act applies to Hindus in the whole of India except the State of Jammu and Kashmir. It has now by appropriate legislation been applied also in Jammu and Kashmir. The Act also applies to Hindus domiciled in India but who are living outside India. The general principle of private international law is that the *lex loci* governs matters relating to immovable property and the law of the domicile governs personal relations.

Some of the principles which determine domicile were considered by the Supreme Court in the undermentioned case (*f*1).

**2.** (1) This Act applies—

Application of Act.

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation.*—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be: —

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

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(*f*) S. 5 (1)(*b*), General Clauses Act.

(*f*1) *Central Bank of India Ltd. v. Ram Narain* ('55) A.S.C. 36.

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

**Persons governed by the Act.**—The word 'Hindu' does not denote any particular religion or community. During the last hundred years and more it has been a nomenclature used to refer comprehensively to various categories of people for purposes of personal law. It has been applied to dissenters and non-conformists and even to those who have entirely repudiated Brahminism. It has been applied to various religious sects and bodies which at various periods and in circumstances developed out of, or split off from, the Hindu system but whose members have nevertheless continued to live under the Hindu law and the Courts have generally put a liberal construction upon enactments relating to the personal laws applicable to Hindus. In the Note to clause 2 of the Hindu Marriage Bill it was observed: "At present, Hindu law applies (i) to Hindus by birth, and to Hindus by religion, that is to say, to converts and re-converts to Hinduism, (ii) to illegitimate children where both parents are Hindus, (iii) to illegitimate children where the mother is a Hindu and the children are brought up as Hindus, (iv) to Brahmos, Arya Samajists, Lingayats and to persons who may have deviated from orthodox standards of Hinduism in matters of diet and ceremonial observances and to every other person who may be regarded as Hindu unless he can show some valid local, tribal or family custom to the contrary and (v) to Jains, Sikhs and Buddhists". This section in effect seeks to codify the existing law on the question.

**Sub-sec. (1)(a): Hindu.**—The words in this sub-section "any person, who is a Hindu by religion in any of its forms and developments" give legislative approval to the numerous decisions of Courts on the subject noted in § 6 including pronouncements of the Judicial Committee of the Privy Council. In a judgment of the Calcutta High Court in a matter which was ultimately decided by the Privy Council it was observed: "The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more

stringent, but amongst its different castes and sections it exhibits wide diversity of practice" (*g*).

**Sub-sec. (1)(b).**—The Act applies not merely to Hindus by religion but also to persons who profess the Buddhist, Jain or Sikh religion. Persons who profess any of these four religions are included in the wide category of persons governed by this Act.

The effect of the four new Acts is to give legislative sanction to the existing previous law that even though Jains may not be Hindus by religion they are to be governed by the same law as the Hindus.

**Sub-sec. (1)(c).**—It is not a mere laconism to observe that for the purposes of this Act it is easier to say who are not Hindus or that the practical separation of Hindus from non-Hindus is not a matter of much difficulty. This sub-section adopts the negative form and in effect lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose is to avoid as far as possible detailed and at times complex inquiries into the matter.

**Explanation (b).**—This explanation deals with legitimate children of mixed marriages where one of the parents is a Hindu, Buddhist, Jain or Sikh. It also deals with illegitimate children, one of whose parents is a Hindu, Buddhist, Jain or Sikh. Such legitimate or illegitimate children, if brought up in the religion of any such parent, are governed by the Act. Reference may be made to the undermentioned case (*g*2).

**Explanation (c).**—This explanation gives legislative sanction to the view that conversion or reconversion of any person to Hindu religion, whatever be the other faith to which that person might have belonged or been converted to, attracts with it the application of the Act. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices. But if he abdicates his religion by a clear act of renunciation and can be said to have in fact adopted the Hindu religion, he may justly be regarded as a Hindu within the meaning of that expression as understood in this Act. The best evidence of such conversion would be an actual formal conversion (*h*).

**Sub-sec. (2): Scheduled Tribes.**—Clause 25 of Article 366 of the Constitution defines the expression 'Scheduled Tribes' and Article 342 enacts the manner in which these tribes may be notified. This was done by the Constitution (Scheduled Tribes) Order, 1950, and by the Constitution (Scheduled Tribes) Order, 1951. The present sub-section has the effect of laying down that persons belonging to such notified tribes will in matters of marriage continue to be governed by the personal law which was hitherto applied to

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(*g*) *Bhagwan Koer* v. *Bose* (1904) 31 Cal. 11, 15.
(*g*1) *Commissioner of Wealth Tax* v. *Champa Kumari* (1972) A.S.C. 2119.
(*g*2) *Rosa Marie* v. *Commissioner of Wealth Tax* ('70) A.M. 249.
(*h*) Reference may be made to *Ratansi* v. *Administrator-General of Madras* (1929) 52 Mad. 160, and *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, where earlier decisions are reviewed.

them and not by any of the provisions of this Act unless the Central Government by notification directs that any such provisions should be applicable to them (*h*1).

**Sub-sec. (3).**—This sub-section is enacted to make it abundantly clear that the expression 'Hindu' wherever used in the Act is to be understood in the inclusive and comprehensive significance given to it in this section. Also see 'Persons governed by the Act' at p. 671 *supra*.

**3.** In this Act, unless the context otherwise requires,—

Definitions.

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided furher that in the case of a rule applicable only to a family it has not been discontinued by the family;

(b) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(c) "full blood" and "half blood"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

(d) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

*Explanation.*—In clauses (c) and (d), "ancestor" includes the father and "ancestress" the mother;

(e) "prescribed" means prescribed by rules made under this Act;

(f) (i) "*sapinda* relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the

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(*h*1) *Dasarath* v. *Gura Bewa* ('72) A. Orissa 78 [Act is not applicable to members of Bathudi sub-caste].

line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be "*sapindas*" of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them;

(g) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(i) if one is a lineal ascendant of the other; or

(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

*Explanation.*—For the purposes of clauses (f) and (g), relationship includes—

(i) relationship by half or uterine blood as well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly.

It will be seen that the definitions given in this section are not all intended to economise words or to serve merely as a little dictionary. Most of the definitions lay down legal principles.

**"Unless the context otherwise requires."**—The definitions and abbreviations given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject-matter. Even when an Act contains a section giving definitions the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the Court will give such meaning to the expression as will be more in harmony with the context and allow it to prevail over the "artificial conceptions" of the definitions clause.

**Cl. (a) "Custom": "usage".**—It is generally said that custom must be ancient, certain and reasonable. It will be noticed that the definition in clause (a) does not use the expression ancient but speaks of the observance of a custom or usage "for a long time". The English rule that "a custom, in order that it may be legal and binding, must have been used so long that the

memory of man runneth not to the contrary" has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group or family. Certainty and reasonableness are also indispensable elements of the rule. An essential attribute of a valid custom and one emphasized in this clause is that it must not be opposed to public policy. The determination of what is opposed to the so-called public policy or policy of the law has necessarily varied from time to time. While the principle underlying the rule do not vary, the application of the rule must in a large measure depend upon public opinion and current notions of what is good for the public. One test which may help is that the custom or usage must have no general tendency to do wrong or injury. Each case of custom or usage must rest upon its own peculiar nature and facts and no hard and fast rule can be laid down.

Also see §§ 15 to 20 *ante* and section 4 *post*.

**Cl. (b): "District Court."**—The expression "district" as defined in Section 2(4) of the Civil Procedure Code means "the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court". Following this definition the expression 'District Court' must be understood to include a High Court in the exercise of its ordinary original civil jurisdiction (*i*). But where there is a City Civil Court, the City Civil Court alone and not the High Court would be the 'District Court' for the purposes of this Act. Section 19 of the Act deals with jurisdiction and lays down that: "Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together".

Also see Notes under Section 19 *post*.

**Cls. (c) and (d): "Full blood: Half blood: Uterine blood".**—Question of relationship subsisting between the parties to a marriage becomes material when dealing with restrictions arising from sapinda relationship and degrees of prohibited relationship because subject to limited exceptions there are certain prohibitions which are absolutely imperative in their nature. Relationship by full blood or half blood or uterine blood or by adoption may bring the parties within those imperative bars and render void marriage between them.

**Cl. (e): "prescribed".**—The Act lays down in Section 8 that the State Government may make rules relating to registration of marriages. Section 14 empowers the High Court to make certain rules and Section 21 confers rule-making powers on the High Court for the purpose of regulating the procedure to be followed in case of petitions under the Act.

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(i) *Kedarnath* v. *Gonesh* (1907) 12 C.W.N. 446.

**Cl. (f): "Sapinda relationship".**—Clause (f) of this section defines *sapinda* relationship by laying down the manner of computing degrees of ascent and relationship for the purpose of marriage. *Section* 5 [*Cl.* (*v*)] *lays down as one of the conditions of a valid marriage that the parties must not be sapindas of each other unless there is a custom or usage governing each of them which permits of a marriage between them.* Under the old law sapinda relationship was of primary importance in matters of succession to the property of a male Hindu and sapindas belonged to the first class of heirs. The different classes of heirs recognised by the Mitakshara and the Dayabhaga have now ceased to exist in case of devolution of property of a male Hindu and the new scheme of succession evolved by the Hindu Succession Act, 1956, does not proceed with sapinda relationship as the indispensable starting point. Sapinda relationship was also a governing consideration in determining prohibited degrees of marriage. The concept of sapinda relationship appears to have been retained in the present Act as more convenient in dealing with the question of degrees of prohibited relationship in marriage. The five and three degrees mentioned in the definition are of vital importance and the rule requires to be carefully applied. The note to clause 3 of the Hindu Marriage and Divorce Bill states that the strict rule prohibiting marriage within the limits of sapinda relationship as defined in the *Smritis* (seven and five degrees) have been considerably relaxed by custom and the limits have therefore been reduced to five and three degrees, as is generally recognised now. Not only has the sapinda relationship been interpreted in different ways by different authors, but the rule itself has been subject to modification by custom. Some definite limits had therefore to be provided for which accord with judicially recognised customs or well-established customs.

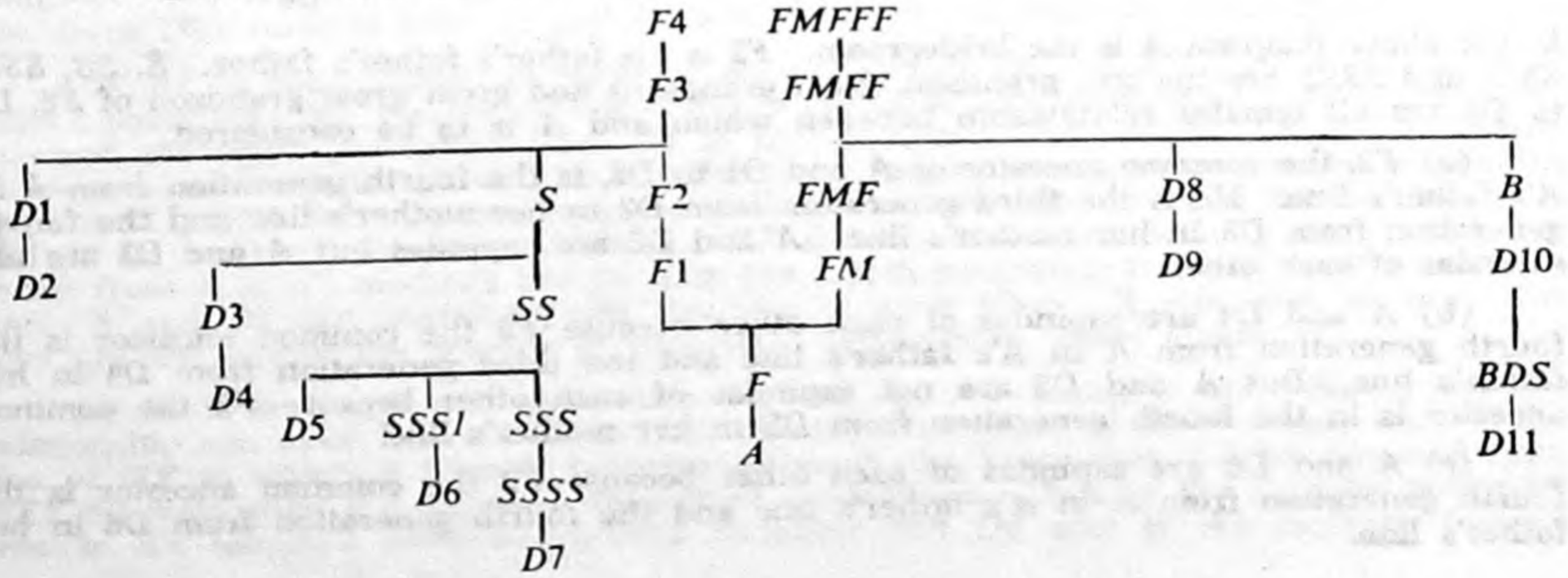
The general rule, therefore, is that no valid marriage can take place between two persons who are sapindas of each other as defined in this clause. This clause read with the Explanation added at the end of the section principally rules that:

1. Sapinda relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties.
2. Sapinda relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties.
3. Sapinda relationship may subsist in case of both the parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and in case of the other through the mother.
4. The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted *inclusive* of the persons concerned and the common ancestor or ancestress.
5. The line of ascent to be traced is not restricted to male ancestors. Thus for instance a person's father's mother's father as also his father's father are in the line of ascent through the father. Similarly the mother's mother and mother's father are in the line of ascent through the mother. The computation of generations as such cannot present

any difficulty but question may arise, from the retention by the Legislature of the expression *sapinda relationship*, whether the line must pass only through male ascendants of the father or may pass through male or female ascendants of the father without differentiating between such ascendants. There was an irreconciliable conflict of views on the question under the old law in dealing with sapinda relationship as understood in the context of prohibited degrees of marriage and the relevant texts were differently interpreted. Even if reference to the old law on the subject is deemed permissible no useful guidance can be derived by reverting to the controversy under the old law however interesting the subject may be. The use of the word 'through' in the expression 'in the line of ascent through the father' and the word 'generation' which means a single succession in natural descent, indicate that the relationship is not confined to the case of direct male ascendants of the father and it is submitted that the language used must be understood as comprehending both male and female ascendants of the father so that in tracing the line of ascent to the fifth generation through the father there can be the intervention of both male and female ascendants. Moreover there is other intrinsic evidence which supports this construction and that is the use of the expression 'lineal ascendant' in clause (f) (ii) which is also used in clause (g). In latter clause it is obvious that the expression lineal ascendant applies both to the male and female ascendants of a father and mother. Explanation (i) also supports this construction. It may be said on the other hand that while one's own maternal line is shortened to three generations there is no reason why the father's maternal line and even the father's mother's maternal line should feature in the computation and largely increase the number of sapinda relations. The language of the clause, however, supports the construction submitted above.

6. Sapinda relationship includes relationship by half or uterine blood as well as by full blood and also by adoption. It also includes both legitimate and illegitimate blood relationship.

The following diagrams will enable the reader to understand the rules applicable in determining sapinda relationship in respect of marriage through the bridegroom's father:



In the above diagram *A* is the bridegroom; *F* is his father; *F*1 to *F*4 are his father's paternal ancestors; *FM* is his father's mother; and *FMF*, *FMFF* and *FMFFF* are his father's mother's paternal ancestors. *S*, *SS*, *SSS*, *SSS*1 and *SSSS* are the son, grandson, great grandsons and great great grandson of *F*3. *B* is another son of *FMFF*. *D*1 to *D*11 are all females relationship between whom and *A* is to be considered.

(a) *F*3, the common ancestor of *A* and *D*2, is the father's father's father's father of *A* and the mother's father of *D*2. As *F*3 is the fifth generation from *A* in *A*'s father's line and the third generation from *D*2 in her mother's line, *A* and *D*2 are sapindas of each other.

(b) *F*3, the common ancestor of *A* and *D*4 is the father's father's father's father of *A* and the mother's father's father of *D*4. *F*3 is the fifth generation from *A* in *A*'s father's line but he is the fourth generation from *D*4 in her mother's line, *A* and *D*4 are, therefore, not sapindas. *D*3, however, is a sapinda of *A*.

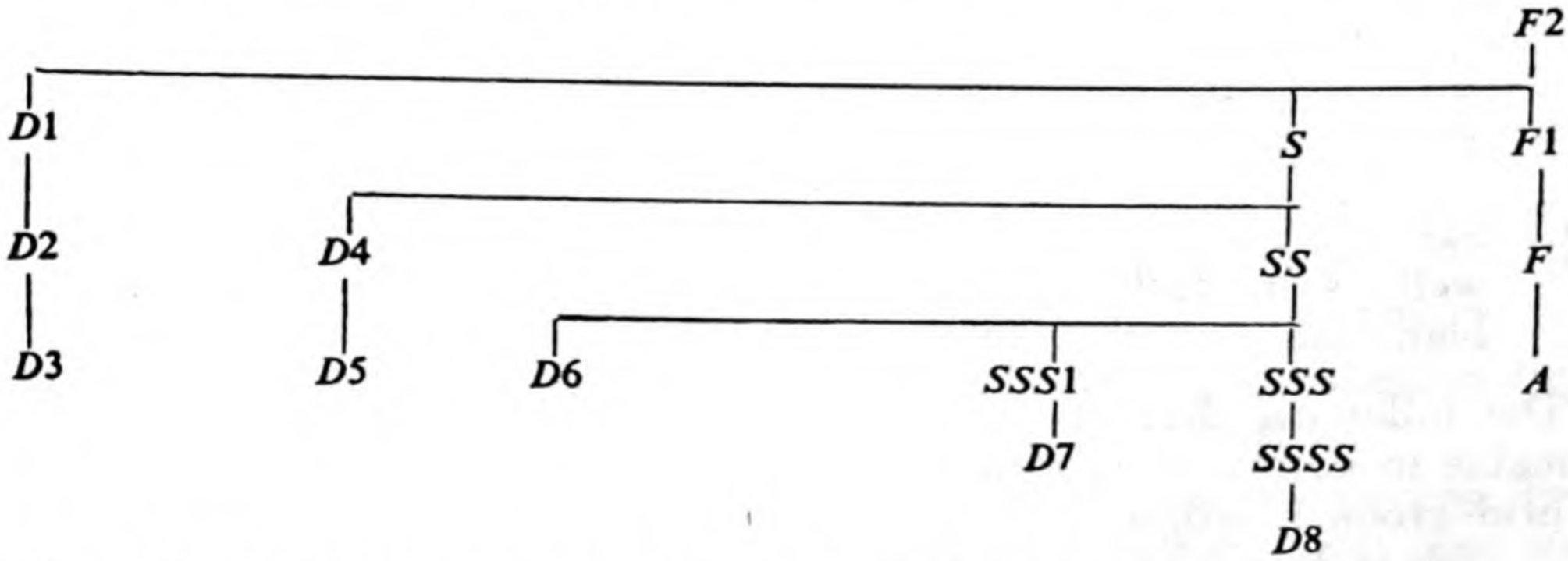
(c) *F*3 in the above diagram is the fifth generation from *A* in *A*'s father's line. He is in the fourth generation from *D*5 in her father's line; and the fifth generation from *D*6 in her father's line. *A* is sapinda of *D*5 and also of *D*6. *A* is not, however, a sapinda of *D*7 because *F*3 is in the sixth generation from *D*7 in her father's line.

(d) *F*4 is the 6th generation from *A* in *A*'s father's line. So no sapinda relationship can exist between *A* and any female descendant of *F*4 (other than in the line of *F*3) although such female descendant may not be removed from *F*4 by more than the specified number of generations.

(e) *FMFFF* also is the 6th generation from *A* and the position of *A* and any female descendant of *FMFFF* (other than in the line of *FMFF*) will be same as in the previous illustration.

(f) *FMFF*, the common ancestor of *A* and *D*9, is the father's mother's father's father of *A* and the mother's father of *D*9. As *FMFF* is the fifth generation from *A* in *A*'s father's line and the third generation from *D*9 in her mother's line, *A* and *D*9 are *sapindas* of each other.

(g) *FMFF*, the common ancestor of *A* and *D*11, is the father's mother's father's father of *A* and the father's mother's father's father of *D*11. As *FMFF* is the fifth generation from *A* in *A*'s father's line and the fifth generation from *D*11 in her father's line, *A* and *D*11 are *sapindas* of each other.




In the above diagram *A* is the bridegroom. *F*2 is his father's father's father. *S*, *SS*, *SSS*, *SSSI* and *SSSS* are the son, grandson, great grandsons and great great grandson of *F*2, *D*1 to *D*8 are all females relationship between whom and *A* is to be considered.

(a) *F*2, the common ancestor of *A* and *D*1 to *D*8, is the fourth generation from *A* in *A*'s father's line. He is the third generation from *D*2 in her mother's line and the fourth generation from *D*3 in her mother's line. *A* and *D*2 are sapindas but *A* and *D*3 are not sapindas of each other.

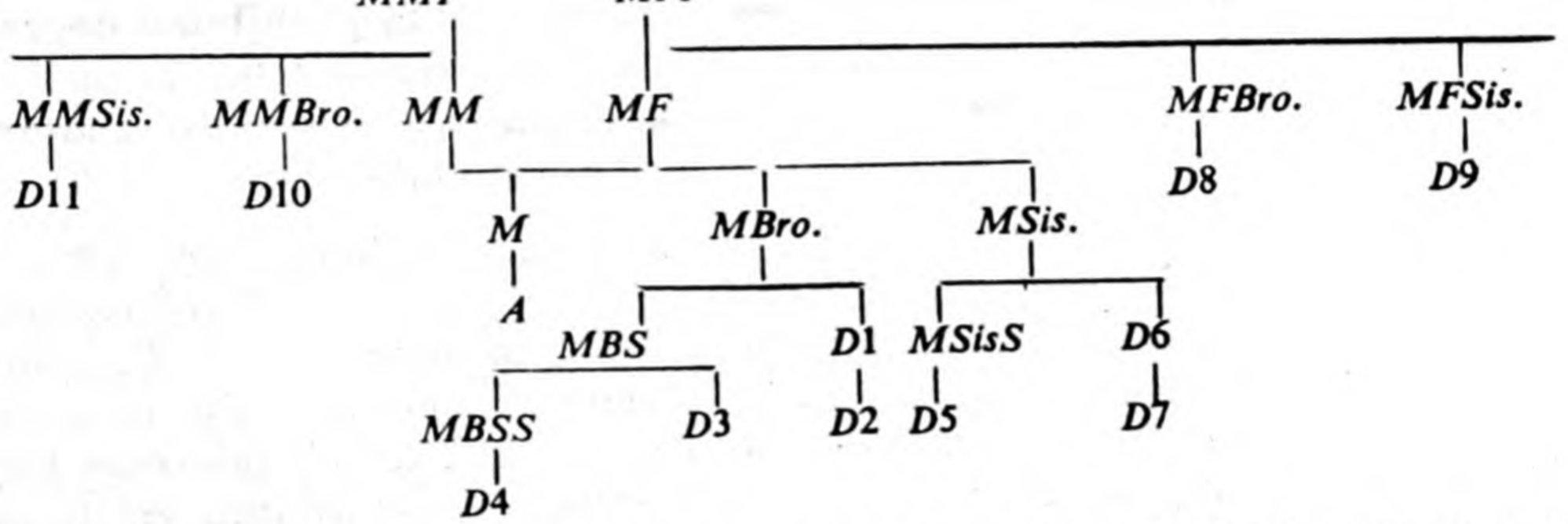
(b) *A* and *D*4 are sapindas of each other because *F*2 the common ancestor is the fourth generation from *A* in *A*'s father's line and the third generation from *D*4 in her father's line. But *A* and *D*5 are not sapindas of each other because *F*2 the common ancestor is in the fourth generation from *D*5 in her mother's line.

(c) *A* and *D*6 are sapindas of each other because *F*2 the common ancestor is the fourth generation from *A* in *A*'s father's line and the fourth generation from *D*6 in her father's line.

(d) *A* and *D*7 are sapindas of each other because *F*2 the common ancestor is the fourth generation from *A* in *A*'s father's line and the fifth generation from *D*7 in her father's line.

(e) *A* and *D*8 are not sapindas of each other because *F*2 the common ancestor though the fourth generation from *A* in *A*'s father's line is the sixth generation from *D*8 in her father's line.

The following diagram will enable the reader to understand the rules applicable in determining sapinda relationship in respect of marriage through the bridegroom's mother:




In the above diagram *A* is the bridegroom; *M* is his mother; *MF* is his mother's father; *MM* is his mother's mother; *MFF* is his mother's father's father; *MMF* ih his mother's mother's father; *MFBro.* is his mother's father's brother; *MFSis.* is his mother's father's sister; *MBro.* is his mother's brother; *MSis.* is his mother's sister; *MMBro.* is his mother's mother's brother; *MMSis.* is his mother's mother's sister; *MBS* is his mother's brother's son; *MBSS* is his mother's brother's son's son; and *MSis. S* is his mother's sister's son. *D*1 to *D*11 are all females relationship between whom and *A* is to be considered.

(a) *MF* is the common ancestor of *A* and also of *D*1 and *D*2. *D*1 is *A*'s mother's brother's daughter. *MF* is in the third generation from *A* in *A*'s mother's line and also in the third generation from *D*1 in her father's line. *A* and *D*1 are sapindas of each other. [It will be seen from clause (g) that they are also within the degrees of prohibited relationship being children of brother and sister.] The relationship of *A* and *D*2 is, however, different. Although *MF* the common ancestor is in the third generation from *A* in *A*'s mother's line he is in the fourth generation from *D*2 in *D*2's mother's line. *A* and *D*2 are, therefore, not sapindas of each other. It will also be seen that they are not within the prohibited degrees of relationship under clause (g).

(b) *MF* is the common ancestor of *A* and also of *D*3 and *D*4. *D*3 is *A*'s mother's brother's son's son's daughter and *D*4 is *A*'s mother's brother's son's son's daughter. *MF* is the third generation from *A* in *A*'s mother's line; in the fourth generation from *D*3 in *D*3's father's line; and in the fifth generation from *D*4 in *D*4's father's line. *A* and *D*3 are, therefore, sapindas of each other. So also *A* and *D*4 are sapindas of each other.

(c) *MF* is the common ancestor of *A* and *D*5. *D*5 is *A*'s mother's sister's son's daughter. *MF* is the third generation from *A* in *A*'s mother's line and the fourth generation from *D*5's father's line. *A* and *D*5 are, therefore, sapindas of each other.

(d) *MF* is the common ancestor of *A* and also of *D*6 and *D*7. *D*6 is *A*'s mother's sister's daughter. *MF* the common ancestor is the third generation from *A* in *A*'s mother's line and the third generation from *D*6 in *D*6's mother's line. *A* and *D*6 are, therefore, sapindas of each other. [It will be seen from the clause (g) that they are also within the degrees of prohibited relationship being children of two sisters.] The relationship of *A* and *D*7 is, however, different. Although *MF* the common ancestor is in the third generation from *A* in *A*'s mother's line he is in the fourth generation from *D*7 in *D*7's mother's line. *A* and *D*7 are, therefore, not sapindas of each other. It will also be seen that they are not within the degrees of prohibited relationship under clause (g).

(e) *MFF* is the fourth generation from *A* in *A*'s mother's line. So no sapinda relationship can exist between *A* and any female descendant of *MFF* (other than in the line of *MF* to which *A* himself belongs) although the latter may not be removed from *MFF* by more than the specified number of generations. Thus in the diagram above *D*8 who is *A*'s mother's father's brother's daughter and *D*9 who is *A*'s mother's father's

sister's daughter, although they are only in the third generation from *MFF* the common ancestor, are not the sapindas of *A*.

(f) Similarly *MMF* is the fourth generation from *A* in *A*'s mother's line. So no sapinda relationship can exist between *A* and any female descendant of *MMF* (other than in the line of *MM* to which *A* himself belongs). Thus in the diagram above *D*10 who is *A*'s mother's mother's brother's daughter and *D*11 who is *A*'s mother's mother's sister's daughter, although they are only in third generation from *MMF* the common ancestor, are not the sapindas of *A*.

*Explanation.*—Sub-clauses (i) to (iii) of the Explanation relate to clauses (f) and (g) and expressly state that relationship between the parties as sapindas of each other or between the parties as being within prohibited degrees is to be understood as including relationship by half or uterine blood as well as by full blood, and also by adoption. The relationship is also to be understood as including both legitimate and illegitimate blood relationship.

Section 12 of the Hindu Adoptions and Maintenance Act, 1956, also contains a rule similar to the rule in sub-clause (iii) of the Explanation. It lays down that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption. That rule, therefore, applies to relationship for all purposes including the bar of sapinda relationship and degrees of prohibited relationship. It may also be noted that as laid down in proviso (a) to that section an adopted child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth. Reference may also be made to the Notes under Section 12 of the Hindu Adoptions and Maintenance Act, 1956.

*Illustrations*

(i) In illustration (a) at p. 678 above *A* and *D*2 are shown to be sapindas of each other. It will not make any difference whether *F*2 and *D*1 were related by full blood or half blood. It will not make any difference if *D*1 was not the daughter of *F*3 and full sister of *F*2 but was the uterine sister of *F*2. Similarly in illustration (b) at p. 624 above it will not make any difference whether *F*2 and *S* were full brothers or half-brothers or uterine brothers.

(ii) In illustration (f) at p. 678 above *A* and *D*9 are shown to be sapindas of each other. It will not make any difference whether *FMF* and *D*8 the mother of *D*9 were related by full blood or half blood. It will not make any difference if *D*8 was not the daughter of *FMFF* and full sister of *FMF* but was the uterine sister of *FMF*. Similarly in illustration (g) at p. 678 above it will not make any difference whether *FMF* and *B* were full brothers or half brothers or uterine brothers.

(iii) In illustration (a) at p. 679 above *A* and *D*1 are shown to be sapindas of each other. It will not make any difference whether *M* and her brother, who is the father of *D*1, were related by full blood or half blood. It will not make any difference if the father of *D*1 was not the son of *MF* and full brother of *M* but was the uterine brother of *M*. Similar will be the position of *A* in case of *D*3 and *D*4 in illustration (b) at p. 679 above and it will not make any difference whether *M* and her brother, the lineal ascendant of *D*3 and *D*4, were full brother and sister, or half brother and sister or uterine brother and sister. Similar also will be the position of *A* in case of *D*5 and *D*6 in illustrations (c) and (d) at p. 679 above and it will not make any difference whether *M* and her sister, the lineal ascendant of *D*5 and *D*6, were full sisters or half sisters or uterine sisters.

(iv) *A* is the legitimate son of his parents *F* and *M*. *D* is the legitimate daughter of her parents *F*1 and *M*1. *M* and *M*1 were the illegitimate daughters of their mother *MM*. *MM* is the third generation in the line of ascent through the mother in case of both *A* and *D*. *A* and *D* are sapindas of each other although they are related only by illegitimate blood relationship.

(v) In illustration (a) at p. 679 above *A* and *D*1 are shown to be the sapindas of each other. It will not make any difference that there was illegitimate blood relationship between them. Thus *D*1 will be a sapinda of *A* even if *M* and the father of *D*1 were

not related by any legitimate blood relationship but were related by illegitimate blood relationship.

(vi) In illustration (g) at p. 678 above *A* and *D*11 are shown as sapindas of each other. *FMFF* is the fifth generation from *A* in *A*'s father's line and the fifth generation from *D*11 in her father's line. It will make no difference to the sapinda relationship for marriage between them that *FMF* and *B* were not brothers by legitimate relationship and were related only by illegitimate blood relationship.

The explanation it will be noticed speaks of relationship by blood or adoption. Relationship by marriage is not by itself an impediment to marriage. Thus a man may marry his deceased or divorced wife's sister or the daughter of such sister.

**Cl. (g): "Degrees of prohibited relationship".**—Clause (g) of the section defines degrees of prohibited relationship. Section 5 [Cl. (iv)] lays down as one of the conditions of a valid marriage that the parties must not be related to each other within the prohibited degrees, unless such marriage is sanctioned by custom or usage governing both the parties. The rules laid down in this clause relating to *sapinda* relationship are based on the principle of exogamy. The general rule of Hindu law was that parties to a marriage should not be *sapindas* of each other. But this relationship was interpreted in different ways and the rule itself had been subjected to modification by custom. A definition of "prohibited degrees" was necessary because there was great diversity among Hindus in different parts of India as to what were the prohibited degrees for marriage. Some limit had to be prescribed to prevent incestuous marriages and it was necessary that the rules should if possible be in conformity with the principles of exogamy and eugenics which were at the basis of the ancient rule which prohibited marriages between persons belonging to the same *gotra* or the same *pravara*. Custom had materially modified the rigour of that rule and the rules laid down in this and the preceding clause obviously aim at uniformity and certainty on this important question. It will be noticed that in some cases the prohibition laid down in clauses (f) and (g) will be overlapping.

The degrees of prohibited relationship enumerated in sub-clauses (i) to (iv) of clause (g) are between persons of very close relationship some of them being related only by marriage. Sub-clauses (ii) and (iii) which refer to wives or some very close relations include persons with whom relationship by marriage may have ceased to subsist by reason of divorce or remarriage. Thus for instance a wife of the brother or of the father's brother or of the mother's brother would be within the degrees of prohibited relationship under sub-clause (iii) even if she had been divorced or even if she had been remarried to some other person after divorce or death of that brother or father's brother or mother's brother and the subsequent marriage had ceased to subsist.

*Explanation.*—See Notes under 'Explanation' at p. 680 *supra*.

**4.** Save as otherwise expressly provided in this Act.—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

Overriding effect of Act.

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

**Over-riding effect of the Act.**—This section gives over-riding application to the provisions of the Act and in respect of any of the matters dealt with in the Act, it repeals in effect all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. As already pointed out the Act brings about some fundamental and radical changes in the law relating to marriage and the result is that immediately on the coming into operation of the Act the law relating to marriage whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law ceases to have effect with respect to all matters dealt with in the Act. The Act practically supersedes the rules of the law relating to marriage contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all such laws shall cease to have effect in so far as they are inconsistent with any provisions contained in this Act.

The Act is a codifying enactment (*j*). It does not merely crystallise or declare the existing law upon the subject but deliberately departs from that law in respect of various matters. It supersedes prior law and lays down the whole of the law relating to marriage in the form of a code and so far as it goes must be read as a complete enactment. Therefore, in matters governed by the enactment appeal to any rule of law previously applicable to Hindus is now permissible only if no provision for the same is made in the Act. Matters expressly saved from the operation of the Act, of course, continue to be governed by the previous law statutory or otherwise (*k*).

The section it will be noticed has a characteristic marginal note "Over-riding effect of the Act" which clearly shows the general trend of the section. In some States divorce had already been allowed on certain grounds as the result of legislation and the object of the present Act was to lay down a uniform and comprehensive law governing all Hindus. It will be seen from section 30 of the Act and the Notes thereunder that the Act repeals some of those statutes and does not seek to repeal all of them. Therefore, the Legislature having expressly repealed certain Acts by section 30 had to deal with other laws which continued on the statute book and which might have provisions with regard to matters dealt with in this Act. It is with regard to those matters that provision is made under sub-section (b) of this section that those laws to the extent that they deal with matters which are inconsistent with the provisions of this Act shall cease to have validity and effect. Reference may be made to sections 29 and 30 of the Act which deal with *savings* and *repeals*.

**"Save as otherwise expressly provided in this Act".**—The initial words of this section and section 29 may be read together. Matters expressly saved

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(*j*) See p. 665, *supra*.

(*k*) See S. 29, *post*.

from the operation of the Act continue to be governed by the previous law statutory or otherwise (*k*1).

One outstanding exclusion from the operation of the Act is contained in sec. 29(4) and relates to marriages solemnized under the Special Marriage Act, 1954, whether the marriage was solemnized before or after the commencement of this Act. Such marriages are not affected nor governed by any provision contained in this Act but are regulated by the provisions of that special enactment (*l*).

Another important *saving* is contained S. 29(2) of this Act which enacts that nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

Reference may also be made to S. 5(iv), S. 5(v) and S. 7.

**Act is not retrospective in its operation.**—It is a fundamental and firmly established rule of interpretation that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. The general rule is that where a statute is passed altering the law it is to be presumed as intended to apply to a state of facts coming into existence after the Act. A necessary and logical corollary to the rule that retrospectivity is not to be presumed is that even in case of a statute intended to affect existing rights it is not to be construed to have any greater restrospectivity than is rendered necessary by the language used unless to do so would result in absurdity or an anomalous situation. In these matters the Courts have been more guided by considerations of substantial justice and convenience than rigid attention to strict grammatical form. There is the clear indication in this section—given by the words "shall cease to have effect"—and in some other important sections of the Act that it is not intended that they should have retroactive effect. A contrary rule would obviously have disastrous consequences and result in manifest injustice.

The general rule that an enactment like the present should operate prospectively and not retrospectively—*nova constitutio futuris formam imponere debet*—has been accepted by the Legislature and the exceptions to its application in the Act are indeed few. The word retrospective is used in several different senses. A statute is "not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing" (*l*1). Section 10 states the grounds on which judicial separation may be decreed in case of a marriage whether solemnized before or after the commencement of this Act; section 12 lays down certain grounds on which a marriage whether solemnized before or after the commencement of this Act becomes voidable; and section 13 lays down the grounds on which any marriage solemnized whether before or after the commencement of this

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(*k*1) Thus, for instance, provisions of Travancore Ezhava Act, which is a special enactment, are operative: ***Vasappan*** v. ***Sarada*** ('58) A. Ker. 39 (F.B.); (1957) Ker. 998.

(*l*) See Introductory Note, pp. 655-656, *supra*.

(*l*1) Maxwell on *Interpretation of Statutes*, (1962) 11th Edition, p. 211.

Act may be dissolved. In general and substantially they confer new rights and cannot strictly be said to have retrospective operation.

**Constitutional guarantees.**—There is nothing in the Constitution which renders this section or section 5 or other provisions of the Act *ultra vires* the same (*m*).

## HINDU MARRIAGES

**5.** A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

Ceremonies for a Hindu marriage.

(i) neither party has a spouse living at the time of marriage;

(ii) neither party is an idiot or a lunatic at the time of the marriage;

(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

This section lays down the conditions for a Hindu marriage solemnized after the commencement of the Act. The section must be read with section 7 which deals with marriage ceremonies. Non-fulfilment of the conditions relating to mental capacity and age laid down in this section do not, however, render null and void a marriage otherwise valid (*n*).

No marriage between Hindus can be valid unless:

(1) in case of a marriage solemnized before the commencement of this Act it was valid under the previous law relating to marriage; but a marriage solemnized between Hindus before the commencement of this Act, if otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different castes, viz. Brahmin, Kshatriya, Vaishya or Shudra or to different religions, viz. Hindu, Buddhist, Jain or Sikh [S. 29(1)];

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(*m*) *Ram Prasad* v. *State of Uttar Pradesh* ('57) A.A. 411.

(*n*) See Sections 11, 10(1)(1), 13(1)(iii) and 18 and Notes under clauses (ii) and (iii) *infra*. Also see *Mohinder Kaur* v. *Major Singh* ('72) P. & H. 184.

(2) in case of a marriage performed, after the coming into force of this Act, it is solemnized in accordance with the customary rites and ceremonies of either party as laid down in S. 7 and fulfils all the primary conditions affecting the validity of the same; or

(3) it is a civil marriage contracted in accordance with the Special Marriage Act, 1954, or previous legislation relating to civil marriages.

**Conception of a Hindu marriage under the Act.**—There was some divergence of opinion on the question whether under the Hindu law as applied by Courts in India marriage was a sacrament or both a sacrament and contract. That it was a sacrament was not questioned but in some cases the Courts expressed the view that it was not merely a sacrament but also a civil contract. Controversy arose when the Court had to determine some legal consequences of marriage and resolve certain difficult questions which arose in divorce cases under the law enacted by some States. Introduction of the principle of a civil contract while it helped to support the conclusion reached in the particular case was, however, apt to give rise to a misconception and greater difficulties in other cases. As already pointed out in the Introduction, in Hindu law the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between matters secular and religious because certain questions such for instance as marriage and adoption had the aspects of both. The demarcation between religious and legal precepts particularly on questions of marriage was rather thin and a number of questions were dealt with by the Smritikars as appertaining to *Achara* (rituals) and not to *Vyavahara* (law proper). Marriage under Hindu law was primarily and essentially a sacrament. That was its religious aspect. Its secular aspect was of a gift of the bride to the bridegroom and from its very nature the element of consensus which must accompany gift and its acceptance had to be present. Having elements both religious and secular it was the source and foundation of the status of the parties; and of their right to associate in religious observances and also of correlative rights and duties in temporal matters.

What the concept of a Hindu marriage now under the Act is can only be gathered from a consideration of the relevant provisions of the Act in their proper perspective. The Act over-rides all the rules of the law of marriage hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all matters dealt with in it (*o*). A Hindu marriage under the Act must be solemnized in accordance with the customary rites and ceremonies of at least one of the parties thereto (*p*) and must fulfil the conditions prescribed for the same. In the Hindu Code Bill and the Bill as it emerged from the Select Committee two kinds of marriage were recognised and there was a provision that marriage between Hindus must be either a civil marriage or a sacramental marriage and the requisite of a sacramental marriage apart from other conditions was that it must be solemnized in accordance with such customary rites and ceremonies of either party thereto as are essential for such marriage.

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(*o*) Section 4.

(*p*) Section 7.

The Act, it will be noticed, does not use the expression sacramental marriage but speaks of a "Hindu marriage solemnized in accordance with the customary rites and ceremonies of either party", presumably because of the very wide connotation of the expression "Hindu" and the inappropriateness of emphasizing the sacramental aspects when the customary rights and ceremonies of one of the parties according to which a marriage is solemnized may not require any ceremonies insisted upon for a marriage which was hitherto understood as a sacrament and a gift. It is also not possible to say that the legal concept of marriage under the Act is one of contract. This does not mean that the element of consent is unimportant. There must be the consensus of the parties to the solemnization of the marriage. This element of consent was present even in the concept of a Hindu marriage being entirely a sacrament and a gift because it was an indispensable part of the ceremony that the gift should be accepted. Section 12 (1) (a) rules that a marriage shall be voidable and may be annulled by a decree of nullity on the ground that the consent of the petitioner (or of the guardian in marriage) was obtained by force or fraud. A Hindu marriage under the Act, it is submitted, is not entirely or necessarily a sacrament (*sanskara*) but a union of one man with one woman to the exclusion of all others satisfied by solemnization of the customary rites and ceremonies of either party essential for a marriage: and directly it exists, creates a relation and a status not imposed or defined by contract but by law. There must be no incapacity in the parties to marry one another by reason of a prior subsisting marriage of either of them with any other person or by reason of prohibited relationship or *sapinda* relationship. A "Hindu marriage" does not refer to Hinduism as a religion but relates to all persons who are Hindus in the wide connotation of the expression.

**Solemnization of Hindu marriage.**—This section lays down the conditions for a Hindu marriage which must be fulfilled in case of any marriage between two Hindus which can be solemnized in accordance with the requirements of this Act. The word 'solemnize' means, in this connection, to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and due form it cannot be said to be 'solemnized' (*p*1). Section 7 rules that a Hindu marriage—that is, one under the present Act—must, after the commencement of the Act, be solemnized in accordance with the customary rites and ceremonies of one of the parties to it and where such rites and ceremonies include the *saptapadi* (taking of seven steps by the bridegroom and the bride jointly before the sacred fire) that ceremony must be observed. 'Solemnized' refers to the rites and ceremonies of marriage. What is required is substantial compliance with only those rites and ceremonies performance of which is, by the customary law of either party, deemed as absolutely necessary. Non-performance of such rites and ceremonies of prime necessity would be regarded as failure to solemnize the marriage and no valid Hindu marriage can result. This is because a marriage not duly solemnized by performance of the essential ceremonies is, under the Act, no marriage at all (*q*). Reference may be made to Notes under S. 7 *post*.

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(*p*1) *Bhaurao* v. *State of Maharashtra* ('65) A.S.C. 1153.
A.S.C. 1564; *Priya Bala* v. *Suresh Chandra* ('71)

(*q*) See Section 7 and Notes under it.

**Cl. (i): Monogamy.**—Clause (i) of this section introduces monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. The expression 'spouse' here used means a lawfully married husband or wife. Before a valid marriage can be solemnized both parties to such marriage must be either single or divorced or a widow or a widower and then only they are competent to enter into a valid marriage. If at the time of performance of the marriage rites and ceremonies one or other of the parties had a spouse living and the earlier marriage had not already been set aside the later marriage is no marriage at all. Being in contravention of the condition laid down in this clause it is void *ab initio*.

The general rule of matrimonial law that a party to a marriage of which the other party is incompetent to join in the celebration because of the existence of a previous husband or wife, is entitled without recourse to any court to marry anyone else because that particular marriage is not in law a marriage at all, is applicable equally well to marriages under the Act. A person, an innocent party to a bigamous marriage, may go to a court for a declaration that the bigamous marriage is null and void. That would be for the purpose of precaution or record or evidence. But the bigamous marriage is non-existent and simply because there is no recourse to the court it cannot be said that it exists unless and until a decree is passed declaring it to be null and void (*r*). Section 17 in terms lays down that such a marriage is null and void and imposes punishment for bigamy as provided in the Penal Code.

This provision which prohibits bigamy does not contravene Art. 25 of the Constitution (*r*1).

A decree for divorce terminates the status of the parties as married persons and either is after such a decree competent to remarry since the prior marriage having been dissolved is no impediment to such remarriage. Section 15 enacts: "When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again: Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance." Divorce though not allowed by Hindu law is by custom and usage recognised in certain communities and remarriage of either party is also permissible. Section 29 expressly saves from the operation of the Act all rights recognised by custom or any special enactment to obtain dissolution of marriage whether solemnized before or after the commencement of this Act.

**Cl. (ii): Mental capacity.**—This clause lays down as one of the conditions for a Hindu marriage that neither party must be an idiot or a lunatic and section 12 (1) (b) renders, at the instance of a party, the marriage voidable, if

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(*r*) Reference may be made to *William Hudson* v. *Webster*, A.I.R. (1937) Mad. 565.

(*r*1) *Ram Prasad* v. *State of Uttar Pradesh* ('61) A. All. 334.

the other party was an idiot or a lunatic at the time of the marriage. The requirement is a very simple one which does not demand any high degree of intelligence on the part of the parties to comprehend that marriage is being solemnized and there is always a very strong presumption that the requisite mental capacity was present.

Reference may be made to Notes under section 12 (1) (b).

The scheme of the Act in its relation to mental capacity and age of the parties affecting formation of marriage is different from that under the Special Marriage Act, 1954. The Act although it lays down in clause (ii) of this section that neither party to the marriage should be an idiot or lunatic, does not render *per se* void the marriage of such a person (*s*) but makes it only voidable (*t*). Further, the Act although it lays down in cl. (iii) of this section as one of the conditions of a Hindu marriage the rule relating to the age of the parties, does not render void or even voidable a marriage in contravention of the same (*u*).

**Cl. (iii): Age of the parties: Consent.**—The Act does not in terms state that consent of the parties is necessary for a valid marriage but lays down the condition that at the time of marriage the bridegroom must have completed the age of eighteen and the bride the age of fifteen years; and where the bride has not completed the age of eighteen, the consent of her guardian in marriage must have been obtained for the marriage. Absence of consent of the parties or of the guardian in marriage of the bride does not, however, render the marriage void or even voidable if otherwise duly solemnized and the prime conditions are fulfilled. But a marriage may be annulled by a decree of nullity under section 12 (1) (c) on the ground that it was voidable, where the consent of the petitioning spouse or the guardian in marriage of the petitioner was obtained by force or fraud. Reference may be made to Notes under S. 12 (1) (c) *post*.

A marriage solemnized in violation of the requirement as to age laid down in this clause is not void or even voidable but the contravention of the condition is punishable as an offence under section 18 of the Act.

**Cl. (iv): Degrees of prohibited relationship.**—This clause enacts that no marriage is valid if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by the custom or usage governing both the parties. The custom which permits of a marriage between persons who are within the degrees of prohibited relationship must fulfil the requirements of a valid custom now given statutory sanction by clause (a) of section 3 which defines the expressions 'custom' and 'usage.' The custom must not be unreasonable or opposed to public policy. No custom would be recognised if it is abhorrent to decency and morality or inconsistent with the practices of good men (*v*). The rules relating to "degrees of prohibited relationship" are prescribed in the definition clause [S. 3 (g)] and have been discussed under that clause. They are based on the principle of exogamy.

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(*s*) See S. 24(1)(i) and S. 4(b) of the Special Marriage Act, 1954, which render such a marriage void.

(*t*) S. 12(1)(b), *post*.

(*u*) See S. 24(1)(i) and S. 4(c) of the Special Marriage Act, 1954, which render such a marriage void.

(*v*) *Balusami* v. *Balakrishna* ('57) A.M. 97.

It will be noticed that the Act deals separately with the questions of prohibited degrees of relationship and *sapinda* relationship though in some cases both the prohibitions may overlap. The Hindu Marriage Disabilities Removal Act, 1946, provided that notwithstanding any text, rule or interpretation of Hindu law or any custom or usage, a marriage between Hindus, which was otherwise valid, would not be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara*. Before that enactment came into force it was held that a man could not marry a girl of the same *gotra* or *pravara* the theory being that his father and the girl's father were both descendants of a common ancestor in the male line. Such marriages could only be valid if sanctioned by custom. Section 29 (1) of the present Act re-enacts the above provision of the Hindu Marriage Disabilities Removal Act, 1946, because the latter enactment is now repealed by section 30. The rules now enacted in this and the next clause simplify the position to a considerable extent.

**Cl. (v): Sapinda relationship.**—This clause enacts that no marriage is valid if it is made between parties who are related to each other as *sapindas* unless such marriage is sanctioned by usage or custom governing both the parties. The custom which permits of a marriage between persons who are sapindas of each other must fulfil the requirements of a valid custom now given statutory sanction by clause (a) of section 3 which defines the expressions 'custom' and 'usage.' The custom must not be unreasonable or opposed to public policy. No custom would be recognised if it is abhorrent to decency and morality or inconsistent with the practices of good men (*w*).

The rules relating to "sapinda relationship" are prescribed in the definition clause [S 3(f)] and have been discussed in some detail under that clause. Reference may be made to the diagrams and illustrations given at pp. 677, 678 and 679 *supra*.

**Cl. (vi): Consent of guardian of minor bride.**—This clause must be read with clause (iii) above which requires that the bride must have completed the age of fifteen years at the time of marriage. Where, however, the bride has not completed the age of eighteen it is necessary that the guardian in marriage must have given his consent to her marriage. Absence of consent of the guardian in marriage of a bride who is a minor does not render void or even voidable the marriage if otherwise duly solemnized and valid simply on the ground that the bride at the time of marriage had not completed the age of eighteen or even fifteen. But a marriage may be annulled by a decree of nullity of marriage on the ground that it was voidable and avoided under section 12, where the consent of the petitioning spouse or the guardian in marriage was obtained by force or fraud.

Although a marriage solemnized in violation of the rule laid down in this clause is not void or even voidable the contravention of the condition is punishable as an offence under section 18 of the Act.

Section 6 of the Act gives a list of persons entitled to give consent as *guardians in marriage*.

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(*w*) *Balusami* v. *Balakrishna, supra.*

Reference may be made to section 6 and particularly sub-section (5) of that section and Notes under that section.

Guardianship in marriage.

**6.** (1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:—

(a) the father;

(b) the mother;

(c) the paternal grandfather;

(d) the paternal grandmother;

(e) the brother by full blood; as between brothers the elder being preferred;

(f) the brother by half blood; as between brothers by half blood the elder being preferred:

Provided that the bride is living with him and is being brought up by him;

(g) the paternal uncle by full blood; as between paternal uncles the elder being preferred;

(h) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred:

Provided that the bride is living with him and is being brought up by him;

(i) the maternal grandfather;

(j) the maternal grandmother;

(k) the maternal uncle by full blood; as between maternal uncles the elder being preferred:

Provided that the bride is living with him and and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

**Guardianship in marriage.**—Section 5 of the Act lays down as one of the conditions of a Hindu marriage that the bride should have completed the age of fifteen years at the time of marriage [Cl. (iii)]. That section also lays down that where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, should be obtained for the marriage [Cl. (vi)]. As already pointed out the true legal concept of a marriage under the Act is not one of contract (*x*) and the scheme of the Act, despite these two conditions, is not to render void or even voidable any marriage duly solemnized and otherwise valid simply on the ground that it was in contravention of any of them. The Act does not insist upon free consent of the parties or of the guardian of a minor bride as a condition precedent to the validity of the marriage and it is only where the consent of the petitioner, or of guardian of the bride where such consent is required, has been obtained by force or fraud that the marriage is rendered voidable and annulled on that ground by a decree of nullity of marriage in favour of the aggrieved party [S. 12 (1) (c)].

Violation of the conditions relating to the age of the parties and consent of the guardian in marriage where the bride has not completed the age of eighteen years at the time of marriage, although they do not affect the validity of the ceremonial marriage under the Act, are made punishable under clauses (a) and (c) of section 18 of the Act.

**Persons who may act as guardians in marriage.**—The Smritikars and the Commentators prescribed rules for guardianship in marriage. The present section substantially codifies the previous law relating to persons who may act as guardians in marriage, but the mother is now given a higher place immediately after the father, and the paternal grandmother and some maternal relations are recognised for the purpose. The list is rather long but has the merit of being exhaustive. In case of brother and paternal uncle by half-blood and maternal uncle by full blood who are among the persons enumerated as guardians in marriage, it will be noticed, a condition has been added that the bride must have been living with and been brought up by such relation if he is to act as a guardian in marriage. In the absence of any such person as is mentioned in sub-section (1) the consent can be dispensed with.

**Marriage without consent of guardian.**—Sub-section (1) specifies the order in which the persons enumerated are entitled to give the necessary consent. The primary duty, and correlative right of giving such consent, rests with the father. But guardianship for the purpose of marriage is not so much a right as a duty and the consent of the guardian, as already pointed out, is not a condition precedent to the validity of the marriage. A marriage duly solemnized and otherwise valid under the Act is not rendered invalid nor voidable because it was brought about without the consent of the guardian

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(*x*) P. 657, *supra*.

in marriage or by a person not entitled to act as a guardian because there was a preferential guardian.

**Injunction.**—The rule referred to above applies only where a marriage has been actually solemnized. But where there is only a betrothal or an agreement for marriage, it is competent to the guardian entitled to act under this section to sue for an injunction to prevent the marriage of the minor bride with a person of whom the guardian does not approve and the court may grant an injunction on such terms and conditions at it may consider necessary to impose on the guardian for the benefit of the bride.

Sub-section (5) recognises jurisdiction in the court to prohibit by injunction an intended marriage of a bride below the age of eighteen years if in the interest of the minor bride it thinks it necessary to do so. It is perfectly consonant with the precepts of Hindu law relating to the rights and duties of guardians in marriage and the doctrine of a general supreme guardianship of the State in case of minors that the court should exercise a wide discretion in the matter even though it does not strictly relate to the property or person of the minor. The assistance of the court may be sought by any person interested in the minor.

**7.** (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

Ceremonies for a Hindu marriage.

(2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

**Ceremonies for a Hindu marriage.**—A Hindu marriage under the Act must be solemnized in accordance with the customary rites and ceremonies of at least one of the two parties thereto and must fulfil the conditions prescribed for the same by sec. 5 of the Act. The word 'solemnize' means, in this connection, to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and in due form it cannot be said to be 'solemnized'. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom (*y*). The Act does not, however, prescribe the ceremonies requisite for solemnization of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom or usage applicable to either party; and where the form adopted includes the *saptapadi*—that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire (*homam*)—the marriage becomes complete when the seventh step is taken. This is in accord with existing law. This rule relating to the essential ceremonies of a Hindu marriage proceeds on the principle that marriage being one of the sanskaras for a Hindu male or female,

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(y) *Bhaurao* v. *State of Maharashtra* ('65) A.S.C. 1153. 1564; *Priya Bala* v. *Suresh Chandra* ('71) A.S.C.

whether belonging to the twice-born castes or a Shudra, must be performed with the necessary religious rites and at the same time recognises the position that the customary rites and ceremonies vary in different parts of the country and also among different castes and communities. The essential rites which may, however, be said to be the requirement common in all ceremonial marriages are:

(1) invocation before the sacred fire, and

(2) *saptapadi.*

It will be seen that though the section emphasizes the importance of the *saptapadi* it does not insist upon the same because even under the previous law the rule was that a marriage may be completed by the performance of ceremonies other than those referred to above where it was allowed by the custom of the caste to which the parties belonged. It is competent now to any two persons who are Hindus (as defined in section 2) to solemnize a ceremonial marriage under the Act and all that is insisted upon for the purpose of solemnization of the marriage is that it must be in accordance with the customary rites and ceremonies of either party to the marriage. Persons belonging to different communities and different castes of Hindus have in some places in India different views respecting ceremonial observances and a different estimate of what are generally regarded as the essential rites and ceremonies which must accompany the performance of marriage. It is both just and reasonable, therefore, that the question of the requisite ceremonies must be adjusted in accordance with the custom and usage followed by them or either of them.

As custom is "transcendent law" and expressly recognised by this section in the matter of performance of the marriage ceremonies, it is open to any party called upon to establish validity of a Hindu marriage to show that the customary rites and ceremonies of one of the spouses had been performed. The custom must, of course, be a valid custom. Whether it is a caste custom or a custom of any sub-caste or custom of a particular locality or of a family it must be ancient, certain and reasonable and not opposed to public policy (*z*). It cannot be enlarged beyond the usage by parity of reasoning since it is the usage that makes the law and not the reason of the thing.

**Presumption as to marriage and legitimacy.**—There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognised by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied (*a*). Similarly the fact that a woman was living under the protection of a man who generally lived with her and acknowledged her children raises a strong presumption that she is the wife of that man. But this presumption may be rebutted by proof of facts showing that no marriage could have taken place (*b*).

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(*z*) See definition of 'custom' and 'usage' in Section 3(a). Reference may be made to *Rabindra Nath* v. *State* ('69) A.C. 55

(*a*) See § 438 *ante.* Also see *Guru Charan* v. *Adikanda Behara* ('72) A. Orissa 38.

(*b*) See § 438 *ante.*

**Factum valet.**—The doctrine of 'factum valet' enables to cure the violation of a directory provision or a mere matter of form but does not cure the violation of the fundamental principles or the essence of the transaction. If there are certain essential ceremonies, which are necessary for a marriage, the non-observance of those ceremonies or religious rites cannot be overlooked by applying the doctrine of *'factum valet'*. The doctrine applies only where there is no initial want of authority or where there is no positive interdiction. If certain essential rites are necessary for valid marriage, unless it is shown by custom that those ceremonies have been modified, it is imperative upon the parties concerned to observe the formalities laid down by law. Non-observance of those rites cannot be cured by applying the doctrine of *'factum valet.'* There are, however, many ceremonies connected with the marriage, which are more or less non-obligatory or directory. If those ceremonies are not performed at the marriage, the omission may be cured by the doctrine of *'factum valet.'*

**Madras Act 21 of 1967.**—This Act relates to validation of certain marriages knows as *Suyamariyathai* or *Seerthiruththa* (*b*1).

Registration of Hindu marriages.

**8.** (1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

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(*b*1) *Raghuvir Kumar* v. *Shanmughavadinu* ('70) A.M. 330.

**Registration of marriage.**—Under the Indian law, it is open to two Hindus if they so desire it to contract civil marriage and have it solemnized under the Special Marriage Act, 1954. The provisions relating to the solemnization and registration of a civil marriage are laid down in that Act. Chapter III of that enactment lays down provisions relating also to registration of marriage celebrated in other forms. It is open to two Hindus married according to the ceremonial form to have their marriage registered under that Chapter provided they fulfil the conditions there laid down. Two Hindus, therefore, whose marriage is solemnized in accordance with the provisions of the present enactment can get their marriage registered under that Chapter. The effect of such registration is stated in section 18 of that enactment.

This section enacts that the State Government may make rules relating to the registration of marriages between two Hindus solemnized in the ceremonial form. The obvious and immeasurable advantage of registration is that it facilitates proof of the factum of marriage in disputed cases. The Act does not lay down any rules relating to registration but merely empowers the State Government to make rules providing for registration of Hindu marriages. It also empowers the State Government in its discretion to provide that such registration shall be compulsory. The rules so framed must not in any manner be contrary to any provision of the Act and if they contravence any such provision they would be *ultra vires* the State Government and of no binding effect.

The rules can provide that the parties to any Hindu marriage, may, and where registration is made compulsory, shall, have the requisite particulars relating to their marriage entered into in the Register of marriages. Sub-section (1) speaks of the 'parties to the marriages' and sub-section (2) speaks of "any person" contravening any rule made in this behalf and although the language is not too clear it would seem that the duty of giving particulars relating to the marriage may be cast on persons other than the parties such for instance as the parents of the parties or the priest who officiates at the marriage ceremonies.

The Register of marriages is to be open for inspection by any member of the public and entries made in it are admissible as evidence.

**Consequences of non-registration and penalty for failure to register.**—Registration of Hindu marriages under the Act is only for the purposes of preserving a record of the same and facilitating their proof. Omission to do so does not, even when registration is made compulsory by the State, affect in any manner the validity of the marriage but will invite the penalty of a fine which may extend to twenty-five rupees. Furnishing false information by any person legally bound to give information to any public servant on any subject with knowledge or having reason to believe that it is false is punishable as an offence under section 177 of the Penal Code.

**Grant of copies.**—Sub-section (4) gives an unrestricted right to any member of the public to obtain a certified copy of an entry in the Register on payment of the prescribed fee.

## RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

**9.** (1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Restitution of conjugal rights.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

**Restitution of conjugal rights.**—Even apart from legislation relating to matrimonial law, decrees for restitution of conjugal rights have been passed by Courts in India in case of all communities though at one time it was questioned whether they had jurisdiction to entertain cases of this description (*c*). The concept of the existence of the court's power to give this relief was borrowed from English law. Matrimonial causes in England were formerly heard and determined by Ecclesiastical Courts and the earlier English statutes which gave jurisdiction to the King's Courts directed the courts to determine causes as far as possible on the principles of Ecclesiastical Law. The legislature did not alter the Canon Law except in a few matter and the Judges who administered the law were bound by precedents established in the Ecclesiastical Courts. An examination of the decisions of courts in India in matters of restitution of conjugal rights shows that in some respects the general principles underlying the English decisions were accepted, while in some cases they were not adopted. But it is unnecessary now to refer to any of the earlier Indian decisions on the subject. The law enforced in this respect in England was described as barbarous by Lord Herschell (*d*) but there have since been considerable changes effected in that law and the provisions of the Matrimonial Causes Act, 1950, have rendered petitions for restitution comparatively rare in England.

**Basis of the rule and importance of a decree for restitution.**—The foundation of the right to bring a suit for restitution of conjugal rights is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort—*consortium*—of the other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause the court should grant a decree for restitution.

The importance of the relief by way of a decree for restitution of conjugal rights recognised in this section lies in this that it enables the aggrieved spouse to apply to the court for maintenance under section 25; and mainte-

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(*c*) *Dadaji Bhikaji* v. *Rukmabai* (1886) 10 Bom. 301. *Moonshe Buzloor Ruheem* v. *Shumsoonissa Begum* (1867) 11 M I.A. 551; *Tekait Mon Mohini* v. *Basanta Kumar* (1901) 28 Cal. 751; *Bai Jivi* v. *Narsingh Lalbhai* (1926) 51 Bom. 329. Also see § 444 *ante*.

(*d*) (1897) A.C. 395, 455.

nance *pendente lite* may also be claimed by making out a case for the same as provided in sec. 24. This enables a wife who does not desire disruption of the marriage or even judicial separation from the husband to secure provision for her support by an order of the court under the matrimonial jurisdiction conferred on it instead of filing a suit for maintenance under the law relating to maintenance now embodied in the Hindu Adoptions and Maintenance Act, 1956.

The more practical importance, however, of this relief by way of a decree for restitution of conjugal rights is that it affords a ground for divorce to either party under section 13(1A) which lays down that either party to a marriage whether solemnized before or after the commencement of the Act, may obtain a decree of divorce on the ground that there has been no restitution of conjugal rights between them for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

**"Petition to the district court".**—The petition for restitution of conjugal rights must be made to the "district court" as defined in section 3(b). Reference may be made to Notes under section 19 *post*. Where a suit is filed instead of a petition the decision is not a nullity the difference being one merely of nomenclature (*d*1).

**Restitution when decreed.**—This section must be read with sec. 23 of the Act which imposes on the court the duty to inquire into and pass a decree *inter alia* for restitution of conjugal rights after satisfying itself about certain matters. The petitioner must show that there is a *bona fide* desire to resume matrimonial cohabitation and to render the rights and duties of matrimonial life. The petitioner who is sincere in that sense can seek the relief but not otherwise (*d*2). The decree may be passed on a petition by either spouse who may be the aggrieved party. Before passing a decree for restitution the court must be satisfied beyond reasonable doubt that:

> the respondent has, without reasonable excuse, withdrawn from the society of the petitioner; and there is no legal ground why the decree should not be passed.

The legal ground for refusing to grant relief may consist of:

> any of the grounds on which the respondent could have asked for a decree for judicial separation or for nullity of marriage or for divorce [S. 9(2)] (*d*3);
>
> any conduct on the part of the petitioner or fact tantamount to the petitioner taking advantage of his or her own wrong or any disability for the purpose of such relief [S. 23(1)(a)];
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> collusion with the respondent [S. 23(1)(c)];
>
> unnecessary or improper delay in instituting the proceeding [S. 23(1)(d)].

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(*d*1) *Sivanandi* v. *Bhagavathyamma* ('64) A.M. 237; *Kusum Lata* v. *Kamta Prasad* ('65) A.A. 280.

(*d*2) *Syal* v. *Syal* ('68) A.P. & H. 489; *Jogindra Kaur* v. *Shivcharan Singh* ('65) A.J. & K. 95.

(*d*3) *Khageswar* v. *Aduti Karnani* ('67) A. Orissa 80 [husband impotent and cruelty towards wife].

Again, no relief can be granted to the petitioner if the respondent had *reasonable excuse* (or what is often spoken of in this context as *just cause*) for withdrawing from the society of the petitioner [S. 9(1)].

Although sub-section (2) lays down in terms express and explicit that nothing can be pleaded in answer which could not have been a ground for judicial separation or for nullity of marriage or for divorce, it is obvious from the section read as a whole that withdrawal from the society of the other for a reasonable excuse, or what is often described as a just cause, would be a plea which if established would be a good defence. This would be so for the obvious reason that relief which a petitioner can claim under the section can only be granted on proof that the other spouse has withdrawn from the society of the petitioner without reasonable excuse [See "Reasonable excuse" or just cause *infra*]. And despite sub-section (2) it seems equally clear that it would be open to the respondent in answer to plead that there was no valid and subsisting marriage between the parties for if any dispute is raised in that behalf it would be incumbent on the petitioner to establish that there subsists a valid marriage between the parties.

A wife can resist a petition for restitution of conjugal rights on the ground that the husband had married another wife before the Act came into operation and by bringing her case within the ambit of section 13(2)(i) *post* (*e*1).

Restitution of conjugal rights cannot be refused to a husband on the ground of a custom forfeiting the right of outcasted husband to society of wife (*e*2).

A husband has the right to require his wife to live with him wherever he may choose to reside and special circumstances apart, the Court will not absolve the wife from discharging her corresponding duty (*ee*). Even an agreement between the parties prior to the marriage that the spouses will live in the house of the wife's father will not affect the husband's right. Such an agreement *per se* would be no answer to a husband's petition for restitution of conjugal rights (*e*3).

**Burden of proof.**—The onus of proving that the respondent has, without reasonable excuse, withdrawn from the society of the petitioner must obviously rest on the petitioner. The mere circumstance that the wife's allegation of cruelty in defence in any such case is not proved would not displace that onus (*e*4). But the onus of proving reasonable excuse must rest on the respondent (*e*5). The initial burden being on the petitioner, the petitioner must, as a general rule, lead evidence to establish the averments on which relief is sought (*e*6).

**"Reasonable excuse" or just cause.**—The question whether conduct falling short of cruelty or any other matrimonial offence can justify one spouse in

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(*e*1) *Veeriah* v. *Nagiah* ('59) A.A.P. 547 (F.B.) *Venkatamma* v. *Venkataswamy Reddy* ('63) A. Mys. 118. *Deepo* v. *Kehar Singh* ('62) A. Punj. 183; *Mallappa* v. *Neelawwa* ('70) A. Mys. 59.

(*e*2) *Mohan Lal* v. *Shanti Devi* ('64) A. All. 21 [Also see S. 4(a) of the Act].

(*ee*) *Tirath Kaur* v. *Kirpal Singh* ('64) A. Punj. 28 (wife not willing to give up her job and join husband).

(*e*3) *Pothu Raju* v. *Rodha* ('65) A.A.P. 407.

(*e*4) *Rebarani* v. *Ashit* ('55) A.C. 162.

(*e*5) *Hardeep Singh* v. *Dalip Kaur* ('70) A.P. & H. 284.

(*e*6) *Ratnaprabhabai* v. *Sheshrao* ('72) A.B. 182.

leaving another has been much debated in England and judicial opinion on the question is not wholly uniform (*f*). But the more recent and acceptable view seems to be that the "just cause" must be "grave and weighty" or as it is sometimes said "grave and convincing" and that it may be distinct from a matrimonial offence. It may be distinct from cruelty to the extent that it falls short of or is less than legal cruelty but none the less the reasons for withdrawal from the society of the petitioner must be grave and weighty. In *Timmins* v. *Timmins* (*g*) it was held by the Court of Appeal that the husband was not guilty of cruelty but his conduct was a grave and weighty matter which gave the wife good cause for leaving him and prevented him from obtaining a decree for restitution of conjugal rights unless and until he satisfied the court that, if she returned to him he would behave with conjugal kindness, and, therefore, was a defence to the husband's petition for restitution.

It would seem that conduct of a spouse which for one reason or another falls short of cruelty or any other matrimonial offence would afford reasonable excuse for leaving or withdrawing from the society of the spouse and be a defence to a suit for restitution under the present section. Whether one party has reasonable excuse for leaving the other or staying apart must depend on whether the conduct complained of is of a *grave and weighty* character. The plea that there was reasonable excuse for the respondent to withdraw from the society of the petitioner must in substance involve an inquiry into facts. Each case must depend on its own facts and circumstances and it is not possible to give an exhaustive statement of what may or may not constitute "reasonable excuse." In the decisions mentioned below (*g*1) the above principles were accepted and relief under the present section was not granted to the petitioner on the ground that the other spouse had withdrawn from the society of the petitioner for a reasonable excuse. A contrary view has been expressed by the High Courts of Andhra Pradesh and Mysore (*g*2) which have held that the "reasonable excuse contemplated by sub-section (*i*) must be one which would afford a ground either for judicial separation or for nullity of marriage or for divorce."

**Delay.**—Unnecessary and improper delay in instituting proceedings for restitution of conjugal rights can be a ground for refusing relief under this section (*g*3). Reference may be made to section 23 (1) (*d*) *post*.

**Separation by mutual consent.**—Prior to the passing of the Matrimonial Causes Act, 1884, it was regarded as settled law in England that deeds of separation were utterly inoperative to abrogate the duty of co-habitation involved in the tie of marriage and that notwithstanding any such agreement

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(*f*) *See Edwards* v. *Edwards* (1949) 2 All E.R. 145, (1950) Probate 8 and *Pike* (1953) 1 All E.R. 232. Also see *Dixon* v. *Dixon* (1953) 1 All E.R. 910.

(*g*) (1953) 2 All. E.R. 187.

(*g*1) *Tulsa* v. *Pannalal* ('63) A.M.P. 5. *Gurdev Kaur* v. *Sarwan Singh* ('59) A. Punj. 162. *Smt. Mango* v. *Prem Chand* ('62) A.A. 447. Also see *Bejoy* v. *Aloka* ('69) A.C. 477; *Sadhu Singh* v. *Jagdish Kaur* ('69) A. P. & H. 139; *Anna Saheb* v. *Tarabai* ('70) A.M.P. 36; *Madan Mohan* v. *Sarla Kohli* ('67) A. Punj. 397 (baseless allegations of unchastity); *Kanna* v. *Krishnaswami* ('72) A.M. 247; *Shanti Devi* v. *Balbir Singh* ('71) A. Delhi 294; *Jagadish Lal* v. *Shyama* ('66) A.A. 150 (husband's inability to consummate marriage); *Karnail Singh* v. *Bhupinder Kaur* ('73) A.P. & H. 19; *Satya Devi* v. *Ajaib Singh* ('73) A. Raj. 20.

(*g*2) *Annapurnamma* v. *Appa Rao* ('63) A.A.P. 312; *Revanna* v. *Suseelamma* ('67) A. Mys. 165.

(*g*3) *Teja Singh* v. *Sarjit Kaur* ('62) A. Punj. 195; *Shanti Devi* v. *Ramesh Chandra* ('69) A.P. 27.

it was competent to either party to sue for a decree of restitution of conjugal rights (*h*). Though an agreement between husband and wife to live apart is not in itself a bar to a petition for restitution of conjugal rights in England the effect of the above Act, which enacted that a respondent who failed to comply with a decree for restitution should be deemed guiity of desertion without reasonable cause, and that a suit for judicial separation might be instituted on that ground, was that the Court was empowered to refuse a decree for restitution where such an agreement was shown to exist and neither party had taken steps to set it aside. It has also been held there that a valid agreement between the spouses to live apart may exist in the absence of a formal deed of separation and without an express covenant not to sue for restitution of conjugal rights (*i*). The principle underlying the cases on the subject is that an agreement providing for present separation is valid while on the other hand an agreement for future separation is bad and opposed to public policy.

The defence that there was a pre-nuptial contract between the parties to live separate in certain circumstances was raised in some cases in India where restitution was sought and such contracts were held to be void and illegal as interfering with marital duties and opposed to public policy. Those decisions also turned on the principle that such agreements were contrary to the personal law of the parties. But the fundamental difference between a case where an agreement for living separate entered into during the continuance of marriage and an agreement before or at the time of marriage controlling the rights of the parties was not disregarded and only agreements of the latter character were treated as nugatory and infructuous (*j*).

The present Act lays down in section 13(1A) that a marriage can be dissolved on the ground that there has been no restitution of conjugal rights between the parties for a period of two years or upwards after the passing of the decree, and the position is the same as that under English law after the Matrimonial Causes Act, 1884. There seems no reason why a valid agreement for immediate and not future separation *bona fide* entered into during the continuance of marriage with a view to enable the parties to live in peace should not be treated as empowering the court to refuse a decree for restitution. It is submitted that a different rule would have the effect of enabling a party to get a decree for divorce on the ground of non-compliance with the decree for restitution on facts contrary to the truth of the case. Moreover a spouse who is living separate after a *bona fide* agreement of this nature cannot properly be said to have withdrawn from the society of the other spouse without reasonable excuse (*j*1).

**Consent Decree.**—Reference may be made to Notes under section 23 *post*.

**Mode of execution of decree.**—Order 21, rr. 32 and 33, of the Civil Procedure Code, deal with the question of execution of a decree for restitution of

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(*h*) *Crabb* v. *Crabb* (1868) L.R. 1 P. & D. 601.
(*i*) *Walter* v. *Walter* (1921) P. 302.
(*j*) *Tekait Mon Mohini* v. *Basant Kumar* (1901) 28 Cal. 751; *Krishna Aiyar* v. *Balammal* I.L.R. 34 Mad. 398.
(*j*1) A contrary view has been taken in *Thirumal* v. *Rajammal* ('68) A.M. 201.

conjugal rights. There can be no sanction or procedure as compulsion by the court to force a party to a marriage to return to the other spouse against his or her will and the more modern procedure is as now laid down in the provisions mentioned above. Section 24 of this Act lays down rules relating to maintenance *pendente lite* and expenses of proceedings and section 25 lays down rules relating to orders for maintenance which can be made at the time of passing of the decree or at any time subsequent to such decree. Reference may also be made to section 28 and Notes thereunder.

*Pending proceedings are governed by this section.*—It is submitted that suits for restitution of conjugal rights between Hindus, whose marriage was solemnized in accordance with Hindu law, pending at the date of the commencement of this Act, will be within the ambit of this section. The defences to any such suit can be those mentioned in sub-section (2). A different view has been expressed by the High Court of Punjab (*l*) but the only question for the determination of the court in that case related to jurisdiction and not to the applicability of the provisions contained in the present section. A suit for restitution of conjugal rights was pending in the court of the Subordinate Judge when the Act came into operation and it was contended that the District Court alone had jurisdiction to proceed with the suit by operation of section 19 of the Act which deals with jurisdiction. The High Court negatived the contention. Section 19 applies only to petitions presented after the Act came into operation and there is no other provision in the Act which affects the jurisdiction of courts which were competent to try pending suits for restitution of conjugal rights (*l*1).

**10.** (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party—

Judicial Separation.

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or

(c) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy; or

(d) has, for a period of not less than three years immediately preceding (*m*) the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or

(e) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; or

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(*l*) *Balwant Singh* v. *Balwant Kaur* ('57) A. Punj. 1. Also see *Sivanandy* v. *Bhagavathyamma* ('62) A.M. 400, and see *Yankappa* v. *Shavappa* ('60) A. Mys. 265. But see *Thenku Veeriah* v. *Tamisetti Nagiah* ('59) A.A.P. 547 (F.B.).

(*l*1) This was quoted with approval in *Udainath* v. *Chhaya* ('63) A. Orissa 27. Also see S. 29 (3) and *Yankappa* v. *Shavakka* ('60) A. Mys. 265.

(*m*) Amended by Act 73 of 1956. In cl. (*d*) of sub-sec. (1) of Sec. 10 for the words "has, immediately before", the words "has, for a period of not less than three years immediately preceding" have been substituted.

(f) has, after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse.

*Explanation.*—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

**Judicial separation.**—A legal or judicial separation permits the parties to a marriage to live apart. Sub-section (2) in terms states that where a decree for judicial separation has been passed, it shall no longer be obligatory for either party to cohabit with the other. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed by the decree are substituted therefor. The decree does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity for reconciliation and adjustment. It may fall by a reconciliation of the parties in which case the rights of respective parties which flowed from the marriage and were suspended are restored. Where there is no reconciliation and cohabitation is not resumed, it serves after two years of the passing of it as the basis for the dissolution of the marriage by a decree of divorce [S. 13(1A)]. Although in a sense the decree for judicial separation is provisional and conditional the court cannot while passing the decree impose any terms on the parties as to the nature or duration of its operation.

Attention has already been drawn in the Introductory Note to the scheme underlying the various provisions and the scheme of this section and section 13 which deals with dissolution of marriage by a decree of divorce; and the distinction between a decree of judicial separation and one for divorce has also been pointed out. This section lays down the grounds which give either party to a marriage the right to present a petition for a decree of judicial separation. The grounds it will be noticed include all the three principal matrimonial offences, desertion, cruelty and adultery. It will also be noticed that 'desertion' has been expressly given a wide meaning by including 'wilful neglect' of the petitioner on the part of the respondent.

The material language of the section has always in these matters to be borne in mind, for if a court is prone too much to indulge in exposition and attempted definition, there is a risk that there will be substituted for the language chosen by Parliament some other form of words and in an attempt at wide survey some essential factor would be omitted. This seems peculiarly

applicable to the matrimonial offences of desertion and cruelty cases relating to which are by far the most common of the matrimonial causes contested before the courts. The circumstances vary infinitely from case to case and the modes of life involved at times present sharp contrasts. The importance therefore, of satisfying the language of the section cannot be overstressed in a branch of the law which has been predominantly judge-made. The following observations of Evershed M.R. cited with approval by Lord Merriman in *Simpson* v. *Simpson* (*n*) should prove useful:

> "It has so often been said that it is obvious—yet it is worth repeating—that all cases that come before this court must be determined on their own particular facts, and I should imagine that in no class of case is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. The fact is, I think, another reason for a sense of danger in trying to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or riders to the actual statutory language."

**Cl. (a): Desertion.**—The expression desertion in the context of matrimonial law represents a legal conception and is one very difficult to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It has been said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably no judge would ever succeed in doing so, but among the descriptions of desertion one which has always appealed to courts trying matrimonial causes is that "desertion" is "a withdrawal not from a place, but from a state of things" (*o*). The essential ingredients of this offence in order that it may furnish a ground for relief are:

(a) *the factum of separation;* and

(b) the intention to bring cohabitation permanently to an end—*animus deserendi;*

(c) the element of permanence which is a prime condition requires that both these essential ingredients should continue *during the entire statutory period.*

The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The *Explanation* purports to give the meaning of the expression desertion with all its grammatical variations and cognate expressions. Permanent forsaking and abandonment (*p*) are expressions often used in the context of the matrimonial offence of desertion. The Explanation as the Joint Committee observed has widened the definition of desertion so as to include "wilful neglect" of the petitioning spouse by the respondent. It states

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(*n*) (1951) 1 All E.R. 955, 958. Also see per Lord Atkin in *Donoghue* v. *Stevenson* (1932) A.C. 562, 583.

(*o*) *Pulford* v. *Pulford* (1923) P. 18, 21; *Khorshed* v. *Muncherji* (1937) 39 Bom. L.R. 1141, 1142.

(*p*) Cf. S. 18(2)(a) of the Hindu Adoptions and Maintenance Act, 1956.

that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner and that wilful neglect of one spouse by the other is desertion within the meaning of the expression. It will be seen that the meaning given is somewhat tautological but the Explanation has the merit of making it abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. It is also clear that the meaning given includes both actual desertion as well as what is generally referred to as constructive desertion in which although there is no ostensible abandonment of one spouse by the other there is expulsive conduct manifesting *animus deserendi*. One effect of including "wilful neglect" in the meaning of desertion is that wilful neglect of one spouse by the other is sufficient to establish abandonment or expulsive conduct and amounts to proof of the *animus deserendi* on the part of the latter which is an essential ingredient of the offence. This will have considerable bearing in cases of constructive desertion. It may be pointed out that neither sec. 27 (b) of the Special Marriage Act, 1954, nor sec. 1 (1) (b) of the Matrimonial Causes Act, 1950. use in this context the expressions "without the consent" or "against the wish" and only say " has deserted the petitioner without cause." This is obviously to avoid any attempt at defining an expression which is extremely difficult if not impossible to define in a manner which would fully bring out its comprehensive connotation. It is enough to satisfy the requirement of the rule that the abandonment was without reasonable cause and without consent. It is not necessary to show that it is against the wish of the person charging it. This latter expression was used in sec. 3 (9) of the Indian Divorce Act, 1869, and construed as meaning contrary to an expressly expressed wish of the person charging abandonment (*q*).

The statutory requirement as to time during which the "state of things" should continue is fixed at a continuous period of not less than two years immediately preceding the presentation of the petition. Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful or voluntary separation. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period (*r*).

A large body of case-law has developed round the legal significance of 'desertion' both in England and in India and the broad general rules deducible from the same will be of great assistance and guidance in cases which fall for determination under the present enactment though of course opinions

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(*q*) *Fowle* v. *Fowle* (1878) 4 Cal. 260.

(*r*) *Bipin Chander* v. *Prabhawati* (1956) S.C.R. 838, (1957) 59 Bom. L.R. 322. Also see *Pratt* v. *Pratt* (1939) A.C. 417; *Williams* v. *Williams* (1939) 3 All E.R. 825 (C.A.); *Dunn* v. *Dunn* (1949) P. 98, (1948) 2 All. E.R. 822.

expressed in the context of enactments even slightly differently worded must always be read with the caution most commonly needed in their application to cases arising in different circumstances and varied situations. Moreover, as already pointed out, the language of the present clause and Explanation are intended to give a wide import to the expression though no radical innovation has been made. In *Bipin Chander* v. *Prabhawati* (*s*), the Supreme Court after posing the question—What is desertion? observed that the legal position had been admirably summarised in paragraphs 453 and 454 of Halsbury's Law of England, 3rd Edition, Vol. 12:

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home.' There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for . . . it must exist for a period of at least . . . years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion . . . differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence."

The Supreme Court, in the case mentioned above, made some general observations and summed up some other important principles which will afford considerable guidance in cases arising under the Act. It was pointed out that desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they should commence at the same time. The *de facto* separation may have

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(*s*) (1956) S.C.R. 838, 59 Bom. L.R. 322.

commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law has prescribed a period of . . . as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the *locus poenitentiae* thus provided by law and decides to come back to the deserted spouse by a *bona fide* offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for relief have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable (*s*1).

Some of the principles summed up above were reaffirmed by the Supreme Court in its latest decisions on the subject (*s*2) and the essential element of *animus deserendi* examined at some length.

**Separation.**—One of the essential ingredients of desertion is separation of one spouse from another and there can, therefore, be no desertion while the parties are living together. So long as cohabitation continues, that is parties are living together, persistent and even wanton refusal of one or other of the parties to have sexual intercourse is not by itself sufficient to amount to desertion because it is neither abandonment nor living apart (*t*). But such refusal, if unjustified, may amount to constructive desertion when the spouse refusing sexual intercourse would have known that the effect of the refusal would be that the other spouse would refuse to live with him (*t*1). Unreasonable refusal may be regarded as a grave and weighty matter and can amount to constructive desertion having regard to the circumstances of the case (*t*2).

In an exceptional case there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses had ceased to be one household and had become two separate households (*tt*). It seems that cases of this nature which do not often arise would under the present section fall for consideration under the Explanation where it is laid down that desertion includes wilful neglect.

**Consensual separation.**—As to separation which begins by being a consensual and situation changing by one of the spouses withdrawing the consent and offering to resume cohabitation reference may be made to the undermentioned decision of Court of Appeal in England (*t*3) and the cases there cited.

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(*s*1) *Bipin Chander* v. *Prabhawati* (1956) S.C.R. 838; *Jiyubai* v. *Ningappa* ('63) A. Mys. 3.

(*s*2) *Lachman* v. *Meena* (1964) A.S.C. 40, 48; *Rohini Kumari* v. *Narendra Singh* ('72) A.S.C. 459.

(*t*) *Weatherley* v. *Weatherley* (1947) A.C. 628; (1947) 1 All. E.R. 563.

(*t*1) *Hutchinson* v. *Hutchinson* (1963) 1 All E.R. 1. Also see under "Wilful neglect p. 708, *infra* and under "Reasonable apprehension of danger to health" p. 722, *infra*.

(*t*2) *Slon* v. *Slon* (1969) 1 All E.R. 759.

(*tt*) *Baker* v. *Baker* (1952) 2 All E.R. 248.

(*t*3) *Gallagher* v. *Gallagher* (1965) 2 All E.R. 967. Also see *Fraser* v. *Fraser* (1969) 3 All E.R. 654; *Nuttley* v. *Nuttley* (1970) 1 All E.R. 410 (not desertion).

**"Continuous period of not less than two years. . ."**.—Desertion is a continuing offence and the element of permanence necessarily involved in it requires that both separation and animus *deserendi* should continue during the entire statutory period of two years immediately preceding the presentation of the petition. It must be noticed that the continuing offence of desertion for the statutory period of at least two years can never become complete until the petition is actually presented. The offence is not complete and remains inchoate till the presentation of the petition however long might have been the period of previous desertion. It necessarily follows that during this period the offending spouse has always the *locus poenitentiae* to go back to the deserted spouse. It also follows that it is necessary that during all the period that there has been desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable (*v*). Desertion differs from other matrimonial offences such as adultery, in that it does not consist of an act or a number of acts separate and distinct in themselves, but is rather an activity or course of a conduct which must persist for the statutory period upto the presentation of the petition (*w*); and it is not permissible, if the period is broken, to add the broken periods together so as to make a sum of two years. The offence founding the cause of action is not complete—is as if it were inchoate—until the petition is filed. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to adopt proceedings. He or she may at once seek relief and is not bound to reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, the other spouse cannot refuse reinstatement (*x*).

Once a state of desertion has arisen it continues until it is terminated (*y*). So when the factum and intention to desert on the part of a spouse is established, the intention is presumed to continue unless the offending spouse proves genuine repentance and sincere and reasonable attempt to go back to the deserted spouse or in case of constructive desertion to get back the injured spouse (*z*). The deserting spouse is only bound to make reasonable attempts. So if on the facts it appears that the petitioner had made it plain to the deserting spouse that the latter would not be received back or has repelled all the advances made by the latter towards a resumption of married life, the petitioner cannot complain that the deserting spouse has persisted in the desertion without cause. There can be cases where it would be unreasonable to expect the deserting spouse to make attempts to end the desertion (*a*).

The question whether a deserting spouse has a reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must

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(*v*) *Bipin Chander* v. *Prabhawati, supra.*

(*w*) *W.* v. *W.* (No. 2) (1954) 2 All E.R. 829, 832, 833. Reference may also be made to *Sitabai* v. *Ramchandra* (1957) 59 Bom. L.R. 885, 890, 891.

(*x*) *Perry* v. *Perry* (1952) 1 All E.R. 1076, 1079, 1080.

(*y*) *Cohen* v. *Cohen* (1940) A.C. 631, (1940) 2 All E.R. 331 (H.L.).

(*z*) *Lachman* v. *Meena* (1964) A.S.C. 40, 49; *Bowran* v. *Bowran* (1925) P. 187, 195; *Cohen* v. *Cohen* (1940) A.C. 631, (1940) 2 All E.R. 331 (H.L.); *Sifton* v. *Sifton* (1939) 1 All E.R. 109, (1939) P. 221.

(*a*) *Pratt* v. *Pratt* (1939) A.C. 417, 420; *Cohen* v. *Cohen, supra.*

always be a question of fact (*a*1). The question for consideration in such cases is, "Is the conduct of the deserted spouse such as to exempt the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?" (*a*2). In considering the conduct of the deserted spouse in any such case the court will have regard to the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse (*a*3).

The mere fact that during the period when the spouses were living apart maintenance was paid by the husband to the wife will not prevent desertion running if it appears that there was no agreement between the spouse to live apart. The agreement to pay maintenance is not of itself proof of consent to live apart (*c*).

**"Wilful neglect".**—The expression wilful neglect used in the Explanation is not defined in the Act. The word wilful in this phrase is important. An act or omission done by accident or inadvertence is not wilful nor is it on the other hand absolutely necessary in the present context that to be wilful, the act or omission which constitutes neglect should be deliberate and intentional. In the context of matrimonial law wilful neglect would seem to mean that the person is consciously acting in a reprehensible manner in the discharge of his marital obligations or is consciously failing in a reprehensible manner in the discharge of those obligations; and connotes that degree of neglect which is shown by an abstention from an obvious duty, attended by a knowledge of the likely results of the abstention. Breach of every tie of marriage or failure to discharge every tie of marriage or failure to discharge every marital obligation cannot be regarded as wilful neglect. Thus for instance in a case where the marriage has been consummated and cohabitation is continued it can hardly be said that mere refusal of sexual intercourse howsoever persistent by one of the spouses amounts to wilful neglect or purports to conclude the matrimonial relationship (*c*1). But wilful neglect to maintain the wife without reasonable cause would be desertion. The neglect to become desertion must be such as amounts to forsaking or abandonment of one spouse by the other by a conscious disregard of the duties and obligations of the married state considered as a whole.

**Constructive desertion.**—It is a well established principle that proof of factum of separation, which is one of the essential ingredients of the matrimonial offence of desertion, does not consist merely in ascertainment of which party left the home first. The rule is now well established that a spouse may be guilty of such misconduct as would render the continuance of marital relations so unbearable that the other spouse feels compelled to leave the matrimonial home and in such a case it is the former and not the latter, who is the deserter. There is no substantial difference between the case of a husband who leaves his wife with the intention of terminating cohabitation and the case of a husband who with like intent evidenced by his misconduct

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(*a*1) *Tickler* v. *Tickler* (1943) 1 All E.R. 57, 59.
(*a*2) *Brewer* v. *Brewer* (1961) 3 All E.R. 957, 964.
(*a*3) *Lachman* v. *Meena* (1964) A.S.C. 40, 53.
(*c*) *Pardy* v. *Pardy* (1939) 3 All E.R. 779, 782, (1939) P. 288.
(*c*1) *P.* v. *P.* (1964) 3 All E.R. 919.

brings the cohabitation to an end by virtually compelling the wife to depart from the matrimonial home. In *Lang* v. *Lang* (*d*) the Privy Council summarized in an impeccable form the principles and made some general observations on the question of constructive or indirect desertion which give authentic guidance on the subject and will be found very instructive: "It has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her; by driving her out. In such a case the factum is the course of conduct pursued by the husband—something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage 'for better, for worse'. The course of conduct—the 'factum'—must be grave and convincing." Conduct which falls short of legal cruelty may justify one spouse in leaving another, provided it is of a grave and convincing character (*e*). It is not possible to deduce any principle of law by reference to which it can be determind in every case on which side of the line the case falls when this test of grave and convincing conduct is to be applied; the issue in the main would be one of fact and no criterion can be propounded which would be very helpful. In these cases it has to be noted that the legislature has not thought fit to make the continuous unhappiness of one spouse caused by the unkindness, the lack of consideration, or the selfishness or every degradation of the other spouse a ground for obtaining relief. It is essential to examine, as Lord Green, Master of the Rolls, observed in the undermentioned case (*f*), the actual facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home. "It is," as Asquith L. J. observed in the same case, "possible to say of certain courses of conduct that they should not amount to constructive desertion, and of certain other courses that they could not fail to do so. . . . But between the extremes indicated there is obviously a no-man's land where the issue is one of fact" (*f*1). One effect of including 'wilful neglect in the meaning of desertion (Explanation) is that such neglect of one spouse by the other is sufficient to establish expulsive conduct. The neglect to become desertion must be such as amounts to forsaking or abandonment by a conscious dis-

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(*d*) (1954) 3 All E.R. 571, 573; *Narayan Prasad* v. *Prabhadevi* ('64) A.M.P. 28; *Jyotish Chandra* v. *Meera Guha* ('70) A.C. 266.

(*e*) *Edwards* v. *Edwards* (1949) 2 All E.R. 145, (1950) P. 8.

(*f*) *Buchler* v. *Buchler* (1947) P. 25, (1947) 1 All E.R. 319, 322. Also see *Marjoram* v. *Marjoram* (1955) 2 All E.R. 1. (Sluttishness alone is not a sufficient ground); *Bartholomew* v. *Bartholomew* (1952) 2 All E.R. 1035 (Wife dirty in her person and the home—no ground).

(*f*1) *Buchler* v. *Buchler, supra* (1947) 1 All E.R. 319 at p. 326.

regard of the duties and obligations of the married state considered as a whole (*g*).

In case of constructive desertion also there must be proof of both the essential ingredients of *factum* and *animus deserendi* on the part of the offending spouse. The law relating to this latter requirement was reviewed by the Privy Council in the abovementioned case and it was laid down that *prima facie* in these cases a person is presumed to intend the consequences of his acts, though the inference may be rebutted; and if the whole of a husband's conduct is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home the fact that the husband did not want this consequence to ensure does not rebut the inference that he intended the probable consequnces of his acts and thus intended his wife to leave the home. Conduct which would give rise to this inference must be grave and convincing and where it exists proof of actual intention to bring the matrimonial consortium to an end would not be required. Apart from rebutting evidence, therefore, such conduct would be sufficient proof of an intention to disrupt the home and it would be no answer that his desire was that his wife will stay and the home will not be disrupted (*h*).

It is sometimes said that a charge of constructive desertion cannot be proved by evidence of conduct, alleged to have caused the petitioner to leave the matrimonial home, of the nature of cruelty, but not amounting to cruelty in law (*i*). The true rule of the matter would seem to be that it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That again does not cover the whole area of constructive desertion. Grave and weighty matters may be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty (*j*). In this class of cases the facts are often somewhat complex and overlapping. If the facts and circumstances are such as satisfy the general test already discussed the court may well reach the conclusion that the conduct of the other spouse was equivalent to expulsion and that the complaining spouse was justified in leaving the matrimonial home (*k*). The acts sufficient to satisfy this test must be of a serious and convincing nature, but conduct short of an actual matrimonial offence may be sufficient. The conduct, however, must from the very nature of the offence of desertion, obviously be of a grave and convincing character. It may include wilful neglect of the petitioner by the other party to the marriage.

*Mutual desertion.*—It is conceivable, as held in England in a recent case, that the court may grant simultaneous decrees on the ground of desertion (*k*1).

**Good cause for separation.**—It is a well established principle that a spouse who withdraws from cohabitation for what is described as a good cause or a just cause or an effective cause such as adultery (*k*2) or cruelty, cannot be

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(*g*) See 'Wilful neglect' *above*.

(*h*) *Lang* v. *Lang*, (1954) 3 All E.R. 571, at pp. 579, 580.

(*i*) *Pike* v. *Pike*, *supra*.

(*j*) *Timmnis* v. *Timmnis* (1953) 2 All E.R. 187.

(*k*) *Foster* v. *Foster* (1953) 2 All E.R. 518; *Pike* v. *Pike* (1953) 1 All. E.R. 232, 235. As to whether "drunkenness" amounts or not to expulsive conduct see *Hall* v. *Hall* (1962) 3 All E.R. 518.

(*k*1) *Price* v. *Price* (1968) 3 All E.R. 543.

(*k*2) *Samraj Nadar* v. *Abraham* ('70) A.M. 434 (Petitioner husband living in adultery).

said to be guilty of desertion (*l*), for in such a case it is the conduct of the offending spouse that is the cause of separation and the spouse who leaves the matrimonial home cannot be said to have acted from any *animus deserendi*. Apart from other causes to be presently noted adultery and cruelty would afford complete defence to any petition by the other spouse for judicial separation on the ground of desertion unless the court is satisfied that there was condonation of such adultery or cruelty or that there was such connivance in the matter of the adultery complained of as would render it unjust to entertain the objection (*m*). An honest and reasonable belief or as it is sometimes said a *bona fide* and reasonable belief, even though erroneous, that the other spouse has committed adultery may be a good cause and justification for withdrawal from cohabitation. It has been held in England that a wife's belief, induced by her husband's conduct, that he has committed adultery may justify her, until that belief is proved to be without foundation, in leaving the matrimonial home and living apart (*n*). The belief, however, must be reasonable; it must be sensible and not the result of caprice or stubborn and distorted judgment (*o*). The reasonable belief which affords an answer to a charge of desertion cannot be said to have continued to exist after it has been dispelled. No exhaustive statement of the ways in which such a belief could be dispelled can be expected as the question must resolve itself into one of fact. A husband withdrew from cohabitation with his wife on the ground that he suspected her of having committed adultery and in proceedings by the wife for restitution of conjugal rights it was found by the court that the husband had reasonable grounds for his suspicions. But a petition filed by the husband thereafter for divorce on the ground of adultery was dismissed on the ground that adultery was not proved. In subsequent proceedings by the wife for maintenance it was held that the husband was not entitled to resist the claim on the ground that he had *bona fide* and reasonable belief that the wife had committed adultery (*p*).

*Remarriage of husband.*—Desertion within the meaning of the section implies more than merely separate residence and separate living. Section 18(2)(a) of the Hindu Maintenance and Adoption Act, 1956, entitles a wife to live separately from her husband, without forfeiting her claim to maintenance, if he is guilty of desertion. The effect of that Act is that a wife is entitled to claim separate residence and maintenance from her husband if he should marry again. The High Courts of Andhra Pradesh (*p*1) and Mysore (*p*2) had taken the view that if in any such case the wife was living separately from the husband it could not be said that she had deserted her husband without reasonable excuse. The different view taken by the High Court of Allahabad (*p*3) was that the fact of the remarriage of the husband would not, without anything more, necessarily afford reasonable cause for desertion. According to this latter view the question for the court would still remain as to what was the impact of the fact of the remarriage of the husband, on the mind of the wife. In cases where the consideration of the remarriage of the husband failed to have any impact on the mind of the wife, remarriage of the husband would not afford reasonable cause for desertion. The Supreme Court has accepted the latter view (*p*4).

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(*l*) *Baker* v. *Baker* (1953) 2 All E.R. 1199; *Kuppuswami* v. *Alagammal* ('61) A.M. 391. Also second marriage of the husband as furnishing a good cause for separation see *Pullaiah* v. *Rushingamma* ('63) A.A.P. 323.

(*m*) See Section 23(1)(b).

(*n*) *Allen* v. *Allen* (1951) All E.R. 724, 731.

(*o*) *Allen* v. *Allen, supra.* Also see *Cox* v. *Cox* (1958) 1 All E.R. 569.

(*p*) *Allen* v. *Allen, supra.*

(*p*1) *Pulliah* v. *Rushingamma* ('63) A.A.P. 323.

(*p*2) *Siddegowda* v. *Parvathamma* ('65) A. Mys. 299. Also see *Mallappa* v. *Neelawwa* ('70) A. Mys. 59.

(*p*3) *Rohini Kumari* v. *Narendra Singh* ('70) A.A. 102.

(*p*4) *Rohini Kumari* v. *Narendra Singh* ('72) A.S.C. 459.

**Termination of desertion.**—Desertion may be terminated at any time by resumption of cohabitation, because a resumption of cohabitation is the exact negation of a state of desertion. There must be the common or mutual intention of the parties to resume cohabitation in circumstances showing that a true reconciliation has been effected. Any other rule would hamper attempts at reconciliation (*q*). No court has attempted to give a completely exhaustive definition of cohabitation. Desertion being a withdrawal from a "state of things" resumption of cohabitation must at least mean resumption of that "state of things." This may be evidenced by a common intention of the parties to set up once against the matrimonial home. Sexual intercourse would beyond doubt be a most important incident in the marital relationship and very cogent evidence of the intention of the parties to effect reconciliation and resume cohabitation. There is no absolute rule, however, that desertion is terminated or interrupted by casual acts of intercourse between the spouses or casual visits without any return to the routine of common life, or anything resembling the re-establishment of the matrimonial relationship. But in any event even such intercourse would be strong and very weighty evidence to be considered in the light of the whole facts and merits of the case. It would *prima facie* seem unreasonable that an act which is accorded such a decisive effect as an affirmation by the injured party of the married state should be able to take place consistently with the uninterrupted continuance of a state of desertion which while it continues amounts to a negation of married state. These considerations should be stronger against a deserted husband. The criterion would of course be whether considering all the facts it can be said that there was or must have been the intention to resume married life. It has been held in England that casual acts of intercourse should not be regarded as proof of resumption of marital relationship where a wife, though participating in such acts, in all other respects repudiated the relationship (*r*).

Desertion may also be terminated by a supervening *animus revertendi* expressed by a genuine offer to return to the deserted spouse or in case of constructive desertion by a *bona fide* attempt to get back the aggrieved spouse. If a deserting spouse takes advantage of the *locus poenitentiae* provided by law and goes back to the deserted spouse by a *bona fide* offer of resuming the matrimonial home with all the implications of maritial life before the statutory period is out or even thereafter before any proceedings for relief have been commenced desertion comes to an end and if the deserted spouse unreasonably refuses the offer the entire position would become different and the latter instead of the former would become the deserter (*s*).

**Offer of reconciliation.**—A deserting spouse may at any time before institution of proceedings by the other spouse bring the desertion to an end by sufficient offer of reconciliation. It must be an offer to return and involve readiness and willingness to resume cohabitation in the ordinary sense of the word. The offer must be a genuine offer made in good faith and not merely to lay a foundation for an intended petition or to forestall or defeat any pro-

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(*q*) *Bartram* v. *Bartram* (1950) P. 1, (1949) 2 All E.R. 270; *Mummery* v. *Mummery* (1942) 1 All E.R. 553, (1942) P. 107.

(*r*) *Perry* v. *Perry* (1952) 1 All E.R. 1076. Also see *Whitney* v. *Whitney* (1951) 1 All E.R. 301.

(*s*) *Bipin Chander* v. *Prabhawati* (1956) S.C.R. 838.

ceeding by the injured spouse. The offer must be conciliatory and not hedged in with any unreasonable qualification or condition. In a case of mere desertion the offer to return may be enough. A case of constructive desertion may raise different considerations. There may be cases where the situation created by the conduct of the deserting spouse was such that a mere offer by word of mouth or by letter to resume cohabitation may not suffice unless it is accompanied by expressions of repentance and contrition. Such a situation may exist for instance where the offer of reconciliation is made by a husband who has been guilty of physical violence or other acts of cruelty of a serious nature or of other conduct of a gross nature and the wife had to leave the house in fear or helplessness. In such a case it cannot be said that a bare offer to return or take back the aggrieved spouse will suffice to terminate the desertion.

When a genuine offer of reconciliation is made the other spouse cannot refuse reinstatement. But the other spouse as the injured party will be justified in imposing reasonable conditions in order to ensure a genuine reconciliation and resumption of the matrimonial home with all the implications of martial life. The conditions sought to be imposed must be in good faith. The nature of the previous behaviour and degree of misconduct of the deserting spouse would determine the reasonableness or otherwise of such conditions. The unjustified rejection of a sufficient offer of reconciliation would of itself constitute desertion. Such for instance would be the case where in answer to an offer of reconciliation by the wife a husband imposes conditions which he knows would not be accepted and by his attitude and conduct shows that he is resolved to make a temporary separation an excuse for refusing resumption of matrimonial home. The matter was put very clearly by Lord Merriman when he said that the unjustified refusal by the spouse who has been deserted to resume cohabitation not merely terminates the desertion but also reverses the process; it 'turns the tables' or 'puts the boot on the other leg' . . . and it is immaterial whether the case is one of mere desertion which is terminable by a simple offer on the part of the deserter to return or is a case of constructive desertion terminable, with more difficulty no doubt, but terminable by appropriate repentance and appropriate assurance of amendment of such a kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing (*t*). In each case, the question must be determined on its own merits. There may be some conduct so gross that no woman could be expected ever to resume cohabitation with the husband. The husband's merits may be so slight that he cannot reasonably hope ever to be taken back. Thus for instance if the husband has been guilty of adultery which is uncondoned or of cruelty of so atrocious a character that the wife cannot possibly be expected to subject herself to a risk of recurrence. In such cases the actual separation must continue to have the quality of desertion by the husband (*u*). A different rule would require that the wife should be regarded as a deserter even in such a case because she refused

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(*t*) *Everitt* v. *Everitt* (1949) 1 All E.R. 908, 916. [Reference may also be made to the following cases which are illustrative of the rule]: *Casey* v. *Casey* (1952) 1 All E.R. 453; *Slowson* v. *Slowson* (1942) 2 All E.R. 527. Also see *Price* v. *Price* (1951) 1 All E.R. 877; *Holborn* v. *Holborn* (1947) 1 All E.R. 32.

(*u*) In *Everitt* v. *Everitt*, *supra*, a number of cases on the subject were examined by Lord Merriman.

reinstatement. That would be contrary to the plain reason and good sense underlying the doctrine of desertion. It is submitted that the proper question in these cases would be whether having regard to the whole background and facts and circumstances both prior and subsequent to the desertion the deserting spouse can be said to be ready and willing to resume the marital home.

**Desertion and cruelty.**—It is sometimes said that desertion of itself cannot be cruelty (*v*). In *Cade* v. *Cade*, it was held in England that the same conduct could constitute expulsive conduct founding a charge of constructive desertion and could also be an element of conduct founding a charge of cruelty (*w*). It may at times be impossible to draw the line between the two because very often the facts are mixed so that it is impossible to extricate one from the other. This may have bearing on cases of constructive desertion of which it may well be said that the same facts also amount to cruelty. It is commonplace that constructive desertion and cruelty may often in substance be the same thing, proved by the same evidence (*x*). A charge of cruelty must be distinctly pleaded and proved as such (*y*). The court, even if it is satisfied on a charge of desertion that the evidence is sufficient to establish cruelty, must insist on the pleading being put in order and should raise the necessary issue before granting relief.

**Onus and standard of proof.**—It is incumbent on the petitioner to prove that desertion without reasonable cause subsisted throughout the statutory period. Before granting relief on the ground of desertion the court must be satisfied beyond reasonable doubt, that the matrimonial offence complained of is established. In *Bipin Chander* v. *Prabhawati* (*z*) the Supreme Court referred to the law in England on the question of desertion and observed: "It is also well settled that . . . the plaintiff must prove the offence of desertion beyond all reasonable doubt." In *Lachman* v. *Meena* (*z*1) the Supreme Court held that the onus lies on the petitioner to establish that the desertion was without cause and stressed the importance of avoiding the fallacy which lies in a failure to distinguish between a legal burden of proof which rests on the petitioner and a provisional burden raised by the state of evidence which may shift from one party to another. The legal burden throughout the case is on the petitioner to prove that the wife (for instance where the husband is the petitioner) deserted him without cause. To discharge that burden he may rely on the fact that he asked her to join him and she refused. From that fact the court may infer that she deserted him without cause but it is not bound to do so. Once he proves the fact of refusal she may seek to rebut the inference of desertion by proving that she had just cause for her refusal and usually it would be wise for the respondent (wife) to do so. Even if she does not affirmatively prove just cause the Court has still, at the end of the case to ask itself : Is the legal burden discharged? Has the husband proved that she deserted him without cause?

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(*v*) *Carpenter* v. *Carpenter* (1955) 2 All E.R. 449, 451.

(*w*) *Cade* v. *Cade* (1957) 1 All E.R. 609.

(*x*) *Cade* v. *Cade, supra,* p. 619.

(*y*) *Pike* v. *Pike* (1953) 1 All E.R. 232.

(*z*) (1956) S.C.R. 838. *Manglabai* v. *Deorao* ('62) A.M.P. 193.

(*z*1) (1964) S.C. 40, 48; *Dunn* v. *Dunn* (1948) 2 All E.R. 822, 823.

Reference may also be made to Notes under sec. 23: "Standard of Proof" and "Corroboration."

**Desertion and doctrine of condonation.**—The doctrine of condonation in its strict sense or on some analogous principle is inappropriate and inapplicable to the offence of desertion as defined in section 10 (1) (a). Section 23 of the Act it will be noticed speaks of condonation only in relation to the matrimonial offences of adultery and cruelty. Condonation involves (i) an election by the injured spouse to affirm the marriage notwithstanding the condoned offence, and (ii) the possibility of revival of the condoned offence by any further matrimonial offence on the part of the guilty spouse. It is the essence of the offence of desertion that the deserted spouse should all the time be affirming the marriage; otherwise desertion ceases and becomes separation by consent. There is thus no question of election on the part of the deserted spouse to affirm or disaffirm it. He or she has no option but to affirm. Further, the offence of desertion for a period of two years immediately preceding the presentation of the petition, once condoned, could never be revived, because the continuous period of desertion required by the statute would be irretrievably broken (*a*).

**Cl. (b): Cruelty.**—The legal conception of cruelty and the kind or degree of cruelty necessary to amount to a matrimonial offence has not previously been defined by any statute of the Indian Legislature relating to marriage and divorce; nor has the expression been defined in the Matrimonial Causes Act, 1950, or any earlier enactment in England. The danger of any attempt at giving a comprehensive definition which may cover all cases has been emphasized in a number of decisions. The law on the subject has hitherto been gathered from decided cases and Courts in India have accepted and adapted to conditions in India the principles underlying the judge-made law on the subject in England. The accepted legal meaning in England as also in India of this expression, which is rather difficult to define, has been "conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger" (*b*).

The rule laid down in the present clause would seem to give legislative sanction to what has previously been judicially understood and accepted as the legal conception of cruelty. It also prescribes a criterion or test which emphasizes that the treatment which amounts to cruelty must be such as to cause a reasonable apprehension in the mind of the injured spouse that cohabitation with the other spouse will be harmful or injurious. Though the Joint Committee has observed that "cruelty has now a self-contained definition" it is difficult to say that any comprehensive definition of cruelty has been given in this clause. In any case it does not seem that the Legislature intended to give any different meaning to the expression cruelty or aimed at a more elastic or restricted definition. There is nothing in the language of the clause to show that beyond adding a criterion which has always been applied by the courts as flowing from the accepted legal conception of cruelty, any com-

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(*a*) *Perry* v. *Perry* (1952) 1 All E.R. 1076, 1089. Reference may, however, be made to *France* v. *France* (1969) 2 All E.R. 870.

(*b*) *Russell* v. *Russell* (1897) A.C. 395; *Kallan* v. *Kallan* ('33) A.L. 728; *Foster* v. *Foster* ('28) A. Oudh. 114.

prehensive definition has been laid down. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a definition exclusive or inclusive which will aptly meet every particular act or conduct and not fail in some circumstances. It seems permissible, therefore, to enter a *caveat* against any judicial attempt in that direction.

Though the clause does not in terms so state it is abundantly clear from the language used that the application of the rule must depend on the circumstances of each case. Without attempting to define cruelty it may be said that this clause in effect lays down that to amount to cruelty there must be such treatment of the petitioner which causes suffering in body or mind whether in realization or apprehension in such a way as to render cohabitation harmful or injurious having regard to the circumstances of each case, keeping always in view the character and condition of the parties.

It is necessary to note that the legal conception of cruelty comprises two distinct elements—firstly, the ill-treatment complained of, and, secondly, the resultant danger or apprehension thereof. It would be inaccurate and liable to lead to confusion if the word cruelty is understood apart from its effect on the victim (*c*). The apprehension contemplated by the clause is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated. Where the acts or conduct can be said to amount to cruelty it is immaterial that there is no danger of its repetition. The inquiry must be whether the cruel treatment established by evidence is of such a nature as to cause in the mind of the victim reasonable apprehension that it will be harmful or injurious to live with the other party. "The more serious the original offence, the less grave need be the subsequent matters to constitute cruelty, for the subsequent acts must be looked at in the light of the earlier history from which they derive their significance" (*d*).

The judicially accepted legal concept of cruelty had for its basis the principles adopted by the Ecclesiastical Courts in England and it found favour in the House of Lords with five law lords in the leading case of *Russell* v. *Russell* (*e*) who were in a majority against four other law lords who were willing to extend the meaning still further but it would be academic to refer to those opinions. An examination of the cases under analogous enactments in England will show that the legal conception has varied and been modified from time to time, though not in theory but in application, with changes in social and economic conditions. There has been such a marked change in the notions of matrimonial duties and obligations of husband and wife in the present generation in India that it will be incumbent on the court to be extremely careful in the matter of seeking assistance and guidance from decisions arrived at under any previous legislation in India or England even when the rules may be similarly worded and blind adherence to any of those decisions must be deprecated and particularly when they relate to persons whose customs, manners and mode of life may be different.

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(*c*) *Jamieson* v. *Jamieson* (1952) A.C. 525, 545. *Jamieson* v. *Jamieson* (1952) A.C. 525, 546.
(*d*) *Cooper* v. *Cooper* (1950) W.N. 200, 201; (*e*) f.n. (*b*) at p. 715.

The section in terms lays down that either party to a marriage may petition for judicial separation on the ground of cruel treatment by the other spouse. It is not necessary that the act or acts complained of must take place within what is sometimes described as "the ambit of the marital relationship." It may well be that the acts may occur after the husband and wife have begun living apart (*f*).

What is cruel treatment must to a large extent be a question of fact or a mixed question of law and fact to be determined within the ambit of the rule and the test given in this clause. No dogmatic answer can be expected to the variety of problems that must continue to arise before the Court in this sort of cases and the law has no footrule by which to measure the nature and degree of cruel treatment which may satisfy the test of apprehended harm or injury. Physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must have bearing on the question whether the acts or conduct complained of amount to the matrimonial offence which entitles a spouse to relief under this clause. The conduct alleged must be judged upto a point by reference to the victim's capacity or incapacity for endurance in so far as that is or ought to be known to the offending spouse (*g*). It is also necessary to weigh all the incidents and quarrels between the parties keeping in view the impact of the personality and conduct of one spouse upon the mind of the other (*h*).

The language of the clause is comprehensive enough to include cases of physical as also mental cruelty and cases where both the elements are present. Where physical violence is proved the test laid down in the section cannot present any particular difficulty. Even a single act of violence may be of such a grievous and inexcusable nature as by itself to satisfy the test of cruelty. On the other hand isolated acts of assault committed on the spur of the moment and on some real or fancied provocation may not amount to cruel treatment. The assault or assaults must not be viewed as isolated facts but in the proper setting and as an incident or incidents in a complicated series of marital relations. It would be relevant to have regard to any physical or mental strain under which the accused spouse may have been labouring. Difficulty sometimes may arise where the question is whether a number of minor acts of physical violence alleged are sufficient to amount to legal cruelty. This can only be determined by keeping in view the physical and mental condition of the parties, their age, environments, standard of culture and status in life. Allowance in judging of the language or conduct used by one spouse to another must be made for local and social habits. The principle is

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(*f*) *Meacher* v. *Meacher* (1946) P. 216, (1946) 2 All E.R. 307. Also see *Jamieson* v. *Jamieson* (1952) A.C. 525, 546, 547.

(*g*) "Much depends in each case upon its circumstances and in particular upon the victim's capacity for endurance" *Mackenzie* v. *Mackenzie* (1895) A.C. 384, 405. Also see (1951) S.C. 286, 294. Reference may also be made to *Gollins* v. *Gollins* (1962) 3 All E.R. 897.

(*h*) *King* v. *King* (1953) A.C. 124, 130; *N. Sreepadachar* v. *Vasantha Bai* ('70) A. Mys. 232. Also see *P. L. Sayal* v. *Sarla Rani* ('61) A. Punj. 125 (administering "love-potion" to husband and husband suffering in health); *Kaushalya* v. *Wisakhi Ram* ('61) A. Punj. 521 (beating); *Iqbal Kaur* v. *Pritam Singh* ('63) A. Punj. 242 (unwarranted allegation of immorality by husband); *Umri Bai* v. *Chittar* ('66) A.M.P. 205; *Putul Devi* v. *Gopi Mandal* ('63) A.P. 93. But, of course, these accusations must be considered along with all the other circumstances of the case. Reference may be made to cases in f.n. (*g*) and f.n. (*h*) under "Reasonable apprehension of danger to health" at p. 722 *infra*.

well established that cruelty might be inferred from the whole facts and matrimonial relations of the parties and atmosphere disclosed by evidence. The acts alleged must be considered not separately but together. It would be a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass the test of cruelty. A single act of physical violence though as a general rule not sufficient of itself to meet the test may when considered with other minor acts constitute cruelty; and similarly particular acts of violence can have the cumulative effect of establishing the degree of apprehended harm or injury required by this clause. The picture of the domestic life of the spouses must be surveyed as a whole before any judgment can be formed of their possible future relations and the reasonableness or otherwise of the apprehension in the mind of the petitioner.

**Mental cruelty.**—The language of the clause is comprehensive enough to apply to cases of mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. A large volume of case-law has grown round the significance of what is sometimes termed 'legal cruelty' and as has already been pointed out facts and circumstances vary infinitely and so do various other factors which present relevant considerations of vital importance so much so that acts which may be said to amount to cruelty in one case may not be sufficient to fulfil the requisite test in another case. Comparison of facts, therefore, of cases which may present similarity is one danger always to be borne in mind. Some broad general principles, however, which emerge from the decided cases will be found useful:

(i) Cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence. The question whether the respondent treated the petitioner with cruelty is a single question only to be answered after all the facts have been taken into account. Without quoting the specific opinions in which this principle was stated by at least two of the Lords who decided the case of *Jamieson* v. *Jamieson* in the House of Lords (*i*) this principle may now be said to be well established by that decision. It may be taken as equally well established that it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass that test.

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(*i*) *Jamieson* v. *Jamieson* (1952) A.C. 525, 550.

(ii) It is undesirable, if not impossible to create categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances amounting to mental cruelty (*j*). Nor is it necessary to compare acts as being gross and less gross. There may be cases where the acts complained of are in themselves so trivial that the Court would be justified in not attaching any importance to them. On the other hand acts not serious in themselves may be symptomatic of the pass to which the marriage had come and of the state of mind of the parties. Since cruelty is to be inferred from the whole of the relations between the husband and wife it would not be a proper approach "to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage in the present context is not to be taken as just the sum of a number of incidents."

(iii) In general cruelty is in its character a cumulative charge. It is not necessary that the acts complained of must be of a certain character. The conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long-continued series of minor acts no one of which could be regarded as serious if taken in isolation. Every such act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health (*k*). The age, environments, standard of culture and status in life of the parties are also matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. The acts and incidents complained of as also the conduct of the parties must be taken together to form a composite picture from which alone it can be ascertained whether the acts of one spouse on another should, judged in relation to all the surrounding circumstances, be found to amount to cruelty.

(iv) The existence of cruelty depends not on the magnitude, but rather on the consequence of the offence, actual or apprehended (*l*).

(v) Mental ill-treatment may be coupled with physical ill-treatment in order together to found a charge of cruel treatment. Since mental and physical ill-treatment can, though they are not *ejusdem generis*, be taken together, it must follow that different forms of ill-treatment may be taken together to found a charge of treatment which amounts to cruelty (*m*).

**Intention.**—Actual intention on the part of one spouse to injure the other is not an essential factor. In a passage which has become *locus classicus*

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(*f*) Per Lord Normand in *Jamieson* v. *Jamieson* at pp. 535, 536.

(*k*) See per Lord Reid in *Jamieson* v. *Jamieson* (1952) A.C. 525 at p. 548 and per Lord Tucker in *ibid* at p. 550.

(*l*) *Barker* v. *Barker* (1949) 1 All E.R. 247, 250, (1949) P. 219.

(*m*) This principle is derived from *Cooper* v. *Cooper* (1954) 3 All E.R. 415.

it was observed: "It is not necessary in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are indeed often consistent with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring" (*n*). In *Jamieson* v. *Jamieson*, Lord Merriman reviewed the law on the subject and pointed out (*p*) that actual intention to injure was not an essential factor, and that intentional acts may amount to cruelty even though there was no intention of being cruel. Motive, malignity or malevolent intention, it is well recognised (*q*), are not essential ingredients but where they exist they would be factors of considerable importance (*r*) for acts done with malevolence are likely to bear fruit in acts of a serious and grave nature. In a doubtful case actual intention to hurt may even be of decisive importance (*s*). Where there is proof of a deliberate course of conduct on the part of one intended to hurt and humiliate the other spouse and so persisted in that it seriously affects the mental and bodily health of that party cruelty can easily be inferred. Studied neglect or a course of degradation may well prove more deleterious to the health of a spouse than the receipt of a blow (*t*). As pointed out by Lord Reid in the case mentioned above (*u*) there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. Where such course of conduct is shown it is no answer that there was no actual intention to treat the other spouse with cruelty.

In *Gollins* v. *Gollins*, the House of Lords (*v*) overruled some earlier decisions of courts in England and laid down that neither actual or presumed intention to hurt the other spouse was a necessary element in cruelty. There were views expressed in some earlier decisions and chiefly in *Keslefsky* v. *Keslefsky* (*v*1) and *Eastland* v. *Eastland* (*v*2) to the effect that intention to hurt is a necessary element in cruelty and also to the effect that intention is an element, in the sense, that there must be conduct which is, in some way, aimed by one spouse at the other, or directed at the other. It was also said that there must be in some part an intention to injure the other and to inflict misery on him or her. Those decisions cannot safely be relied on as affording any guidance in cases arising under the present Act. They depended on an erroneous view as to the significance of intention.

The courts in adopting the necessity of "intention" had inevitably to introduce the notion of presumed intention and that introduced difficulties which clouded the law and gave the word "cruelty" a sense not justified by its ordinary significance. It was, accordingly held in the House of Lords case referred to above that if the conduct complained of and its consequences were so bad that the complaining spouse must have a remedy, then it did not matter what was the state of mind of the offending spouse. In other cases the state of the mind of the offending spouse would be material and may be crucial (*v*3). It was observed by Lord Pearce "when reprehensible conduct or departure from

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(*n*) *Holden* v. *Holden* (1810) 1 Hag. Con. 453, 458.

(*p*) (1952) A.C. 525, 540, 541; *Squire* v. *Squire* (1949) p. 51. Also see *ibid.* at p. 58.

(*q*) *Squire* v. *Squire, supra.*

(*r*) See per Lord Reid in *King* v. *King* (1953) A.C. 124, 145.

(*s*) See per Lord Normand in *Jamieson* v. *Jamieson*, (1952) A.C. 525 at p. 535.

(*t*) *Stuart* v. *Stuart* (1926) 53 Cal. 436, ('26) A.C. 864.

(*u*) *Jamieson* v. *Jamieson*, *supra*, at p. 548. "Conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference", *ibid* at p. 535.

(*v*) (1964) A.C. 644, (1963) 2 All E.R. 966.

(*v*1) (1950) 2 All E.R. 398 (C.A.).

(*v*2) (1954) 3 All E.R. 159.

(*v*3) Lord Reid in (1964) A.C. at pp. 666-7: Lord Morris of Borth-y-Gest at pp. 673-4.

the normal standards of conjugal kindness cause injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person after taking due account of the temperament and all other particular circumstances would consider that this spouse should not be called on to endure it" (*v*4). In such cases of inexcusable conduct no intention actual or presumed need be established. The question which the court asks itself is—whether *this* conduct by *this* man, to *this* woman or *vice versa* is cruelty (*v*5).

While there is no such requirement that intention to hurt must be shown much must depend on the knowledge and intention of the offending spouse, on the nature of his (or her) conduct and on the character and physical or mental condition and weaknesses of the spouses and no general statement can be expected except the requirement that the party seeking relief must show actual or probable injury to life, limb or health. The treatment complained of must, in the ultimate test, be such as to cause a reasonable apprehension in the mind of the complaining spouse that it will be harmful or injurious for him or her to live with the other spouse.

**". . . treated . . . with cruelty".**—The clause requires that to establish cruelty the offending spouse must have "treated" the petitioner with cruelty and the court has to ascertain whether or not there was anything which can be described as treatment or conduct of the nature discussed above. There are no limits to the kind of treatment or conduct which might constitute cruelty. It may consist of a display of temperament, emotion or perversion whereby the one gives vent to his or her feelings, without intending to injure the other. It need not consist of direct action against the other but may be misconduct indirectly affecting the other spouse even though it is not aimed at that spouse. Such for instance would be persistence in a course of criminal conduct where the necessary ingredients are present of physical injury or apprehension of the same (*w*). Such also for instance would be cases of sexual offences directly relevant to the husband's conjugal obligations or indecent assault on a child. The question in all such cases of ill-treatment is whether one party to the marriage has treated the other with cruelty, according to the ordinary sense of that word rather than whether the party charged was himself or herself a cruel man or woman. In doing so, as observed by Lord Evershed in *Williams* v. *Williams* (*x*) the court would apply the common sense of the English language and the ordinary standard of human conduct. After the decision of the House of Lords in *Gollins* v. *Gollins* (*y*) in England the test for establishment of cruelty is there regarded to be that the conduct complained of must be sufficiently "grave and weighty" or "grave and substantial" to warrant the description of being cruel. The question which the court would ultimately put to itself after considering the sum total of the reprehensible conduct complained of would be—"whether *this* conduct by *this* man to *this* woman or *vice versa* is cruelty.

Merely showing that the parties are unhappy because of unruly temper of a spouse or matrimonial wranglings would fall considerably short of the conduct which can amount to cruel treatment. Nor would it be sufficient to show that the other spouse is moody, whimsical, exacting, inconsiderate and

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(*v*4) *Ibid*. at p. 695.

(*v*5) *Ibid* at p. 672; *Lauder* v. *Lauder* (1949) 1 All E.R. 76 (C.A.).

(*w*) *Warburton* v. *Warburton* cited in *Woollard* v. *Woollard* (1954) 3 All E.R. 351 at 357. The latter case was decided on the ground that the misconduct of the husband which resulted in his convictions for criminal offences had injured the wife's health.

(*x*) *Williams* v. *Williams* (1963) 2 All E.R. 994 (H.L.).

(*y*) See f.n. (*v*) *supra*.

irascible. Incompatibility of temperament, mere neglect and want of affection, disavowal of love, wounding of the feeling or even expressions of hatred and the like would not be regarded as of themselves cogent grounds for relief; nor would meanness, stinginess, shiftlessness or selfishness afford grounds for relief. Defects of temperament, like defects of health, must ordinarily be accepted for better or for worse.

Nor would mere vulgar or obscene abuse, rudeness of language, opprobrious and offensive remarks, petulence of manners, austerity of temper, or an occasional sally of passion or act of ill-treatment *per se* constitute legal cruelty. The court has to take account of the ordinary weaknesses and failings and shortcomings as well as strength of human nature and the test laid down in this clause cannot be satisfied unless grave and substantial causes are shown.

Although there may be unhappiness in a marriage the court cannot for that cause alone find cruelty. In matrimonial causes courts have repeatedly said that if by this inactivity of the courts injustice may be suffered, and misery produced, the answer is that the courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

There are a number of decisions of courts in England which on examination will be found to turn on their own peculiar facts and situations and it is submitted that they need not readily be pitchforked in the case of persons whose mode of living may be totally different. But the broad general principles reiterated by the courts in England in the most recent decisions to which reference has already been made should prove useful as they afford considerable guidance on the question of cruelty where the border line is at times extremely difficult to trace.

Unwarrantable indifference to the victim's health, callous neglect, extreme boorishness, deliberate refusal to co-operate and calculated harassment in matters touching the household and children of the marriage and any ill-treatment of a grave and serious character, may be elements which would go far to entitle the injured spouse to relief when the cumulative effect of the conduct viewed as a whole brings the case very near the line where there would be reasonable apprehension that cohabitation would be harmful.

**Reasonable apprehension of danger to health.**—The general principles are mostly well established and not difficult to enunciate but the difficulty in this sort of cases is to determine on which side of the border of cruelty the facts lie. Applying these principles it has been held that though mere refusal of sexual intercourse is not *per se* cruelty (*g*) for a man deliberately and without

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(*g*) *Weatherley* v. *Weatherlay*, *supra*; see p. 832; *Knott* v. *Knott* (1955) 2 All E.R. 305, (1955) P. 249 (case of *coitus interruptus*): *Cackett* v. *Cackett* (1950) 1 All E.R. 677, (1950) P. 253. But mere abstention by the husband from intercourse has not been held in any case to amount to cruelty: See *Walsham* v. *Walsham* (1949) P. 350, (1949) 1 All E.R. 774; *P.* v. *P.* (1964) 3 All E.R. 919. In *Bravery* v. *Bravery* (1954) 3 All E.R. 59 the husband got sterilization operation performed on himself after the birth of one child; this was held not to amount to cruelty. Also see under 'separation' at p. 706, *supra*.

good reason permanently to deny to a wife who has a normally developed maternal instinct a fair opportunity of having a single child can of itself be cruelty if it results in injury to her health or causes reasonable apprehension of such injury and when the husband adopts a course of conduct which preserves to himself a measure of sexual enjoyment. If a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, and the deprivation reduces him to despair and affects his mental health, the wife would be guilty of cruelty (*h*). The same considerations apply to the case of a husband who behaves in similar manner. It would, however, be impossible to lay down any rule of law or to generalise on whether refusal of intercourse constitutes cruelty; each case must be looked at in the light of its own facts (*h*1). Similar considerations would apply to cases arising under the Act. In this type of cases the court, it is submitted, would attach due weight to the general principles underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer funeral cake and libations of water to the manes of his ancestors and it would be no answer to say that it is now open to the other spouse to adopt a child.

Demands which are known to be regarded by other spouse as inordinate or revolting may, if persisted in, be a grave and weighty consideration and there may come a point of time at which persistent lack of consideration in matters of this sort may lead to a reasonable apprehension of harm or injury (*i*). Sexual malpractices in circumstances which create reasonable apprehension of harm or injury may amount to cruelty (*j*). A husband who knows that he is suffering from venereal diseases, insists, against the will of his wife who knows of his condition, in having marital intercourse with her, may be guilty of legal cruelty although in fact the disease is not communicated to her (*k*). Persistent course of dishonesty and criminal convictions which create reasonable apprehension of harm or injury to the other spouse may well amount to cruelty (*k*1).

Drunkenness, *per se*, is not cruelty. But persistent drunkenness after warnings that such a course of conduct is inflicting pain on the other spouse and if the offending spouse knows that it is injuring the health of that spouse, may well amount to cruelty. Such drunkenness, if it is combined with other acts of ill treatment, as it usually is, may obviously be a factor of great importance (*l*)

As a general rule words of menace or threats would not be regarded as by themselves sufficient to cause apprehension of harm or injury when there is no attempt to carry out the threat; but threats of physical violence may be

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(*h*) *Forbes* v. *Forbes* (1955) 2 All E.R. 311. Reference may be made to *Fowler* v. *Fowler* (1952) 2 T.L.R. 143 which was distinguished in this case. Also see *Knott* v. *Knott*, *supra*.

(*h*1) *Sheldon* v. *Sheldon* (1966) 2 All E.R. 257; *P.* (D) v. *P.* (J) (1965) 2 All E.R. 456 (Refusal due to psychological fear of conception over which wife had no control—held cruelty); *Evans* v. *Evans* (1965) 2 All E.R. 789 (adverse effect on husband's health): In *B.*(L.) v. *B.*(R.) (1965) 3 All E.R. 263(C.A.) is was held on the facts that there was no cruelty.

(*i*) *Holborn* v. *Holborn* (1947) 1 All E.R. 32. As to sexual malpractices see the cases in the footnote (*f*) below.

(*j*) *Statham* v. *Statham* (1929) P. 131; *Lawson* v. *Lawson* (1955) 1 All E.R. 341 (standard of proof required in case of sodomy); *Gardner* v. *Gardner* (1947) 1 All E.R. 630 (unnatural sexual relations by wife with another woman).

(*k*) *Foster* v. *Foster* (1921) P. 438.

(*k*1) *Stanwick* v. *Stanwick* (1970) 3 All E.R. 983.

(*l*) *Baker* v. *Baker* (1955) 3 All E.R. 193.

of such a character as would afford reasonable ground to apprehend that they will be carried into effect and render cohabitation unsafe. While the court would be slow in accepting and acting on mere outbursts of threatening language or wild expressions uttered by a person of ungovernable temper it would not wait for any serious threat to be carried into effect if considering the marital relations of the parties and their conduct and character it appears that it is such as to cause in the mind of complaining spouse reasonable apprehension of danger.

Unfounded accusations of infidelity by one spouse against another will not be regarded as by themselves amounting to cruelty (*m*). These at times proceed from turbulent passions or passions of jealousy. The general rule in a matrimonial cause that the whole of the relations between the parties and all the relevant circumstances must be considered is of special value when cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Wilful accusations of adultery may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty—for example they may have been provoked by the cruel conduct of the other spouse (*n*). But malicious charges of adultery persistently made in bad faith may warrant relief under this section if in the light of the whole facts of the case the court is satisfied that the health of the complaining spouse was thereby seriously impaired or that there was reasonable apprehension that future cohabitation would be harmful (*o*). Similar considerations would apply to the case of false and malicious accusations of any serious crime. The criterion to be applied in all such cases is not the effect produced in the minds of others but their consequence actual or apprehended on the complaining spouse.

**Justification and excuse.**—Provocation or self-defence may be pleaded in justification or by way of excuse for the act or conduct complained of on the ground of cruelty. It is well established that relief on this ground may be denied where the misconduct is provoked or may be justified or is excusable. The provocation must, however, be extreme (*p*) and cruelty wholly disproportionate to the provocation would not be treated as excusable.

**Insanity.**—The question whether insanity is a defence to a charge of cruelty and if so to what extent has been debated in a number of cases in England and there was diversity of judicial opinion on what has been felt to be a "difficult question." According to one view it would be "a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing. The word 'cruel' carries with it implications of guilt which can no more be imputed to such a person than to a sleep walker" (*q*).

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(*m*) *Augustin* v. *Augustin* (1882) 4 All 374; *Niblett* v. *Niblett* ('35) A. Oudh 133, 136; *Siddagangiah* v. *Lakshamma* ('68) A. Mys. 115 (defence to a suit for restitution of conjugal rights). Also see cases in footnotes below.

(*n*) *King* v. *King* (1953) A.C. 124; (1953) 2 All E.R. 595.

(*o*) *Jeapes* v. *Jeapes* (1903) 89 L.T. 74; *Kamla Devi* v. *Amar Nath* ('61) A.J. & K. 33; *Kohli* v. *Kohli* ('67) A. Punj. 397; *Kusum Lata* v. *Kamta Prasad* ('65) A.A. 280; *Umri Bai* v. *Chittar* ('66) A.M.P. 205.

(*p*) *Meacher* v. *Meacher* (1946) 2 All E.R. 307, (1946) P. 216. Also see *Stick* v. *Stick* (1967) All E.R. 323.

(*q*) *Swan* v. *Swan* (1953) 2 All E.R. 854, 857, (1953) P. 258; *Palmer* v. *Palmer* (1954) 3 All E.R. 494; *Williams* v. *Williams* (1962) 3 All E.R. 441.

The other view was that in petitions based on cruelty by the husband the duty of the court to interfere was intended, not to punish the husband for the past, but to protect the wife for the future, and to withdraw from consideration intolerable conduct which due to insanity would render the court powerless in cases where help was most needed and therefore the defence of insanity should not be open to the husband in any such case (*r*). In *Williams* v. *Williams* (*s*) the House of Lords after a review of the decisions on the subject held that the fact that the husband did not know that his acts were wrong did not of itself constitute a defence to the allegations of cruelty. The view succinctly stated there is that insanity of a respondent spouse (in the sense that he or she, owing to disease of the mind, was unaware of the nature and quality of his or her acts, or if aware of that, did not know the act to be wrong) is not necessarily a defence to the ground that the respondent treated the petitioning spouse with cruelty; but insanity is a factor to be taken into account in applying the test (which nevertheless remains an objective test) whether in all the circumstances of the case the respondent's conduct is of such gravity that he has by his acts treated the petitioner with cruelty. Thus for instance if the conduct were such that it would amount to cruelty only if aggravated by intention to hurt, a spouse who could not form such an intention would not be held to have treated the other spouse with cruelty.

As to *abnormality* (*s*1) and *uncontrollable impulse* (*s*2) reference may be made to the undermentioned cases.

**Schizophrenic: Serious diseases.**—It would be unreal to strain the meaning of the word cruelty to comprehend what can only be described as the schizophrenic isolation, passivity and stillness of the wife and the impact of those manifestations on the life and health of the husband. Similar are situations where one of the spouses is struck down by physical diseases such as disseminated sclerosis, cerebral thrombosis or other illnesses that for years encumber all communication or active co-operation in the home. These situations engulf both spouses in personal tragedy. But no court would characterise such sufferings as cruelty (*s*3).

**Proof: Sufficiency of evidence: Corroboration**—Judicial opinion on the question of standard of proof in case of the matrimonial offence of cruelty cannot be said to have been quite uniform. It has at times been said that accusation of cruelty is a very grave and serious charge and therefore the court should insist on proof with the same degree of strictness as in case of a criminal offence. On the other hand it has been said that the court should not require proof with any more strictness than is required in a civil case. Section 23 of the Act lays down that the court shall decree the relief if it is *satisfied* that the "other party has treated the petitioner with . . . cruelty." The evidence must preponderate in favour of the petitioner and must be clear and

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(*r*) *Lissack* v. *Lissack* (1950) 2 All E.R. 236, (1951) P. 1. Also see *White* v. *White* (1950) P. 39; (1949) 2 All E.R. 339.

(*s*) (1963) 2 All E.R. 994 (H.L.); *Bhagwat* v. *Bhagwat* ('67) A.B. 80.

(*s*1) *Williams* v. *Williams* (1963) 2 All E.R. 994 at p. 1004 *per* Lord Reid; (1964) A.C. at pp. 722-723.

(*s*2) *Crump* v. *Crump* (1965) 2 All E.R. 980.

(*s*3) *Priday* v. *Priday* (1970) 3 All. E.R. 554, 561.

satisfactory. The offence charged must be proved beyond reasonable doubt for the court would not be satisfied that it is established if it entertains any real doubt on the matter. What is required is that cruelty must be strictly proved. The word "strict" is sufficiently apt to describe the measure and standard of proof and it is unnecessary to introduced any question of a standard of proof required of a criminal charge. Reference may also be made to Notes under section 23 "Standard of Proof" and "Corroboration."

**Cl. (c): Leprosy.**—Clause (c) of sub-section (1) lays down as one of the grounds for judicial separation that the respondent has been suffering for a period of not less than one year immediately preceding the presentation of the petition, from a virulent form of leprosy. This provision may be compared with clause (iv) of sub-section (1) of section 13 which lays down as one of the grounds for divorce that the respondent has been suffering, for a period of not less than three years immediately preceding the presentation of the petition, from a virulent and incurable form of leprosy.

Modern medical science has made some progress in the treatment of this disease and with new drugs which are now used the question whether in any particular case leprosy is virulent or not will have to be carefully considered when relief is sought on that ground.

The expression "virulent" was interpreted as malignant or venomous in the undermentioned case (*s*1).

Also see Notes under section 13(1) (iv).

**Cl. (d): Venereal disease.**—Clause (d) of sub-section (1) as amended lays down as one of the grounds for judicial separation that the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form not contracted from the petitioner. This provision may be compared with clause (v) of sub-section (1) of section 13 which lays down as one of the grounds for divorce that the respondent has been suffering, for a period of not less than three years immediately preceding the presentation of the petition, from venereal disease in a communicable form. Although the latter section does not say so in terms there can be little doubt that in case of either relief the ground cannot be entertained if the respondent had the misfortune of contracting the disease from the petitioner. But it is no defence to urge that the disease was innocently contracted or that it is curable. The ground is made out if it is shown that the disease is in a communicable form and it is not necessary that it should have been communicated to the petitioner. It will be noticed that this identical ground entitles the petitioner to seek relief either by way of judicial separation or divorce at her or his option. "Venereal disease" as evidence of adultery or cruelty and as a ground for leaving the other spouse has been considered under those heads.

The ground must be specifically pleaded. Question may arise as to the construction of "in a communicable form." Does it mean communicable to the other spouse or to the children that might be born of the marriage? Presumably it means both.

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(*s*1) *Annapurnamma* v. *Appa Rao* ('63) A.A.P. 312.

**Cl. (e): ". . . continuously of unsound mind for a period of not less than two years . . ."**—The scheme of the Act on the question of mental capacity of the spouses affecting formation of marriage has been pointed out in the Notes under section 5(ii). This clause deals with supervening unsoundness of mind. Insanity of the respondent for a period of not less than two years immediately preceding the presentation of the petition is a ground for judicial separation under this clause. This clause does not require that the respondent's unscundness of mind should be incurable. For relief under the present clause it will suffice to establish that the respondent has been continuously of unsound mind for a period of two years immediately preceding the presentation of the petition. Subsequent to the passing of a decree for judicial separation either party may seek divorce after lapse of two years under section 13(1A) of the Act. The Act also provides for a decree of divorce being directly asked for on the ground that the respondent has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the petition. The onus of proving unsoundness of mind and the requisite duration of it in case of both the reliefs as also of showing that the unsoundness of mind is incurable where dissolution of marriage is sought under section 13(1) (iii), is on the petitioner.

Also see Notes under section 13(1) (iii).

**Cl. (f): Adultery.**—Adultery in matrimonial law is one of the principal grounds for relief and has been defined as consensual sexual intercourse between a married person and another person of the opposite sex during the subsistence of the marriage. An attempt to commit adultery must be distinguished from adultery and will not of itself be sufficient ground for judicial separation (*t*). One act of adultery is enough to constitute a matrimonial offence and under many enactments it is a sufficient ground for dissolution of marriage (*u*). But as already pointed out (*v*), the Legislature took the view that a single act of infidelity to the marriage bond should not be sufficient ground for divorce but should be ruled as a ground for judicial separation. It will be noticed that the expression 'adultery' has not been used in this clause and instead the words are: "had sexual intercourse with any person other than his or her spouse" and in the grounds for divorce which can be granted under this head the words in section 13(1) (i) are: "is living in adultery."

Direct proof of adultery is not imperative (*v*1). It would be unreasonable to expect direct evidence and such evidence if brought before the court must be suspect and is apt to be disbelieved. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as lead to it by fair inference, as a necessary conclusion; and unless this were so, no protection whatever could be given to marital rights. It is impossible to indicate those circumstances universally, because they may be infinitely diversified by the situation

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(*t*) As to what constitutes adultery as a matrimonial offence see *Dennis* v. *Dennis* (1955) 2 All E.R. 51, (1955) P. 153. Also see *Sapsford* v. *Sapsford* (1954) 2 All E.R. 373, (1954) P. 394.

(*u*) Cf. S. 1(1)(a), Matrimonial Causes Act, 1950; S. 27(a), Special Marriage Act, 1954.

(*v*) See p. 660, *supra*.

(*v*1) *Avinash Prasad* v. *Chandra Mohini* ('64) A.A. 486; *Devyani* v. *Kantilal* ('63) A.B. 98; *Vedavalli* v. *Ramaswamy* ('64) A. Mys. 280; *Pattayee Ammal* v. *Manickam* ('67) A.M. 254; *Varadarajulu* v. *Baby Ammal* ('65) A.M. 29 (surrounding circumstances).

and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have important bearing upon the particular case. The only general rule upon the subject is, that the circumstances must be such as would lead the guarded judgment of a reasonable and just man to the conclusion. The facts usually are not of a complicated nature but determinable upon common grounds of reason. It is in consequence of this rule that it is not necessary to prove a fact of adultery in time and place (*w*). Nor is it absolutely incumbent on the petitioner to prove the identity of the person with whom the alleged act of adultery took place.

Proof beyond reasonable doubt means such proof as precludes every reasonable hypothesis, except that which it tends to support. "It need not reach certainty, but must carry a high degree of probability" (*x*). The court does not as a general rule infer adultery from evidence of opportunity alone but would require some more satisfactory proof. In respect of what were known in England as the hotel bill and register cases where the evidence consisted of an entry in a hotel register and of the respondent being seen in a bedroom with an unknown woman the view was expressed that the court would insist upon evidence of background of an adulterous association (*y*). Apart from evidence of opportunity there should be some evidence of disposition on the part of the respondent. This latter may be proved by showing that prior or subsequent to the alleged fact there had been improper familiarity between the parties or other circumstantial facts. Evidence of the conjunction of strong inclination or disposition and opportunity would be strong *prima facie* evidence but there is no rule of law that such evidence raises an irrebutable presumption that adultery has been committed (*z*). The mere fact that some male relation of the respondent had written most improper letters to her is not of itself sufficient to prove adultery (*z*1).

**Long period of gestation: Non-access.**—A charge of adultery may be based on non-access and long period of gestation of a child born to the wife. In a case decided by the House of Lords in England the only evidence of adultery was the birth of a normally developed child three hundred and sixty days after last marital intercourse between the parties. A decree was granted in favour of the husband and the court reviewed the question of the value of medical evidence on the subject. Lord Simonds observed (*a*) that it would be fantastic suggestion to any ordinary man or woman that a normal child born three hundred and sixty days after the last intercourse of a man and a woman was the child of that man, and it was to him repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions. Both Lord

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(*w*) *Lovedon* v. *Lovedon*, 2 Hagg. Con. 1, 3; *Hearsey* v. *Hearsey* ('31) A. Oudh 259; *Barker* v. *Barker* ('55) A.M. 103.

(*x*) *Miller* v. *Minister of Pensions* (1947) 2 All E.R. 372, 373. For instance, see *Subbarama* v. *Saraswathi* ('67) A.M. 85.

(*y*) *Raspin* v. *Raspin* (1953) 2 All E.R. 349, (1953) P. 230.

(*z*) *England* v. *England* (1952) 2 All E.R. 784.

(*z*1) *Chandra Mohini* v. *Avinash Prasad* ('67) A.S.C. 581. Also see *Jyotish Chandra* v. *Meera Guha* ('70) A.C. 266.

(*a*) *Preston Jones* v. *Preston Jones* (1951) 1 All E.R. 124, 128, (1951) A.C. 39. *Vira Reddy* v. *Kistamma* ('69) A.M. 235 [402 days]; *Maganlal* v. *Bai Dahi* ('71) A. Guj. 33 [313 days]. Proof of non-access must be very clear and satisfactory. *Mohindar Kaur* v. *Narindar Singh* ('60) A. Punj. 169.

Simonds and Lord MacDermot observed that the difficulty lay in drawing the line. The latter added that a time must come when, with the period far in excess of the normal, the court may properly regard its length as proving the wife's adultery beyond reasonable doubt. If a line has to be drawn, he thought, it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else, and that before acting on the length of the period due regard must be paid to any other relevant evidence (*b*).

Access and non-access connote, as pointed out by the Privy Council (*b*1), existence and non-existence of opportunities for marital intercourse. These facts can be established not merely by positive evidence of the parties and witnesses but also by circumstantial evidence which is relevant to the issue. It is competent both to the husband and wife to give evidence on the issue. The presumption of legitimacy is, however, highly favoured by law and it is necessary that proof of non-access must be clear and satisfactory (*b*2). It is said that the Court will examine the evidence with a lynx eye.

**Blood test.**—In a case based on non-access or period of gestation the Court cannot compel any party to submit to a blood-test. But of course, if a party voluntarily tenders such evidence it would be duly taken into consideration. In England any such issue is at times combined with the issue relating to paternity (*b*3). There also it is a well-established principle that a person of full age and capacity cannot be ordered to undergo a blood-test against his will. Reference may be made to the undermentioned decision of the House of Lords (*b*4) where there are some general observations on blood-test though, of course, Courts in India are not concerned with the provisions of the English enactment (Family Law Reform Act 1969) which was being considered in that case relating to paternity of child. Reference may be made to Notes under section 12 (1) (d) *infra*.

**Confession of adultery.**—Confessions or admissions of adultery are admissible in connection with other relevant evidence on a charge of adultery. But confession or admission of adultery is a species of evidence which though admissible is regarded by the court with some distrust and must be examined with jealous scrutiny. There is a canon particularly pointed against it, which says *nex partium confessione fides habeatur*. As a general rule, therefore, the court refuses to be satisfied that the charge is established by the mere proof of such confession or admission unless it is corroborated by independent evidence. Although it is the general practice in matrimonial cases not to act and grant relief upon an uncorroborated confession or admission of adultery, there is no absolute rule of practice nor any rule of law which prevents the court from acting upon such uncorroborated evidence (*c*). Section 23 of the Act requires that before granting relief the court must be satisfied that the ground for relief is established. What the court will insist upon is that the charge should be strictly proved, that is, beyond all reasonable doubt (*d*).

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(*b*) *Ibid* at p. 140.
(*b*1) *Karapaya* v. *Mayandi* ('34) A.P.C. 49.
(*b*2) *Venkateswarlu* v. *Venkatanarayana* ('54) A.S.C. 176.
(*b*3) *F.* v. *F.* (1968) 1 All E.R. 242.
(*b*4) *W.* v. *Official Solicitor* (1970) 3 All E.R. 107 (H.L.).
(*c*) *Over* v. *Over* (1925) 27 Bom. L.R. 251 (admission of adultery by wife in her letters).
(*d*) See Notes below and under Section 23 *post*.

In England, in the undermentioned case (*e*) the view was taken by the Court of Appeal that an adulterer who gave evidence of his or her own adultery was in the same position as an accomplice and that the danger of relying on his or her own unsupported evidence was so great that the court should insist upon being satisfied beyond reasonable doubt that the matrimonial offence had been committed and that it is the duty of the court to direct itself to be slow to act on such evidence in the absence of corroboration. And even where a confession of adultery made out of court may be taken into consideration against the person making the same it will not be evidence against any other person implicated by it (*f*); and if such confession is made in court its probative value against the other person would be such that the court would be slow to act on it in the absence of cogent and convincing corroborative evidence of adultery by such person.

The true test, where a confession or admission of adultery made by the other spouse is relied upon, would seem to be that the court should be satisfied from all the surrounding circumstances that it is true and there is no collusion. If so satisfied it is open to the court to grant relief, notwithstanding the absence of independent corroborative testimony (*f*1). In such cases the circumstances themselves may be said to afford that requisite corroboration which is insisted upon not as a matter of legal proof but by dictates of prudence. Obviously what circumstance may afford adequate corroboration cannot be listed and must depend upon factors such as the particular or exceptional nature of the case, the evidence of disposition and opportunity and background of an adulterous association The court would also take into consideration the circumstances and situation in which the confession is made. Reference may also be made to the general observations made by the Supreme Court in the undermentioned case (*g*).

**Onus and standard of proof.**—Before granting relief on the ground of adultery the court must be satisfied beyond reasonable doubt that the matrimonial offence complained of is established. There is always the presumption of innocence and it is for the petitioner to prove the allegations relied upon. The respondent, on the other hand, bears the burden of establishing affirmative defences set up in reply.

It is sometimes said that since adultery is a serious charge it must be examined on the same footing as a criminal charge. It is also said at times that it is a quasi-criminal offence and must be proved as such. Section 23 of the Act requires that the court should decree the relief if it is *satisfied* that the ground for granting relief exists. That section itself lays down a standard and puts adultery on the same footing as cruelty, desertion, or unsoundness of mind. What is required is that the court must be satisfied beyond reason-

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(*e*) *Galler* v. *Galler* (1954) 1 All E.R. 536, (1954) P. 252 (the same consideration would apply to the uncorroborated testimony of a co-respondent). Also see *White* v. *White* and *Jerome* (1890) 62 L.T. 663. Reference may also be made to *Fairman* v. *Fairman* (1949) 1 All E.R. 938, (1949) P. 341.

(*f*) *Rutherford* v. *Richardson* (1923) A.C. 1, 6, 7.

(*f*1) *Getty* v. *Getty* (1907) P. 334; *Simpson* v. *Simpson* (1931) 146 L.T. 47; *Collins* v. *Collins* (1916) 33 T.L.R. 123 (confession made solely to obtain husband's forgiveness and not for the purpose of bringing about a dissolution of the marriage was acted upon by the Court); *Weinberg* v. *Weinberg* (1910) 27 T.L.R. 9.

(*g*) *Mahendra Nanavati* v. *Sushila Nanavati* ('65) A.S.C. 364. Also see Notes under S. 23 *post*.

able doubt that the charge is established. A conclusion at all points logical cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. The word "strict" is regarded as sufficiently apt to describe the measure and standard of proof and it is unnecessary to introduce any question of a standard of proof required of a criminal charge.

In *White* v. *White* (*g*1) the Supreme Court had to consider the words "satisfied on evidence" used in section 14 of the Divorce Act 1869. After referring to the case *Preston Jones* (*g*2) decided by the House of Lords in England the Supreme Court expressed the view that the words "satisfied on evidence" mean that the court should be satisfied beyond reasonable doubt as to the commission of the matrimonial offence. The view was also expressed that the evidence must be clear and satisfactory beyond mere balance of probabilities. It was also pointed out that it was not necessary and really possible to prove adultery by any direct evidence.

Reference may also be made to Notes under sec. 23 "Standard of Proof and Corroboration" and the cases there mentioned. Also see "false defence" in Notes under that section.

**Condonation of adultery.**—Section 23(1)(b) lays down in effect that condonation of adultery is an absolute bar to granting of any relief by way of judicial separation under section 10(1)(f) or by way of a divorce under section 13(1)(i). The subject of condonation has been considered under section 23.

**Sub-section (2): Rescission of decree.**—This sub-section confers on the Court the power to rescind a decree for judicial separation passed under this section on application by either party if it considers it just and reasonable to do so. No difficulty can arise where the parties themselves are agreeable to rescission of the decree or where the application is not resisted. But where the application is resisted the extraordinary power would be exercised by the Court in exceptional circumstances where there are compelling reasons (*gg*2).

## NULLITY OF MARRIAGE AND DIVORCE

**11.** Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

Void marriages.

Sections 11 and 17 (monogamy) do not offend Article 15(1) of the Constitution (*x*).

**Marriage void ipso jure.**—Marriage under the Act is the voluntary union of one man with one woman to the exclusion of all others satisfied by the

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(*g*1) (1958) S.C.R. 1410.
(*g*2) (1951) A.C. 391, 417.
(*gg*2) *Godabai* v. *Narayan* ('73) A.M.P. 4.
(*x*) *Sambireddy* v. *Jayamma* ('72) A.A.P. 156 (F.B.).

solemnization of the marriage. A marriage may be solemnized in the sense that the parties to it have gone through the customary rites and ceremonies of either party thereto as laid down in section 7. But such a marriage to be valid must in any event fulfil three of the conditions enacted in section 5. The three conditions are that:

> neither party has a spouse living at the time of the marriage;
>
> the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
>
> the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two.

The present section in terms lays down that non-fulfilment of any one of these conditions renders a marriage solemnized after the commencement of the Act, null and void from its inception and either party to such marriage can obtain decree of nullity from the court. Parties to a marriage solemnized before this Act came into force are not, however, affected by this rule. In respect of matters dealt with by this section they are governed by the previous law. But the prohibition imposed against bigamy is equally applicable to them with the result that a Hindu husband cannot, after the Act came into force, marry another wife as long as his previous marriage is subsisting.

The three conditions non-fulfilment of which renders a marriage solemnized after the commencement of the Act null and void have been considered in some detail under section 3(f), 3(g), and section 5. (See pp. 676 to 681 and 685 to 689.) Attention has been drawn in the Introduction to the scheme of the Act and the distinction between marriage which is void *ipso jure* and marriage which is voidable under section 12.

In a petition for nullity of marriage on the ground that the respondent had a spouse living at the time of marriage [S. 5(i)], it need not necessarily be established by direct evidence and positive proof that the spouse by an earlier marriage was in existence at the time of the performance of the marriage with the petitioner. It may be implied from other facts and circumstances which should, however, be cogent and reliable (*y*).

**Decree of nullity.**—A decree of nullity may be passed by the Court at the instance of either party to the marriage solemnized after the commencement of the Act on the ground that the marriage was in contravention of any of the three conditions mentioned in this section (*g*3). A marriage which does not fulfil these three conditions is in law no marriage at all being void *ipso jure* and it is open to the parties even without recourse to the court to treat it as a nullity. Neither party is under any obligation to seek a declaration of nullity under this section though, of course, such a declaration may be asked

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(*y*) *Rajida* v. *Suka* ('72) A.M.P. 57.

(*g*3) A third party cannot apply under this section for a decree of nullity and if such party has any right it would be enforceable by a suit *Lakshmi Ammal* v. *Ramaswami* ('60) A.M. 6; '1959) 1 Mad. L.J. 333. *Amarlal* v. *Vijaybai* ('59) A.M.P. 400. A first wife cannot present a petition under this section on the ground that the husband has gone through the ceremony of a second marriage which would be void but she may seek relief on the ground of adultery, *Kedar Nath* v. *Suprava* ('63) A.P. 311.

for for the purpose of precaution or record. It is competent to the parties whose marriage is null and void on the ground of sapinda relationship between them to enter into marriage with another person at any time even if they had cohabited as husband and wife after the solemnization of such marriage. And where the marriage is null and void on the ground that one of the parties to the marriage had a spouse living at the time of the marriage it is competent to the other spouse to disregard such void marriage and enter into marriage with another person. A marriage which is void *ab initio* does not alter or affect the status of the parties nor does it create between them any rights and obligations which must normally arise from a valid marriage except such rights as are expressly recognised by the Act. Thus for instance the provisions of sections 24 and 25 relating to maintenance *pendente lite* and costs and permanent alimony and maintenance apply to such marriage and it is competent to the court to pass any such order in a proceeding for a declaration of nullity of marriage under this section. Under general law the children born of a marriage void *ab initio* would be illegitimate and would not become entitled to any rights of a legitimate child. Section 16 of the Act operates in favour of children born of such a marriage and in terms lays down that even in case of a marriage void under the present section the children begotten or conceived of the parties to such void marriage are to be deemed to be their legitimate children notwithstanding any decree that may be passed by the court declaring the marriage to be null and void. Reference may be made to the Notes under Section 16.

**Remarriage before disposal of appeal against decree of nullity.**—See Notes under Section 15 *post*: "Remarriage before disposal of appeal against decree of nullity under Sections 11 and 12". A decree of nullity of marriage under this section is appealable (See Notes under Section 28 *post*).

**12.** (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

Voidable marriages.

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

**Voidable marriage.**—The scheme of the Act is to treat of marriages as valid, void and voidable. Attention has been drawn in the Introductory note to the distinction drawn between a marriage void *ipso jure* and a marriage which is voidable at the instance of one of the parties to the same. A voidable marriage remains valid and binding and continues to subsist for all purposes unless a decree is passed by the court annulling the same on any of the grounds mentioned in this section. The grounds it will be noticed involve the elements of incapacity of either spouse to consummate the marriage, want of mental capacity of the spouses, absence of free consent of the parties or of a guardian in marriage in case of a bride who had not completed the age of eighteen years at the time of the marriage and *suppressio veri* by a woman, who was pregnant at the time of marriage.

**Cl. (a): Impotence.**—Impotency has been understood in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have conjugal intercourse, which is one of the objects of marriage (*g*4). As pointed out by the Supreme Court (*g*5) a party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. Capacity for sexual intercourse must exist at least

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(*g*4) As to what amounts to "consummation" reference may be made to *W.* v. *W.* (1967) 3 All E.R. 178 and cases cited there in a footnote. Also see *Chanchal Kumari* v. *Kewal Krishan* ('72) A. P. & H. 474 and cases there cited.

(*g*5) *Digvijay Singh* v. *Pratap Kumari* ('70) A.S.C. 137.

in *posse*, at the time of the marriage. It is for this reason that impotency, by which is meant permanent and incurable impotency, existing at the time of the marriage and continued until the institution of proceedings for nullity is recognised as a ground for annulment of marriage. In a case decided under Hindu law prior to the coming into force of the present Act it was held by the High Court of Calcutta (*h*) that the marriage of a female with a male who was impotent and who had not been able to consummate the marriage was a nullity. In a case decided in Bombay (*i*) the defendant wife suffered from permanent and incurable infirmity and the view was taken that it was competent to the court to grant a decree for nullity of marriage.

Clause (a) of sub-section (1) makes it abundantly clear that a marriage solemnized whether before or after the commencement of the Act is voidable at the instance of either party on the ground of impotence of the other party to the marriage and may be annulled by a decree of nullity of marriage. A question as to the impotence of either party cannot be raised by a third person because it is solely a personal matter for the spouses. Nor can it be raised after the death of one of them (*j*). The petitioner's own infirmity it will be noticed does not afford a ground for relief under the Act. Under English law the Courts have exercised jurisdiction to grant such relief where the petitioner was not aware of his or her own infirmity at the time of the marriage and there was nothing in the circumstances of the case which would have rendered it unjust to grant such relief (*k*). It is also clear that any such incapacity supervening after the solemnization of the marriage is no ground for relief. The clause in terms requires that the respondent:

(i) was impotent at the time of marriage, and

(ii) continued to be so until the institution of the proceeding.

It is necessary to prove that the disability alleged is incurable or such as to make consummation of the marriage practically impossible. Impotency contemplated in the section does not signify sterility or incapacity of conception but incapacity to have sexual intercourse (*k*1). The true test of impotence is the practical impossibility of consummation. Cases of malformation or structural defects causing disability often arise for consideration under the head of practical impossibility. Either spouse is at liberty to ask for relief under this clause as soon as it is discovered that the other party is incapable of sexual intercourse from any malformation or structural defect or otherwise. Ordinarily and also as a matter of prudence the court will insist on proof of this by medical evidence. It may be questioned whether the court can order physical examination in any case under the present head; but where a husband or wife refuses to submit to such examination the court may, if the facts and circumstances of the case so warrant, properly draw an unfavourable inference (*l*). The court, however, is not bound to draw such

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(*h*) *Ratan Moni Debi* v. *Nagendra Narain* ('49) A.C. 404. Also see *Venkateswararao* v. *Nagamani* ('62) A.A.P. 151. Also see *Chamanlal* v. *Rupa* ('66) A.J. & K. 68 (Burden of proof).

(*i*) *A.* v. *B.* (1952) 54 Bom. L.R. 725.

(*j*) *A.* v. *B.* (1868) L.R. 1 P. & D. 559.

(*k*) *Harthan* v. *Harthan* (1948) 2 All E.R. 639, (1949) P. 115.

(*k*1) *Shewanti* v. *Bhawrao* ('71) A.M.P. 168. In *Laxmi Devi* v. *Babu Lal* ('73) A. Raj. 89 it was held that there was incapacity to have conjugal intercourse even after an operation.

(*l*) *Birendra Kumar Biswas* v. *Hemlata Biswas* (1921) 48 Cal. 283, 297. Reference may be made to *Bipinchandra* v. *Madhuriben* ('63) A. Guj. 250; (1963) 4 Guj. L.R. 890. Also see *Jayaraj* v. *Seeniammal* ('67) A.M. 242 (case under Indian Divorce Act, 1869).

inference (*n*). A spouse must be regarded as incurable either if the condition can be remedied by an operation attended by danger, or if the spouse at fault refuses to submit to an operation (*o*). The court has to approach and deal with any such matter by looking at the matter from the practical point of view. A very belated offer to undergo an operation to correct a defect may be only an afterthought and not genuine or there may be no reasonable prospect of the incapacity being cured. In such a case the Court would be justified in granting relief to the aggrieved spouse (*p*).

In deciding whether a state of impotency existed at the date of the marriage, and continued to the date of the institution of the proceeding the court must take into consideration future medical or surgical treatment which might remove the cause of disability. Applying the test whether there was practical impossibility of consummation it was held in a case in England that as at the material date the wife was willing to undergo and subsequently underwent an operation which remedied the impediment the husband had failed to prove that the marriage had not been consummated owing to the wife's incapacity (*q*). In cases falling under this head the following observations will be found useful: "The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shown that connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to" (*r*).

**Incapacity quoad the particular individual.**—It is not absolutely necessary that the incapacity to perform the act of coitus must be general because a person may generally be capable of the act and yet incapable of it with a particular individual. Relief can be granted in cases of impotence *quoad hunc* or *quoad hanc* (*s*).

**Wilful refusal of the respondent to consummate marriage.**—Section 25(1) of the Special Marriage Act, 1954, and section 8 of the Matrimonial Causes Act, 1950, in England give wilful refusal of the respondent to consummate the

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(*n*) *Ratan Moni Debi* v. *Nagendra Narain* ('49) AC. 404, 407; *P.* v. *P.* (1909) 25 T.L.R. 638; *Ganeshji* v. *Hastuben* (1967) 8 Guj. L.R. 966 (medical evidence of respondent wife's potency). In *Suvarnabahen* v. *Rashmikant* ('70) A. Guj. 43 the Court was satisfied with the testimony of the wife about the husband's impotency. It was held that corroboration was not absolutely essential.

(*o*) *S.* v. *S.* (1954) 3 All E.R. 736, 741, (1954) P. 194.

(*p*) *M.* v. *M.* (1956) 3 All E.R. 769.

(*q*) *S.* v. *S.* (1954) 3 All E.R. 736, (1954) P. 194; *W.Y.* v. *A.Y.* (1946) S.C. 27.

(*r*) Per Lord Penzance in *G.* v. *G.* (1871) I.R. 2 P. & D. 287, 291. Also see *S.* v. *S.* (1954) 3 All E.R. 736.

(*s*) *C.* v. *C.* (1921) P. 399; *H.* v. *P.* (1873) L.R. 3 P. & D. 126. Reference may be made to *J.* v. *J.* (1908) 24 T.L.R. 622, (1909) P. 217. Also see *D-E* v. *A-G* (1845) 1 Rob. Eccl. 279. Also see *Jagdish Lal* v. *Shyama* ('66) A.A. 150.

marriage as an additional ground for decree of nullity of marriage by declaring that in such a case the marriage is voidable. The Matrimonial Causes Act, 1937, also contained a similar provision. Prior to that the view taken in England was that such refusal did not of itself empower the court to annul the marriage on the ground of impotence. It was, however, held that when after a reasonable time of the marriage it was shown that the wife had refused intercourse and resisted all attempts by the husband without just cause and the court was satisfied of the *bona fides* of the suit, it was at liberty to infer that the refusal was wilful and arose from incapacity to consummate the marriage. Wilful refusal in this context connotes a settled and definite decision come to without just excuse. It does not mean a mere temporary unwillingness due to a passing phase or a nervous ignorance which may be got rid of or cured by patient forbearance, care, kindness and tact (*t*). There is no provision in the present enactment similar to that in the enactments mentioned above but in cases decided under the Indian Divorce Act, 1869, the same view had been taken following the earlier decisions on the subject of Courts in England. Incapacity to consummate the marriage need not necessarily be physical. It may be due as well to mental causes. 'There can be cases of invincible repugnance to the act of intercourse either generally or with the particular individual. This can arise from a variety of causes; from nervousness (*u*) or excessive sensibility (*v*), though 'hysterical' or 'unconquerable aversion' may be more usual (*w*). It is true that the common area covered by suits on the ground of impotence and wilful refusal to consummate the marriage is very small. But it is quite possible that both the grounds may be present at the same time and it is submitted that in a case of wilful refusal to consummate the marriage persisted in till the institution of the proceeding the court would be at liberty to infer incapacity and grant relief under the present clause where it is sought after a reasonable time of marriage and the court is satisfied that the petition is *bona fide*. This would be after taking into consideration all the facts and history of the case because in cases of this nature the danger of collusion is great and the court has to be watchful that it is not imposed upon.

**Delay in instituting proceedings.**—Reference may be made to Notes under section 23 (d) *post*. "Delay and proceeding for nullity on ground of impotence."

**Doctrines of "Insincerity": "Approbation."**—In England it is not unusual to speak of the plea of insincerity in the context of proceedings for nullity. Any such consideration, in order to be relevant, would have to fall within the ambit of clause (*a*) of section 23 (1) which disentitles a person to any relief where it is established that he or she is taking advantage of his or her wrong or disability for the purpose of such relief. It would seem unnecessary for courts in India to act upon the undefined concept of doctrine of insincerity. In *S.* v. *R.* the Delhi High Court (*w*1) examined these doctrines and expressed the view that these doctrines were inapplicable to cases under the present

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(*t*) *Horton* v. *Horton* (1947) 2 All E.R. 871, 874; *Baxter* v. *Baxter* (1947) 1 All E.R. 387 (case of acquiescence).

(*u*) *F.* v. *P.* (1897) 75 L.T. 192.

(*v*) *G.* v. *G.* (1871) L.R. 2 P. 287.

(*w*) *Kishore Sahu* v. *Snehaprabha Sahu* ('43) A.N. 185, 191. Also see *Jagdish Kumar* v. *Sita Devi* ('63) A. Punj. 114. And see *Shanta Bai* v. *Tarachand* ('66) A.M.P. 8.

(*w*1) ('68) A. Delhi 79.

section. Of course, the court in applying sec. 23 (1) (a) would decline to give relief in a proceeding for nullity where the facts and circumstances proved plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable that he or she should be permitted to challenge the validity of the marriage with effect. In cases of this kind many sorts of conduct might exist, taking pecuniary benefit for example. But the court must be fully satisfied that the facts and circumstances of the case bring the case clearly within the ambit of the rule laid down in that section (*w*2).

**Cl. (b): Marriage with an idiot or a lunatic.**—Section 24(1)(i) of the Special Marriage Act lays down that a marriage solemnized under that Act is null and void and may be so declared by a decree of nullity *inter alia* on the ground that a party to the marriage was an idiot or a lunatic at the time of the marriage. Under English law a person of unsound mind is incapable of consent and the marriage of such a person is automatically void. The rule laid down in the present clause it will be noticed is different. One of the conditions of a Hindu marriage under the Act is that neither party to the same should be an idiot or a lunatic at the time of the marriage [Section 5(ii)]. The Legislature seems to have preferred to take the view that a marriage with any such person should not be null and void but should only be voidable. Presumably this rule was enacted in view of the difficulties felt and the opinions expressed in the undermentioned cases decided on general principles of Hindu law (*x*). An objection to a marriage on the ground of mental incapacity must depend on a question of degree of the defect in order to rebut the extremely strong presumption in favour of the validity of a marriage which has in fact taken place.

**"Idiot".**—The expression is not defined in the Act. It must be understood in its ordinary significance (*z*). It does not contemplate a person merely of weak intellect, in the sense that he is not up to the ordinary standard of human intelligence or endowed with the capacity to manage his affairs properly (*a*). In the present context it means a person so deficient in mind as to be permanently incapable of rational conduct. Idiocy is congenital. It must be shown to have been complete and absolute before it can be held that a person was incompetent to marry as being incapable of understanding the meaning of marriage. An idiot is one born without any glimmering of reason and is to be distinguished from a lunatic who is one that had understanding but has temporarily or permanently lost use of reason by disease, grief or other cause.

**"Lunatic."**—The expression lunatic has not been defined in the Act. According to a decision of the Calcutta High Court (*a*1) it must be given the same meaning as in section 3(5) of the Lunacy Act and should be understood to mean a person of unsound mind.

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(*w*2) *A. v. B.* ('67) A. Punj. 152. Reference may be made to the observations of Selborne, L. C., in *G. v. M.* (1885) A.C. 171, 185, 186.

(*x*) *Amirthammal v. Vallimayil Ammal* (1942) Mad. 807, 203 I.C. 648, ('42) A.M. 693; *Rateshwari Nandan v. Bhagwati Saran* (1949) F.C.R. 715, (1950) A.F.C. 142.

(*z*) *Mt. Titli v. Alfred Jones* ('34) A.A. 273, 280.

(*a*) *Surti v. Narain Das* (1890) 12 All. 530, 533.

(*a*1) *Amina Roy v. Mohan Roy* ('69) A.C. 304.

The burden of proving lunacy of the other spouse to the marriage is on the petitioner.

**Cl. (c): Consent obtained by force or fraud.**—The ceremonial marriage under the Act, although it creates a relation and a status not imposed or defined by contract, does require the consensus of the parties to the solemnization of it. Absence of consent does not render the marriage void *ipso jure* but voidable at the instance of the party whose consent was obtained by force or fraud. Clause (c) of sub-section (1) which has to be read with clause (a) of sub-section (2) lays down the rule relating to annulment of such voidable marriage. The rule is not absolute and will not operate if:

(i) the petition is presented more than one year after the force ceases or the fraud is discovered; or

(ii) the petitioner has with his or her full consent and knowledge acquiesced in the marriage by living with the other party to the marriage as husband or wife.

**Force.**—Where consent of a party to solemnization of marriage is obtained by force, or as it is sometimes said by coercion or duress, it is obvious that there is absence of a consenting will to marry. Force when it is used excludes any real or intelligent consent altogether. In two English cases *Scott* v. *Sebright* (*b*) and *Ford* v. *Stier* (*c*) marriages were avoided in extremely peculiar circumstances on the ground of combined fraud and coercion having operated on the pretended wife to such an extent that the marriage was not her voluntary act. The test to be applied is whether there was any real consent to the solemnization of the marriage. In a recent decision in England it was observed that in order for the impediment of duress to vitiate an otherwise valid marriage, it must be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat or immediate danger, for which the party itself is not responsible, to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock (*c*1).

**Fraud.**—It is essential to note that the section does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent but fraud whereby the consent of the petitioner was obtained to the solemnization of the marriage. If there was actual consent to the solemnization of the marriage with the respondent the marriage cannot be annulled on the ground of fraud. In matrimonial law when fraud is spoken of as a ground for avoiding a marriage, it does not include such fraud as induces a consent but is limited to such fraud as procures the appearance without the reality of consent. This distinction is clearly brought out by the case where it was held that concealment by a woman from her husband at the time of her marriage of the fact that she was then pregnant by another man was no

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(*b*) (1886) 12 P.D. 21.

(*c*) (1896) P. 1 Reference may also be made to *Annjana Desi* v. *Prahlad* (1871) 6 Beng. L.R. 243.

(*c*1) *Szechter* v. *Szechter* (1970) 3 All E.R. 905 (case-law discussed). In *Purabi* v. *Basudeb* ('69) A.C. 293 allegations of fraud and coercion were disbelieved (case under Special Marriage Act, 1954).

ground for avoiding the marriage on the plea that that consent was obtained by fraud (*d*). It will be noticed that the Legislature has in view of this expressly provided in clause (d) that in such a case the marriage may be annulled if the petitioner was at the time of the marriage ignorant of that fact. In another case which seems to illustrate the rule it was held that concealment of the fact that the wife had been a naikin by profession and even in the keeping of more than one person prior to the marriage was not fraud if there was consent to the marriage (*e*). A person who freely consents to a solemnization of the marriage with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot raise an objection to the validity of the marriage on the ground of any fraudulent representation or concealment. Thus for instance a marriage cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statements relating to family or fortune or caste or religion or age or character of the respondent (*e*1). The test is that there should be real consent to solemnization of marriage and consent to marry the particular person. Where, however, there is no real consent, as for instance where a party is kept under the impression that what is being performed is only a betrothal (*f*) or there is deception as to the identity of the other party, that would be fraud which affords a ground for annulment of the marriage under the rule laid down in this clause.

**Cl. (d): Respondent wife pregnant at the time of marriage.**—Any marriage whether solemnized before or after the commencement of the Act is voidable at the instance of the husband on the ground that the respondent wife was at the time of the marriage pregnant by some person other than the petitioner provided the conditions laid down in sub-section (2) (b) are strictly fulfilled. The basis of the rule is *suppressio veri* by a woman who was pregnant at the time of marriage. The rule applies only in case of pregnancy *per allium*. The onus of proof which requires the husband to establish his case beyond reasonable doubt does not extend to establishing the scientific impossibility of his being the father of the child. In *Mahendra Nanavati* v. *Sushila Nanavati* the Supreme Court held that in a petition founded on this clause read with sub-section (2) (b) (i) the petitioner has to establish such facts and circumstances which would lead the Court either to believe that the respondent was pregnant at the time of marriage by someone else or to hold that a prudent man would, on those facts and circumstances, be completely satisfied that it was so and has also to establish that he was at the time of the marriage ignorant of the fact that the respondent was pregnant by some person other than the petitioner. The child was born 171 days after the first coitus between the petitioner and the respondent wife. The delivery was normal and the child born was also normal. It was held that the child was not a child born after gestation of only 171 days and the petitioner was

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(*d*) *Moss* v. *Moss* (1897) P. 263.

(*e*) *Appibai* v. *Khimji* (1936) 38 Bom. L.R. 77.

(*e*1) Reference may be made to *Raghunath* v. *Vijaya* ('72) A.B. 132 (concealment as to state of health: epilepsy); *Harbhajan Singh* v. *Brij Balab* ('64) A. Punj. 359 (character and moral conduct); *Surjit Kumar* v. *Raj Kumari* ('67) A. Punj. 172 (past unchastity). The correctness of the decisions in *Bimla Bai* v. *Shankulal* ('59) A.M.P. 8 (legitimacy: caste) and in *Babui Panmato* v. *Ram Agya Singh* ('68) A.P. 190 (age) must be doubted.

(*f*) *Ford* v. *Stier* (1896) P. 1.

not the father of the child (*f*1). Reference may also be made to Notes under S. 23 *post*: "Admission of parties".

**Blood-test.**—There is no provision in Indian law regarding jurisdiction of the court to order blood-tests in matrimonial proceedings. In *S.* v. *S.* (*f*2) the House of Lords in England had occasion to examine the question in the context of paternity proceedings. It is a well-established principle that a person of full age and capacity cannot be ordered to undergo a blood-test against his will. In England section 21 (1) of the Family Law Reforms Act deals with the matter. Also see Notes under section 10 (1) (f) *supra*.

The clause adopts the language of section 8 (1) (d) and the proviso to that section in the Matrimonial Causes Act, 1950.

**Sub-section (2) (a) (ii).**—The application of the condition laid down in this clause does not depend upon the lapse of any time after the discovery of the alleged fraud. If it is shown that the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, that would be sufficient for rejecting the petition for annulment (*f*3).

**Sub-section (2) (b) (ii).**—The condition laid down in sub-section (2) (b) (ii) that the petition must be filed within one year as therein prescribed is absolute and a petition will not lie under this clause after that period has lapsed even if fraud had been practised on the petitioner in the matter of the pregnancy by concealment of the truth (*g*). The condition as to the time within which proceedings under clause (d) of sub-section (1) must be instituted is absolute and mandatory. Hence a petition for nullity of marriage filed under that clause on the day on which the court opened after the long vacation cannot be entertained even though the period of one year expired during the vacation (*g*1).

**Remarriage before disposal of appeal against decree of nullity.**—See Notes under Section 15 *post*: "Remarriage before disposal of appeal against decree of nullity under Sections 11 and 12". A decree of nullity of marriage under this section is appealable (see Notes under Section 28 *post*).

**13.** (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

Divorce.

(i) is living in adultery; or

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(*f*1) ('65) A.S.C. 364; *Preston Jones* v. *Preston Jones* (1951) A.C. 391 [360 days]; *Nishit Kumar* v. *Anjali* ('68) A.C. 105 [167 days]; *Vira Reddi* v. *Keslamma* ('69) A.M. 235 [402 days]; *Maganlal* v. *Bai Dahi* ('71) A. Guj. 33 [313 days]. As to burden of proof in these cases see *Mahendra Nanavati* v. *Sushila Nanavati* and *Nishit Kumar* v. *Anjali* cited above.

(*f*2) (1970) 3 All E.R. 107 (H.L.). Also see *T* (H) v. *T* (E) (1971) 1 All E.R. 590.

(*f*3) *Raghunath* v. *Vijaya* ('72) A.B. 132.

(*g*) *Chaplin* v. *Chaplin* (1948) 2 All E.R. 408 (C.A.), (1949) P. 72.

(*g*1) *Savlaram* v. *Yeshodabai* ('62) A.B. 190; (1962) Bom. 326; 64 Bom. L.R. 27; *Vellinayagi* v. *Subramaniam* ('69) A.M. 479.

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

**Amendments:—**

This section was amended by the Hindu Marriage Amendment Act 44 of 1964. Clauses (viii) and (ix) of sub-section (1) were omitted and in their place sub-section (1A) was inserted. Clauses (viii) and (ix) which are now deleted were as under:

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against the party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

*Uttar Pradesh Act 13 of 1962.*—Section 2 of this Act is as under:

Amendment of section 13 of Act 25 of 1955.—In sub-section (1) of section 13 of the Hindu Marriage Act, 1955—

(a) after clause (i) the following new clause shall be inserted and shall be deemed always to have been inserted:—

"(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party or" and

(b) for clause (viii) the following clause shall be substituted and shall be deemed always to have been substituted—

"(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and—

(a) a period of two years has elapsed since the passing of such decree; or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party; or."

In *Chandra Mohini* v. *Srivastava* (g2) the Supreme Court held that sub-clause (b) above is not an independent provision. It still requires a decree of judicial separation being passed and then only a decree for divorce may follow without waiting for two years. The court cannot forthwith pass a decree of divorce under this sub-clause.

**Divorce.**—Unless allowed by custom divorce was not recognized by the general Hindu law as administered by courts in British India. Subject to the exception relating to the right where it is recognized by custom (*h*) divorce is entirely statutory. It is conceded in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner and for the cause specified by law. Divorce is not favoured or encouraged, and is permitted only for grave reasons. And even when any ground laid down in the section exists the court will not as a general rule entertain a petition for divorce within three years of the marriage (section 14). That limitation of three years and an examination of the grounds mentioned in the present section and a comparison of the same with the grounds on which judicial separation may be decreed (section 10) will show that the intention of the Legislature was to provide for maximum opportunities for mutual adjustment and to see that the rules are so framed that divorce is not made easy.

A decree of divorce, as a general rule, operates from the moment it is pronounced. The rule laid down in section 15 that neither spouse can marry

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(g2) ('67) A.S.C. 581.

(*h*) Section 29(2). Also see § 441 *ante*.

again until the time for appeal has expired in no way affects the operation of the decree. Subject to the limitation relating to remarriage by either spouse the effect of a decree of divorce is to dissolve the marriage for all intents and purposes from the date of its pronouncement. The Act does not provide for passing of decree nisi and decree absolute as for instance is done under the Indian Divorce Act (see Notes under Section 15 *post*).

Attention has already been drawn in the Introduction to the scheme of the Act and the distinction made between grounds on which a decree of nullity of marriage can be passed and grounds on which dissolution of marriage may be decreed. In case of divorce the marriage having been duly solemnized and itself not being void or voidable is dissolved by the court for reasons mostly arising after the marriage.

**Cl. (i): "Living in adultery".**—As already pointed out the Legislature took the view that a single act of infidelity to the marriage bond should not be sufficient ground for relief by way of a decree of divorce but should only be a ground for judicial separation as provided in section 10(1)(f). The present clause deals with a more aggravated form of matrimonial offence. In a case covered by this clause the petitioner is not bound to obtain a degree for judicial separation. He has the option to ask for a dissolution of marriage or he may only seek judicial separation.

A single act of adultery cannot amount to "living in adultery" within the meaning of this clause. The natural meaning of the words would seem to be that they point to a course of action more or less continuous and not isolated acts of immorality. The identical expression is to be found in sec. 488(4) of the Criminal Procedure Code and has there been interpreted to refer to a course of conduct and to mean something more than a single lapse from virtue (*i*). The present tense in the words "is living in adultery" is significant and the court will refuse to pass a decree if it is satisfied that the respondent was not actually living in adultery, at the time of the petition even though it may be shown that he or she had in the past formed an adulterous connection. The onus of showing that the respondent had ceased to live in adultery in any such case would, however, be heavy on the respondent since the ordinary presumption would be that the guilty respondent shown to have done so had continued to live in adultery.

It would not be enough for the petitioner to show that the respondent had been living in adultery some time in the past and no relief would be granted to the petitioner under the present clause if it appeared that the latter had seceded from such life for an appreciable duration extending to the filing of the petition (*j*). The same view has been taken in the undermentioned cases (*j*1).

In any such case if there is no condonation of the adultery a decree for judicial separation can be granted under section 10(1)(f). In the under-

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(*i*) *In re Fulchand* (1928) 30 Bom. L.R. 79; *Kallu* v. *Kausilia* (1904) 26 All. 326; *Patala Atchamma* v. *Patala Mahalakshmi* (1907) 30 Mad. 332; *Jatindra Mohun* v. *Gouri Bala* (1924) 29 Cal. W.N. 647. Reference may be made to *Chanda* v. *Nandu* ('65) A.M.P. 268.

(*j*) *Rajani* v. *Prabhakar* ('58) A.B. 264. *Bhagwan Singh* v. *Amar Kaur* ('62) A. Punj. 144.

(*j*1) *Maganlal* v. *Dahi* ('71) A. Gui. 33; *Pattayee Ammal* v. *Manickam* ('67) A.M. 254. Also see f.n. (*j*2) and (*j*3) below.

mentioned case (*j*2) there was proof of only a single act of adultery and a decree for judicial separation was granted though the petitioner had only claimed dissolution of marriage. Relief by way of judicial separation, in any such case, may be granted even at appellate stage (*j*3).

Reference may be made to the Notes under Section 10(f).

**Cl. (ii): "Ceased to be a Hindu by conversion".**—As pointed out in § 441 ante, there is no rule of Hindu law which forbids the subsistence of a marriage one of the parties to which has ceased to be a Hindu. The marriage being indissoluble the rule was firmly established that conversion did not operate *per se* as a dissolution of marriage. The law was modified to some extent by the Native Convert's Marriage Dissolution Act, 1866. The Hindu marriage under the Act is one solemnized between persons who are Hindus in the wide connotation of the term and the Legislature has now laid down that the conversion of one of the spouses to any other religion affords a ground to the other spouse to seek dissolution of the marriage. The Note to the Hindu Marriage and Divorce Bill stated: A change in religion is not inconsistent with the continuance of conjugal love and it should therefore not be permissible for a party to the marriage to get a divorce by changing his or her religion. The right to get a divorce under this law is therefore given to the party who continues to be a Hindu (in the wide sense in which the term is used). A somewhat similar right is given to a person changing his religion for Christianity under the Native Convert's Marriage Dissolution Act, 1866, under which a husband or wife who changes his or her religion for Christianity is entitled to sue the other party for restitution of conjugal rights if the other party deserts or repudiates him or her, and if after the petition the desertion is persisted in, the court may declare the marriage dissolved after following the prescribed procedure.

The term Hindu in this clause must be understood in the wide sense given to it in section 2 which includes all Hindus, Buddhists, Jains and Sikhs. So a person continues to be a Hindu even though he may have been converted from any one to any other of these religions and his case will not be covered by this clause. Conversion in the present context implies that the person has voluntarily relinquished his religion and adopted another religion after formal ceremonial conversion. A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith, or is an ardent admirer and advocate of such religion and its practices. But if he abdicates his religion by a clear act of renunciation and adopts the other religion by undergoing formal conversion he would cease to be a Hindu within the meaning of this clause.

**Cl. iii: ". . . incurably of unsound mind for a continuous period of not less than three years . . ."**—The scheme of the Act on the question of mental capacity of the spouses affecting formation of marriage has been pointed out in the Notes under sec. 5(ii). This clause deals with supervening unsoundness of mind if it is incurable. Insanity of the respondent for a continuous period

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(*j*2) *Bhagwan Singh* v. *Amar Kaur* ('62) A. Punj. 144.

(*j*3) *Vira Reddi* v. *Kistamma* ('69) A.M. 235.

of not less than two years immediately preceding the presentation of the petition is already pointed out as a ground for judicial separation under section 10(1)(e). For that relief it is not necessary that the unsoundness of mind should be incurable. For relief by way of a decree of divorce dissolving the marriage a stronger ground has to be made out as laid down in this clause. The unsoundness of mind must be incurable and must have been present for a continuous period of three years immediately preceding the presentation of the petition.

The meaning of the expression "incurably of unsound mind" and the test applicable in dealing with any case under section 1(1)(d) of the Matrimonial Causes Act, 1959 has been examined in a number of cases decided in England. It has been observed that the state of mind envisaged is a degree of unsoundness or incapacity of mind properly called insanity. The practical test of the degree is to be found in the phrase 'incapable of managing himself and his affairs including the problems of society and of married life but without reference to the cause of such incapacity' (*j*4).

The onus of proving unsoundness of mind and the requisite duration of it as also that it is incurable is on the petitioner. It is not necessary that the respondent should have been adjudged a lunatic under the Lunacy Act. Nor does the finding of the Court on the inquisition against the respondent afford proof of his unsoundness of mind. But the finding of such Court that the respondent is a lunatic is *prima facie* evidence and raises a presumption that he continued to be of unsound mind (*k*) and throws the burden of proof on those who contend the contrary. The presumption is not then, as it would otherwise be, in favour of sanity or soundness of mind, but the contrary must be proved (*l*); that is those who allege the sanity of the respondent at any time during the period of three years or at the time of the petition, have the burden cast on them of proving such soundness of mind. Being in all cases a question of fact it must depend upon the facts of each case whether there is satisfactory evidence of the unsoundness of mind of the respondent. There should be a strict inquiry into the matter and the court must be satisfied beyond reasonable doubt that the requirements of this clause are established (*m*). The court insists on the test of legal insanity being satisfied by cogent and clear evidence to the effect that the respondent is unable to understand the nature and consequences of his acts and is such as cannot be regarded as responsible for his acts in the eye of law (*m*1).

The legal terminology on the subject is neither consistent nor comprehensive and decisions on the subject often turn on the peculiar facts and circumstances of each individual case. The question is to be determined not upon wire-drawn speculations but upon tangible and established facts. The question is a mixed one, partly within the range of common observation and partly within the range of medical experience. The gravity and importance

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(*j*4) *Whysall* v. *Whysall* (1959) 3 All E.R. 389, 395-397; *Robinson* v. *Robinson* (1964) 3 All E.R. 232, 239, 240.

(*k*) *Seshamma* v. *Padmanabha Rao* (1917) 40 Mad. 660.

(*l*) *Snook* v. *Watts* (1848) 11 Beav. 105; *Hill* v. *Clifford* (1907) 2 Ch. 236, 244, 245.

(*m*) See Section 23 and Notes thereunder "Standard of proof." In *Dastane* v. *Dastane* ('70) A.B. 312 the court considered the question of schizophrenia.

(*m*1) Reference may be made to *Ajitrai Mehta* v. *Vasumati* ('69) A. Guj. 48.

of the issue requires that the court ought to form its own independent judgment on the point. Medical testimony can be of considerable assistance and even guidance but the question is one for the court and not for the experts and evidence of experts does not relieve the court from the obligation of satisfying itself on the point beyond reasonable doubt (*m*2).

In England section 1(1) (d) of the Matrimonial Causes Act, 1950, lays down incurable unsoundness of mind as a ground for divorce and requires that the respondent must have been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

No decree would be granted on this ground if the unsoundness of mind had been conduced by the wilful neglect or misconduct of the petitioner and the court is satisfied that the petitioner is in asking for relief taking advantage of his or her own wrong (*n*).

**Cl. (iv) Incurable and virulent leprosy.**—Clause (c) of sub-section (1) of section 10 lays down as one of the grounds for judicial separation that the respondent has been suffering for a period of not less than one year immediately preceding the presentation of the petition, from a virulent form of leprosy. The present clause lays down as one of the grounds for divorce that the respondent has been suffering, for a period of not less than three years immediately preceding the presentation of the petition, from a virulent and incurable form of leprosy. Medical testimony can be of considerable assistance and even guidance but ultimately the question is one for the court and not for the experts and evidence of experts does not relieve the court from forming its own judgment and from the obligation of satisfying itself beyond reasonable doubt on the question whether leprosy from which the respondent suffers is both of a virulent form and incurable. The onus of proving this is on the petitioner. Reference may be made to the undermentioned case where a number of treatises on the subject were carefully examined by the court (*nn*).

The expression "virulent" was interpreted as malignant or venomous in the undermentioned case (*n*1).

Also see Notes under section 10(1) (c).

**Cl. (v): Venereal disease.**—This clause lays down as one of the grounds, on which marriage may be dissolved by a decree of divorce, that the respondent has been suffering from venereal disease in a communicable form for a period of not less than three years immediately preceding the presentation of the petition. This provision may be compared with clause (d) of sub-section (1) of section 10.

Also see Notes under section 10(1) (d).

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(*m*2) This passage is quoted with approval in *Munishwar Datt* v. *Indra Kumari* ('63) A. Punj. 449, (1963) 2 Punj. 263.

(*n*) See S. 23(1)(a). Also see Proviso (IV) to Section 4, Matrimonial Causes Act, 1950.

(*nn*) *Padma Rao* v. *Swarajya Lakshmi* ('70) A.A.P. 300.

(*n*1) *Annapurnamma* v. *Appa Rao* ('63) A.A.P. 312.

**Cl. (vi): Adoption of religious order.**—Under Hindu law where a person enters into a religious order renouncing all wordly affairs, his action is tantamount to civil death (§ 111). This clause lays down that a husband or wife can seek dissolution of marriage by a decree of divorce on the ground that the respondent has renounced the world by entering any religious order. Both these requirements must be satisfied before a decree for divorce can be granted on the ground laid down in this clause. The religious orders contemplated by the clause include those of Hindus, Buddhists, Jains and Sikhs. The religious orders well known in India require on the part of a person who wants to enter the same the performance of certain ceremonies or certain formalities. The religious order whatever it is must be one which requires renunciation of the world. This postulates relinquishment of all property and worldly concerns.

A person cannot be said to have adopted a religious order by merely declaring himself to belong to such order. He must have performed the requisite ceremonies and formalities of the particular religious order. Thus for instance a person who wants to renounce the world by becoming a sanyasi can be held to have entered that order only if he has performed the necessary rites and ceremonies prescribed by the shastras. The mere fact that he calls himself or is described by others as such is not enough; and the mere adoption of the external symbols of sanyasa as the wearing of coloured clothes or shaving of the head is not sufficient to make him a sanyasi. The renunciation of the world which is a postulant for sanyasa requires relinquishment of all property and wordly affairs. Relinquishment of property need not be in favour of any particular person but may be in a general way. Renunciation of the world by entering into a religious order must be unequivocal and absolute (*o*).

**Cl. (vii): "has not been heard of as being alive for a period of seven years . . ."**—It is a rule of presumption that in the absence of evidence to the contrary a person shall be taken to be dead if he has not been heard of for a period of seven years or more by those persons who would naturally have heard of him, had he been alive. This is a presumption of universal acceptance as it aids proof of death in cases where it would be extremely difficult if not impossible to prove that fact. It is a presumption of great convenience and section 108 of the Evidence Act lays it down as a distinct rule. The fact that for a period of seven years or upwards the respondent has been absent from the petitioner and the petitioner or other persons who would hear of him had he been alive, have not heard of him at all should in normal circumstances be sufficient evidence on which death may be presumed and dissolution of marriage granted to the petitioner. That presumption is the foundation of the rule laid down in this clause and although the clause does not in terms require the Court to make in any such case a "decree of presumption of death and of a dissolution of marriage" as laid down in England in section 16 of the Matrimonial Causes Act, 1950, it does not seem that the Legislature intended to enact any different rule. The standard of proof is that laid down

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(*o*) *Kondol Row* v. *Swamulavaru* ('18) A.M. 402; *Baldeo Prasad* v. *Arya Priti Nidhi Sabha* (1930) 52 All. 789. Also see f.n. (*c*) under § 111 *ante*.

in section 23 and the court will inquire into all the relevant facts and circumstances and pass a decree only if it is satisfied that reasonable grounds exist for acting on the presumption of the death of the respondent. The Rules framed under the Act by some of the High Courts require the petitioner to state in any such case, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, the date and the place where the respondent was last seen or heard of, and the steps which were taken to trace the respondent (*p*).

The object of the rule is not to establish whether in point of fact the respondent was dead or alive, but whether, on the day on which the decree is passed, the facts so far as then known, were such as to justify the court in taking action on the ground set out in the clause. Therefore, a decree of divorce granted under this clause is valid and effective even if it subsequently transpires that the respondent was in fact alive when the decree was passed.

**Sub-section (1A)(i): Where there has been no resumption of cohabitation for two years or more after decree for judicial separation.**—The newly added clause (i) of sub-section (1A) makes a distinct departure from the original clause (viii) of sub-section (1). Under the original provision relief by way of divorce on the ground therein mentioned could be obtained only by a petitioner, husband or wife, who had obtained a decree for judicial separation. The present clause permits either party to that petition in which a decree for judicial separation had been passed to apply to the court for a decree for divorce by showing that there has been no resumption of cohabitation between the parties to the marriage for a period of two years or upwards after the passing of the decree. The decree must of course be a subsisting decree and no relief will be granted under this clause if it had been rescinded by the court under section 10(2).

The scheme of the Act, as already pointed out, is to discourage divorce, but without enforcing conditions which may cause great hardship or drive parties to act in collusion with one another. In fixing the period of two years the Legislature seems to have taken the view that there should be scope for the maximum opportunities of mutual adjustment after a decree for judicial separation. At the same time the view seems to have been taken that in case where the parties have not resumed cohabitation for a period of two years or more after any such decree, the marriage must be regarded as having proved a complete failure or having broken down and not only the party, husband or wife, who obtained the decree but either party should have the right to ask for dissolution of marriage. The court will in case of such an application grant dissolution of marriage in the absence of any bar laid down in section 23 disentitling the petitioner from seeking this relief.

The effect of this substituted clause would seem to be that where the period of two years or more has expired after the passing of the decree for judicial separation it would be irrelevant and unnecessary to examine whether one or the other spouse has been responsible for not resuming cohabitation

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(*p*) For instance, see Rule 8(vii)(b) of the Rules of the Patna High Court. Reference may be made to Rule 4(1)(f) of the Matrimonial Causes Rules, 1950. Also see *Parkinson* v. *Parkinson* (1939) 3 All E.R. 108, (1939) P 346.

after the passing of the decree. The mere fact that the spouse who obtained the decree or the spouse against whom the decree had gone had not expressed desire or willingness to resume cohabitation or even had been opposed to and declined offer of resumption of cohabitation would not be a ground for refusing relief to him or her now under this clause, for granting relief even to such spouse would *inter alia* seem to be the purpose of this change in the law.

The clause, however, does not confer an absolute unrestricted right on a party to obtain a decree for divorce. As laid down in section 23 the court has to be satisfied that the ground for relief exists and it has also to be satisfied that to the granting of such relief there is no bar of any kind mentioned there. Thus for instance the court will decline to grant a decree for divorce in any such case if it is satisfied that the petitioner is taking advantage of his or her own wrong when seeking such relief. The conduct of the petitioner spouse may be of such grave and weighty character as would disentitle the petitioner spouse to any relief under this clause. As a general rule the conduct which would disentitle the petitioner spouse to such relief would have to be subsequent to the passing of the decree for judicial separation though there may be exceptional cases where even conduct prior to that may become relevant. This question of taking advantage of one's own wrong would ordinarily arise in case of a spouse against whom decree for separation had gone though it is conceivable that the bar may apply in the facts and circumstances of a particular case to the spouse who had obtained the decree for judicial separation. The reason underlying the rule being that relief should be granted to either spouse under this clause where the marriage can be regarded as having completely failed or broken down, the conduct which may disentitle a party from seeking relief must be such as can only be regarded as a grave and weighty matter. See Notes under Sub-section (1A) (ii). Reference may be made to section 23 and Notes under it.

There is nothing irrevocable in a decree for judicial separation and it always leaves time and opportunity to the parties for reconsideration. So if the parties have resumed cohabitation after a decree of judicial separation it would not be open to the party who had obtained that decree to claim relief under the present clause. Cohabitation means living together as husband and wife. It consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband supporting his wife as a husband should. Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. If there is sexual intercourse, it is very strong evidence—it may be conclusive evidence—that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting (*q*). Cohabitation implies something different from mere residence. It must mean that the husband and wife have begun acting as such and have resumed their status and position as husband and wife.

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(*q*) *Thomas* v. *Thomas* (1948) 2 All E.R. 98, 99, (1948) 2 K.B. 294. Also see *Evans* v. *Evans* (1947) 2 All E.R. 656, (1948) 1 K.B. 175.

**"Two years or upwards after the . . . decree".**—The period of two years mentioned in the clause would commence from the date of the passing of the decree by the court of first instance and the same would be the date of commencement of the period when there is an appeal and the decree is confirmed. Where, however, the court of first instance has dismissed the petition and in appeal a decree for judicial separation has been passed the period of two years would commence from the date of the decree of the Appellate Court. The Appellate Court has in such a case no power to ante-date its decree (*r*).

*Consent Decree.*—See Notes under Section 23 *post.*

In the undermentioned case (*rr*) in a petition for divorce the parties obtained a consent decree for judicial separation and subsequently an application for divorce was made under the present clause. The application was dismissed by the High Court on the ground that the decree for judicial separation must be regarded as without jurisdiction since it had been passed without proving any of the grounds mentioned in section 10 and was in violation of the mandatory requirements of section 23(1). In any view of the question about jurisdiction the conclusion reached could be supported on the ground of collusion or fraud in obtaining the decree for judicial separation.

**Sub-Section (1A)(ii): Where there has been no restitution of conjugal rights.**—The newly added Clause (ii) of Sub-section (1A) makes a distinct departure from the original Clause (ix) of Sub-section (1). Under the original provision relief by way of divorce on the ground therein mentioned could be obtained only by a petitioner, husband or wife, who had obtained a decree for restitution of conjugal rights. The present clause permits either party to that petition in which a decree for restitution of conjugal rights had been passed to apply to the court for a decree for divorce by showing that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of the decree.

The scheme of the Act, as already pointed out, is to discourage divorce, but without enforcing conditions which may cause great hardship or drive parties to act in collusion with one another. In fixing the period of two years the Legislature seems to have taken the view that in a case where even after the decree there has been no restitution of conjugal rights, not only the party, husband or wife, who obtained the decree but either party should have the right to ask for dissolution of marriage. The court will in case of such an application grant dissolution of marriage in the absence of any bar laid down in section 23 disentitling the petitioner from seeking this relief. Thus for instance the court will not grant a decree for divorce in any such case if it is satisfied that the petitioner before it is taking advantage of his or her own wrong when seeking such relief.

The effect of this clause would seem to be that where a period of two years or more has expired after passing of the decree for restitution of conjugal rights and there has been no restitution of conjugal rights it would be unnecessary for the court to examine whether the one or the other spouse has been responsible for non-compliance with the decree for restitution. The mere fact that the husband or wife against whom the decree had been passed was responsible for non-compliance of the decree would not *per se* be a

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(*r*) *Kirpalani* v. *Kirpalani* (1960) A. Bom. 447. Reference may be made to *Chander Prakash* v. *Sudesh Kumari* ('71) A. Delhi 208 where the court applied the maxim *actus curiae neminem gravabit* and granted a decree for divorce under this clause.

(*rr*) *Hirakali* v. *Awasthi* ('71) A.A. 201.

ground for refusing relief to him or her under this added clause, for granting relief to such defaulting spouse would *inter alia* seem to be the very purpose of this change in the law.

The clause, however, does not confer an absolute or unrestricted right on a party to obtain a decree for divorce in any such case. The conduct of the petitioner spouse may be of such grave and weighty character as would disentitle the petitioner spouse to any relief under this clause. As a general rule the conduct which would disentitle the petitioner spouse to such relief would be subsequent to the decree of restitution though there can be exceptional cases where even conduct prior to that may become relevant. This question of taking advantage of one's own wrong would ordinarily arise in case of a spouse against whom the decree for restitution had gone though it is conceivable that the bar may apply in the facts and circumstances of a particular case to the spouse who had obtained the decree for restitution. Whether the conduct of the petitioner spouse in a case falling under this clause would bring the case within the mischief of section 23(1)(a) must depend on the facts and circumstances of each particular case and it is not possible to expect any general or exhaustive statement of what may or may not constitute "wrong" within the ambit of the rule there laid down. But it is submitted that in any case the conduct must be grave and weighty. There is, however, some conflict of judicial opinion on this subject. In *Chamanlal* v. *Mohinder Devi* (r1) the view has been taken that a spouse against whom the decree for restitution had gone and who has failed to comply with the decree cannot be permitted to seek relief under this clause, for such spouse should be regarded as taking advantage of his or her own wrong for the purpose of such relief. In *Syal* v. *Syal* (r2) the court found that throughout the proceedings against the wife the husband had been taking advantage of his own wrong to get the marriage dissolved and the wife had been driven out of the house by him and there was no impropriety or illegality on her part. The husband was held not entitled to relief under this clause. In *Laxmibai* v. *Laxmichand* (r3) it was held that deliberate non-compliance of the decree for restitution by the husband against whom the decree had gone was defiance of that mandate of the court and the husband was not permitted any relief under this clause. In *Ram Kali* v. *Gopal Das* (r4) a full bench of the Delhi High Court has expressed the view that non-compliance by the husband of a decree of restitution would not constitute a wrong within the meaning of section 23(1)(a) and that the husband could seek relief under this clause. The court accepted the principle of the breakdown of the marriage and also expressed the view that section 23(1)(a) should be so construed that it operates in harmony with the present clause. The preferable view, it is submitted would be that non-compliance with the decree of restitution whether deliberate or otherwise would not *per se* be a ground for refusing relief under this clause. The reason of the rule would seem to be that in a case falling under this clause also, as in a case falling under clause (i) of sub-section (1A), the marriage must be regarded as having proved a

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(r1) ('68) A. Punj. & H. 287.
(r2) ('68) A. Punj. & H. 489; *Someswara* v. *Leelawathi* ('68) A. Mys. 274.
(r3) ('68) A.B. 332.
(r4) I.L.R. (1971) 1 Delhi 6 (F.B.). Reference may be made to an Article by Mr. Justice Deshpande in A.I.R. (1971) Journal p. 113.

complete failure or as having broken down. This clause can be read harmoniously with section 23 (1) (a). The 'wrong' contemplated in the latter provision must be something much more than deliberate non-compliance with the decree. The conduct of the petitioner spouse must be of such grave and weighty character, as in the opinion of the court, should disentitle such spouse from getting the relief.

**"Two years or upwards after the . . . decree".**—See Notes under the same heading above.

*Consent Decree.*—See Notes under Section 23 *post.*

**Sub-section (2): Husband having more than one wife alive: Marriages solemnized before commencement of the Act.**—Sub-section (1) provides for a decree of divorce dissolving a marriage, solemnized whether before or after the commencement of the Act, at the instance of either party, on the various grounds specified in it. In addition to those grounds a wife can seek dissolution of her marriage on the ground that the husband has at the time of the presentation of the petition another wife who is alive. This ground can obviously exist only in case of any marriage solemnized before the Act came into operation. With the coming into operation of the Act monogamy has become the rule and a bigamous marriage, if contracted after the coming into force of the Act, would be null and void as laid down in s. 11 read with s. 5 (i) and no question can arise of dissolution of a marriage which was void *ab initio.* A somewhat anomalous position was, however, bound to remain in case of more than one marriage contracted by the husband prior to the coming into force of the Act. Such marriages could validly take place under the former system of law which recognised polygamy and therefore the Legislature has enacted in this sub-section that in case of any such marriage the wife should have the right to seek dissolution of her marriage. A petition for dissolution of the marriage by divorce can be maintained by a wife in caso of any marriage solemnized before the commencement of the Act on the ground of the husband having another wife irrespective of the fact that the other marriage had taken place after or before the marriage of the petitioner with him, provided the other wife is alive at the time of the presentation of the petition. As a general rule in any such case the conduct or disability on the part of the petitioner wife cannot be relied on by the husband (*r*1) (*supra*) unless, of course, he can establish that she is taking advantage of her own wrong or disability for the purpose of such relief (*r*2) (*supra*). The mere fact that after the filing of the petition the husband has divorced the other wife is no ground for dismissing any such petition (*r*3). The Bombay Hindu Divorce Act (XXII of 1947) which is now repealed contained a provision which, though not *in pari materia* with the present sub-section, enabled a first wife to sue for divorce on the ground that her husband had married again before the coming into operation of that enactment. In a case decided under that enactment (*s*) the first wife had continued to live with the husband for ten years after a second marriage and had children born of him after the second marriage. Her petition for divorce on the ground of the second mar-

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(*r*3) *Naganna* v. *Lachmi Bai* ('63) A.A.P. 82. Reference may also be made to *Thenku Veeriah* v. *Tamisetti Nagiah* ('59) A.A.P. 547 (F.B.)

(*s*) *Chandrabhagabai* v. *Rajaram* (1955) 57 Bom. L.R. 946.

riage was resisted by the husband on the ground of condonation (*s*1) and it was also contended that on the facts of the case it would be inequitable to grant a decree for divorce to her. Both the pleas were rejected. Under the present sub-section it would be competent to the court and even necessary and incumbent on it to consider (*s*2) whether there was any unnecessary or improper delay in instituting the proceeding as laid down in section 23 (1) (d).

**Bigamous marriage.**—Where the husband has gone through ceremony of a second marriage after the commencement of this Act the case would not fall under this clause but such a marriage would be a nullity and the first wife can get dissolution of marriage under sub-section (1) (i) of this section (*s*3).

**Sub-sec. (2) (ii).**—In addition to the grounds mentioned in sub-section (1) and clause (*i*) of sub-section (2) a wife can seek divorce on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality. It is not necessary that the husband should have been convicted of any of these offences in any criminal proceedings. Attempt to commit any of these offences is not, however, a ground for divorce.

A wife can sue for divorce if the husband has, since the solemnization of the marriage, been guilty of any of the unnatural offences mentioned in this clause. The offences are committed by having carnal intercourse against the order of nature with any man, woman or animal. *Cotius per os* is a criminal offence punishable under section 377 of the Penal Code, but, as already pointed out above, it is not necessary that the husband should have been convicted of any of the offences mentioned in this clause. The Penal Code makes it an offence on the part of persons of either sex who commit an unnatural offence but under the present clause the matrimonial offences under this head are confined only to the case of the husband (*t*).

As to standard of proof see Notes under section 23 and the undermentioned case (*u*).

**Remarriage after decree for dissolution of marriage.**—See Notes under Section 15 *post*.

**14.** (1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

No petition for divorce to be presented within three years of marriage.

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in

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(*s*1) Reference may be made to *Deepo* v. *Kehar Singh* ('62) A. Puni. 183.

(*s*2) Also see *Nirmoo* v. *Nikka Ram* ('68) A. Delhi 260 [delay of eleven years after the Act came into force explained]. And see *Lalithamma* v. *Kannan* ('66) A. Mys. 178 [delay held not culpable or improper].

(*s*3) *Gitabai* v. *Fattoo* ('66) A.M.P. 130.

(*t*) Reference may be made to *Gardner* v. *Gardner* cited in f.n. (j) at 723, *supra*.

(*u*) *Lawson* v. *Lawson* (1955) 1 All E.R. 341. Also see *Statham* v. *Statham* (1929) P. 131; *Revanna* v. *Suseelamma* ('67) A. Mys. 165.

that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresenation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

**No petition for divorce within three years of marriage.**—The rules laid down in this section are intended to give a fair trial to every marriage. The salutary principle underlying this section found legislative sanction in s. 2 of the Matrimonial Causes Act, 1950, and was adopted in section 2 of the Special Marriage Act, 1954. The language of the sections in all these enactments is *pari materia*. The general rule enacted in sub-section (1) of this section is that no petition for a decree of divorce under any of the grounds mentioned in section 13 can be entertained by the court till the period of three years laid down by this section has elapsed. Both the proviso and sub-section (2) deal with matters of considerable importance. Apart from exceptional cases falling under the proviso the court would have no jurisdiction to entertain any such petition before the statutory period has expired. In the undermentioned case (*u*1) a petition was presented within three years of the date of the marriage without pleading the ground of exceptional hardship. Amendment of the petition was allowed after that period had expired to bring the case within the proviso on the ground of substantial justice.

**Proviso to sub-section (1).**—The proviso is intended to modify the effect of the three years' limit in very exceptional cases. It enables the court in such cases to entertain a petition for a decree of divorce before the statutory period of three years has expired. The procedure relating to the application for special leave to present such petition is to be regulated by the rules as may be made by the High Court in that behalf. Rules have been framed by various High Courts relating to the application for special leave under the section and service for order granting leave *ex-parte* and the procedure to be

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(*u*1) *Sawita Devi* v. *Pran Nath* ('67) A.J. & K. 89.

followed thereafter if the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained. Reference may be made to Notes under "Contested application for leave" *post*.

The proviso also lays down in effect that if it appears to the court at the hearing of the petition, where leave had been granted and not revoked, that leave had been obtained by misreprsentation or concealment of the true nature of the case and the court is satisfied that the ground for relief exists, the court may although it passes a decree for divorce suspend the operation of the decree by adding a condition that it shall not operate until after the expiry of three years from the date of the marriage (*u2*). It is not, however, incumbent on the court to pass a decree suspending its operation and the court may in its discretion dismiss altogether the petition for divorce. In the latter case a petition may be brought on the same grounds after the expiration of the period laid down in the section.

**"Exceptional hardship" or "Exceptional depravity."**—The proviso engrafts a very important qualification on the general rule laid down in the section that no petition for dissolution of marriage by a decree of divorce can be entertained by the court before the statutory period. It enables the court in the exercise of its discretion to grant leave to present such petition before the expiry of the three years' limit in a case of exceptional hardship to the petitioner or exceptional depravity of the respondent. The proviso does not define the terms "exceptional hardship" or "exceptional depravity" presumably because to do so would require modifications, qualifications and exceptions in addition to all the implications of these terms and to bring out all the implications is just what a definition ought not to aim at. The meaning of the expressions 'hardship' and 'depravity' must depend on the effect of the word 'exceptional.' This involves an inquiry into the degree of depravity alleged or the degree of hardship said to be suffered and much would depend on the merits of each particular case. These expressions occurring in identical context in the English statute came up of for consideration in *Bowman* v. *Bowman* (*v*) and the broad general principle there enunciated and stated below will be found of some guidance and assistance. The cases in which mostly the question arises are those of adultery or of cruelty. If there is nothing more than adultery with one person within the first three years of marriage that may be considered ordinary depravity. It may not involve exceptional hardship on the innocent spouse. If, however, the adultery is coupled with other matrimonial offences, e.g., if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then, even if his offence cannot be stigmatised a exceptional depravity on his part, nevertheless, it does involve exceptional hardship suffered by the wife. Even when the adultery is not coupled with desertion or cruelty, it may be

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(*u2*) Reference may be made to *Stroud* v. *Stroud* (1963) 3 All E.R. 539.

(*v*) (1949) 2 All E.R. 127 (C.A.), (1949) P. 353. Also see *Meganatha* v. *Susheela* ('57) A.M. 423. There are some general observations of courts in England in the following cases which may be useful if cautiously applied: *C* v. *C* (1967) 1 All E.R. 928; *W* v. *W* (1966) 2 All E.R. 889; *Hillier* v. *Hillier and Latham* (1958) 2 All E.R. 261, 263, 264; *Brewer* v. *Brewer* (1964) 1 All E.R. 539, 541, 542. *V.* v. *V.* (1966) 3 All E.R. 493 (C.A.) adultery and cruelty of exceptionally grave nature.

committed in such aggravating circumstances as to show exceptional depravity, and, even if the adultery is not coupled with another matrimonial offence, nevertheless, its consequences may involve exceptional hardship to the applicant as, for instance, when a wife as a result of her adultery has a child by another man so that the husband, if he took her back, would have to maintain another man's child. The husband who commits adultery within a few weeks of marriage, or who commits adultery promiscuously with more than one woman, or with his wife's sister, or with a servant in the house, may probably be labelled as exceptionally depraved. Cruelty again, by itself, is not exceptional, but, if it is coupled with aggravating circumstances, as, for instance, drunkenness and neglect, or if it is exceptionally brutal or dangerous to health, then, even if it does not evidence exceptional depravity on the part of the respondent, it does, at least, cause exceptional hardship to the applicant. If it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent. One really important consideration in all these cases is to see whether there is any chance of reconciliation. On this point it is most material to inquire what the applicant has already done to try to make the marriage a success or to become reconciled. If the court is not satisfied that all which is reasonable has been done in this respect, it may well dismiss the application.

In the undermentioned case (*v*1) the view was expressed that relief could be granted under the rule laid down in the proviso in a case where dissolution of marriage was sought under section 13(1)(iv) if the facts and circumstances of the case establish exceptional hardship to the petitioner.

**Contested application for leave.**—The applications under the proviso are not meant to be preliminary trials but intended to be dealt with without any elaborate inquiry. The leave contemplated should not, however, be granted without giving an opportunity of a reply to the respondent. The rules, passed by the various High Courts provide for opposition to the application for leave and the procedure to be followed when the application for leave is contested. In exercising its discretion to grant leave under the Proviso the court would take into consideration not only the averments in the petition or in the affidavit made by the petitioner in support of the same but also that of the respondent (*w*). If the affidavit in answer is destructive of the petitioner's case the court can dismiss the application. Even if it is not destructive of the petitioner's case, but only throws doubt on it, the court is entitled to have regard to that doubt in coming to a decision whether or not to grant or revoke the leave.

**Discretion of the Court.**—Whether leave should be granted or not under this section and when granted *ex parte* should be revoked or not are matters of discretion with the court. In exercising discretion in respect of all matters covered by the section the court is bound to have fullest regard to:

(i) the interest of any child of the marriage, and

(ii) the reasonable probability of a reconciliation between the parties.

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(*v*1) *Padma Rao* v. *Swarajya Lakshmi* ('70) A.A.P. 300 (virulent and incurable leprosy).

(*w*) *Simpson* v. *Simpson* (1954) 2 All E.R. 546.

In all applications of this kind the possibility of reconciliation is a most important aspect of the case; and where there is any child of the marriage the interest of the child should be a very weighty matter for consideration.

The Appellate Court will not interfere with the discretion exercised by the District Court unless that court has proceeded on a wrong principle of law or failed to have regard to a material consideration or some gross injustice has occurred (*x*).

**Remarriage after decree for dissolution of marriage.**—See Notes under the next section.

Divorced persons when may marry again.

**15.** When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

**When divorced persons may marry again.**—Section 13 of the Act which provides for a decree of divorce on stated grounds in case of any marriage solemnized whether before or after the commencement of Act has to be read with the present section when dealing with the question of the right of the parties to remarry any person after dissolution of the marriage. Both under English law as well as the law laid down in this enactment monogamy is the rule and a party can only contract a valid second marriage by showing that the incapacity arising from the previous marriage has been effectually removed. A decree of divorce does not wholly remove that incapacity until the lapse of a specified time after the decree. The rule laid down in this section is an integral part of the proceedings by which alone both the parties to the decree of divorce can be released from their incapacity to contract a fresh marriage (*y*). The rule is founded on the principle that it is contrary to public policy and good morals that persons whose marriage is dissolved should be permitted to remarry some other person with indecent haste and aims at ensuring that divorce is sought as an extreme remedy and not for the sheer purpose of marrying some other person.

The rule laid down in the section operates in cases where a decree of divorce is granted under the provisions of the Act. The decree may be one under section 13 or under that section read with section 14 which empowers the court in cases of exceptional hardship or exceptional depravity on the

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(*x*) *Meganatha* v. *Susheela* ('57) A.M. 423; *Charlesby* v. *Charlesby* (1947) 176 L.T. 532.

(*y*) See observations in *Warter* v. *Warter* (1890) 15 P.D. 152 and per Sunderson C.J. in *Turner* v. *Turner* (1921) 48 Cal. 636, 639, 640.

part of the respondent to grant a decree in case of a petition presented within three years of marriage.

The right to remarry any person after a conclusive decree of divorce can be availed of by either of the spouses whose marriage is dissolved. It is also open to the parties to again intermarry but the remarriage between them must be after the lapse of one year of the date of the decree.

**Period of one year.**—The proviso lays down that it is only after the lapse of one year of the decree of the court of first instance and not sooner that the respective parties whose marriage is dissolved can marry again. A decree granting divorce or dismissing the petition for divorce is appealable (*z*). A decree of divorce may be granted by the court of first instance, or it may be granted in appeal where the trial court has refused to grant it, or the decree granted by the trial court may be confirmed in appeal or there may be no appeal at all against the decree of the trial court. In all these cases the period of one year is to be computed from the date of the decree of the court of first instance. A decree of divorce, as a general rule, operates from the moment it is pronounced. Subject to the limitation relating to remarriage by either spouse as laid down in this section, the effect of a decree of divorce is to dissolve the marriage for all intents and purposes from the date of its pronouncement. The provisions of this section do not have the effect of rendering the decree conditional. The Act does not provide for passing of a decree nisi and decree absolute as for instance is done under the Indian Divorce Act.

In case of a decree pronounced under section 14 the court has the discretion to impose the condition that the decree shall not operate until after the expiry of three years from the date of marriage. Obviously the right to remarry can arise in case of such conditional decree only when it becomes effective after three years. If no such condition is imposed by the court the period of one year will, as in other cases, be computed from the date of the decree of the court of first instance.

**Remarriage before lapse of the period.**—A remarriage solemnized by either party in defiance of the rule laid down in this section prohibiting the same for a period of one year from the date of the decree of the court of first instance is null and void. A marriage performed within one year from such decree would be null and void even if such subsequent marriage is not under this Act but the Special Marriage Act (*z*1). The rule that no marriage can be solemnized by the parties in such a case within one year of the decree is stringent and the court is bound to enforce it although in some cases it may seem very hard and inequitable to do so (*a*). As to legitimacy of children born of such void marriage see Notes under Section 16 below.

**Remarriage before disposal of appeal against decree for dissolution of marriage.**—This section must be read with section 28 of the Act which *inter alia* provides for an appeal against a decree for dissolution of marriage. The

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(*z*) See S. 28 *post.*

(*z*1) *Uma Charan* v. *Kajal* ('71) A.C. 307.

(*a*) *Turner* v. *Turner* (1921) 48 Cal. 636 (Decree of nullity of such marriage granted after 18 years); *Jackson* v. *Jackson* (1912) 34 All. 203; *Battie* v. *Brown* (1915) 38 Mad. 452 (petition for nullity of subsequent marriage after 22 years).

effect of the rule laid down in this section read with the proviso is that the conditions stated in both the section as well as the proviso to the section must be fulfilled before a lawful marriage can take place after a decree for dissolution. It follows that if a decree for dissolution is set aside in appeal and a party remarries before disposal of the appeal such marriage would be a nullity.

The section when it speaks of a case where there is "a right of appeal" does not in terms cover a case of an application for special leave to appeal to the Supreme Court. Even so a party who has succeeded in the High Court and obtained a decree of dissolution cannot by marrying immediately after the High Court's decree take away from the losing party the chance of presenting an application for special leave. If the party does so without making sure of the true position, it takes the risk of the leave being granted and the appeal ultimately succeeding and the decree being set aside (*a*1). The Supreme Court had in this case granted special leave and the appeal ultimately succeeded with the result that the remarriage became a nullity.

**Remarriage before disposal of appeal against decree of nullity under Sections 11 and 12.**—Sections 11 and 12 of the Act relate to passing of decree of nullity by the Court in case of void and voidable marriages respectively. Section 28 confers the right of appeal to an aggrieved party *inter alia* against any such decree. The present section relates only to remarriage after a decree for dissolution of marriage and does not cover the case of any decree of nullity of marriage. On principle, however, it would seem that if any such decree of nullity is set aside in appeal and a party remarries before disposal of the appeal such subsequent marriage would be a nullity. This view derives support from observations made by the Supreme Court in the undermentioned case, though in a different context (*a*2). In a rather peculiar case decided by the Madras High Court (*a*3) an exparte decree was passed granting declaration of nullity of marriage. The respondent applied for setting aside the exparte decree and the Court set it aside. In the meantime the petitioner contracted a second marriage relying upon the exparte decree and contended that the order setting aside the exparte decree had become infructuous since she had already married again. That contention was negatived. It is submitted that the view taken was correct on the principle stated above and which underlies the present section. A different view was taken in a decision of the Madhya Pradesh High Court (*a*4) where it was held that in any such case the remarriage would have the effect of rendering the appeal infructuous.. In a recent decision the High Court of Jammu and Kashmir (*a*5) has dissented from the view taken by the Madhya Pradesh High Court.

**16.** Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Legitimacy of children of void and voidable marriages.

(*a*1) *Chandra Mohini* v. *Avinash Prasad* ('67) A.S.C. 581.
(*a*2) See f.n. (*a*1) above.
(*a*3) *Vathsala* v. *Manoharan* ('69) A.M. 405.
(*a*4) *Mohanmurari* v. *Kusumkumari* ('65) A.M.P. 194.
(*a*5) *Krishen Lal* v. *Krishna* ('71) A.J. & K. 31.

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

**Legitimacy of children of void or voidable marriage.**—Under general law a legitimate child is one born in lawful wedlock. It is well settled that except in the cases where special provision to the contrary is made by any enactment, a marriage which is null and void *ipso jure* or declared to be null and void by the court or annulled by the court on the ground of its voidability, will inevitably have the effect of bastardising any child born of the parties to such marriage. The effect of a decree of nullity in case of a void marriage or annulment of a voidable marriage, as already pointed out (*b*), is to render the marriage null and void from its inception for all intents and purposes. It has always been extremely unfortunate for a child the putative marriage of whose parents is null and void or annulled by the court on some ground such as is to be found in sections 11 and 12 of the Act. This was to some extent remedied in England by the Matrimonial Act of 1937 and Law Reform (Miscellaneous Measures) Act, 1949. Now section 9 of the Matrimonial Causes Act, 1950, in England lays down a provision similar to that in the present section in respect of issue of voidable marriages annulled by the court. The Legitimacy Act, 1926, in England provides for *legitimatio per subsequents matrimoniam* but the bar sinister has not been removed in case of issue of marriages void *ipso jure*. The present section deals with legitimacy of children both in case of void and voidable marriages of the parents. The Joint Committee observed that in no case should children—meaning thereby children of persons whose marriage is solemnized but is void or voidable under sections 11 or 12—be regarded as illegitimate and the clause has provided for this and also for the legitimacy of children *en ventre sa mere* at the time of the proceedings.

The Legislature has adopted in this section the language of section 9 of the Matrimonial Causes Act, 1950. That section deals only with legitimacy of children of voidable marriages and does not refer to children of marriages void *ipso jure*. So far as the present section refers to legitimacy of children of a voidable marriage in respect of which a decree of annulment may be granted under section 12 the position is clear. If the validity of the marriage is challenged by either party and though challenged the marriage is not annulled it would be a valid marriage and the children of the parties to such a marriage would undoubtedly be legitimate. And even if the marriage is annulled at the instance of either party the children born of such marriage are by operation of this section to be deemed to be their legitimate children for all intents and purposes except that by virtue of the proviso to the section they cannot claim any rights in or over property of any person other than the

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(*b*) pp. 732, 733, *supra*.

parents. This is to be the result notwithstanding the decree of annulment of marriage that may be passed by the court. A voidable marriage can only be challenged at the instance of either party to the marriage and cannot be challenged after the death of one of the parties to the same. So if the marriage though voidable was not challenged during the lifetime of a spouse it cannot be challenged thereafter and the issue of such marriage would be legitimate and no question would arise of the applicability of the rule laid down in this section.

The present section also states that as regards children of a marriage which is void under section 11 and declared by the court to be null and void the decree is to be treated as if it were only for dissolution of the marriage by divorce and the children born of such marriage are to be deemed to be the legitimate children of the parents for all intents and purposes subject to the rule laid down in the proviso and this is to be the result notwithstanding the decree of nullity that may be passed by the court. A marriage which though solemnized does not fulfil any of the three conditions mentioned in section 11 is void *ipso jure* whether any proceeding to declare its nullity is adopted or not. No difficulty can arise where such proceeding is adopted and the marriage is annulled by the court because the children born of such marriage are by operation of this section to be deemed to be the legitimate children of the parents for all intents and purposes except that by virtue of the proviso to the section they cannot claim any rights in or over property of any person other than the parents. This is to be the result notwithstanding the decree of nullity that may be passed by the court. But question may arise whether the rule laid down in the section can apply in case of children of such void marriage when no proceeding had been adopted and there was no decree passed by the court. It would be suggested that the operation of the section is confined only to cases where any proceeding had been taken under the Act and the court had granted a decree of nullity under section 11 and contended that it is open to a third party to challenge the validity of the marriage in other proceedings and the children of such marriage would be illegitimate if the marriage was proved to be void by operation of section 11 on the ground that it was in contravention of any of the conditions laid down in clauses (i), (iv) and (v) of section 5. As already mentioned the language used in English Act in the context of a voidable marriage has been borrowed in this section and the section is made applicable to the case of both a voidable and a void marriage annulled by a decree of the court. The Legislature instead of verbally adopting in the present section the provision of the English enactment which is expressed in language appropriate to the case only of a voidable marriage should have stated the rule differently. The position and status of children of such marriage should obviously be the same in either case and presumably the object of the Legislature was to see that where a marriage was in fact solemnized but was void on any of the three grounds mentioned in section 11, the children of such marriage should not be bastardised whether any such proceeding had or had not been adopted and any decree passed or not. It would, however, seem from the language employed that while children born of such marriage will be deemed to be the legitimate children of the parents if a decree of nullity of marriage had been granted in respect of the marriage under section 11, they will be illegitimate children if no pro-

ceeding had been adopted by any of the parents to have the marriage declared void. The same will be the position of children born of a marriage solemnized in defiance of the rule laid down in section 15 which prohibits persons whose marriage is dissolved by a decree of divorce from marrying again until the expiry of a period of one year from the date of the decree. In such a case the marriage would be null and void and the children born of such marriage would be illegitimate children of the parties to the marriage unless proceeding for nullity of the marriage had been adopted by the parents. This is an anomalous and startling position which could hardly have been contemplated. The language of the section borrowed from the English enactment is plain and unambiguous and it would be straining the language beyond permissible limits to say that such cases also are within the ambit of the section. It is submitted that this is a *casus omissus* which the court cannot reach and no canon of construction permits the court to supply what is clearly a lacuna in the statute and it is for the Legislature to set the matter right by appropriate amendment of the section.

In the undermentioned (*b*1) case the view has been expressed that it is only when a decree of nullity is granted in respect of any marriage under sections 11 or 12 that any child begotten or conceived before the decree is made can be deemed to be legitimate. But where no such decree has been obtained no part of the section can be invoked for the purpose of legitimatising an issue borne of a void marriage.

No opinion was expressed on the question whether in case of such a void marriage an application for nullity could be made by a spouse after the death of the other spouse. But it was observed, it is submitted rightly, that since the decree of nullity amounts to a declaration of status of a person there is no reason why death of the other spouse should put an end to the right of the surviving spouse to seek any such declaration of status.

**Void or voidable "under Section 11 or Section 12".** The section applies to children of marriages void or voidable under sections 11 and 12. Section 11 applies only in case of a marriage solemnized after the commencement of the Act and, as already pointed out, the question whether a ceremonial marriage between Hindus performed before the Act came into operation is valid or void is governed by the previous law. That section does not apply to children of any such marriage with the result that the question of legitimacy of the children of any such marriage must be determined by the rules of Hindu law governing the parties and not by the express enactment contained in this section. Section 12, however, speaks of any marriage solemnized before or after the commencement of the Act and the present section, therefore, applies to the children of any such marriage if the marriage is annulled by the court on any of the grounds mentioned in section 12.

**". . .shall be deemed to be their legitimate child".**—It is by a *fictio juris* that children born of a marriage void or voidable under the Act are to be regarded as the legitimate children of the parents. The effect of this fiction of law is that for all intents and purposes including rights of inheritance and succession the children on the one hand and the parents on the other are to be regarded as if the children had been the legitimate children of the parents.

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(*b*1) *Thulasi Ammal* v. *Gouri Ammal* ('64) A.M. 118.

When a statute enacts that something shall be deemed to exist or some status shall be deemed to have been acquired which would not have been so but for the enactment the court is entitled and bound to ascertain for what purpose and between what parties the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The following statement of the principle by Lord Asquith in a decision of the House of Lords (*c*) was quoted with approval by the Supreme Court (*d*): "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied. . . . The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

See illustrations below.

**Proviso.**—The proviso to the section engrafts an exception to the fiction of law whereby the status of legitimate children is conferred upon the issue of a marriage which is null and void and is declared null and void or annulled by a decree of nullity by operation of the provisions of the section. The effect of the rule laid down in the proviso is that such children cannot by relying on the status conferred on them by this section claim any right in or to the property of any person other than their parents. The proviso might have been more explicitly worded. It does not say that conversely persons other than the parents cannot by operation of the fiction created by the section claim any right in or to the property of the children who are to be deemed to be the legitimate children of their parents and leaves it to be understood as a necessary inference. The proviso read as a whole would seem to indicate the converse rule that no persons other than the parents can claim any right in or to the property of such children by operation of the rule laid down in the section.

*Illustrations*

(1) *A* was married to *B* before the Act came into operation. The marriage was performed in accordance with the requisite ceremonies but was invalid as the parties were related to each other within the prohibited degrees. *C* a son born of the marriage is not the legitimate son of *A* and *B* and is not entitled to claim any right or interest in the property left by *A* or *B* by operation of the rule laid down in this section. The rights of *C* quod the property of *A* or *B* will be governed by the rules of Hindu law relating to illegitimate children. In case of death of *A* or *B* after the coming into operation of the Hindu Succession Act, the rights of *C* in matters of succession to the property of such parent will be governed by the rules laid down in that enactment.

(2) *A* was married to *B* before the Act came into operation. The marriage was performed in accordance with the requisite ceremonies. *C* a son was born of the marriage. *B* thereafter obtains a decree of annulment of the marriage (section 12) on the ground that her consent to the marriage was obtained by fraud practised upon her by *A*. The decree of annulment will operate as from the date of the marriage but *C* will be deemed to be the legitimate child of *A* and *B*. There will be mutual rights of inheritance and succession between *C* and his father *A* and *C* and his mother *B*.

The same will be the position if the marriage of *A* and *B* in the above case had been solemnized after the Act came into operation.

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Nandurang (1953) S.C.R.

(3) *A* was married to *B* after the Act came into operation and the marriage was solemnized in accordance with customary rights and ceremonies. *C* a son was born of the marriage. The marriage was void as *A* had another wife living at the time of the marriage and the marriage was declared null and void in a petition presented to the court. Notwithstanding the decree of nullity *C* will be deemed to be the legitimate child of *A* and *B* and entitled to succeed to the property of *A* as an heir under section 8 of the Hindu Succession Act, 1956, read with class I of the Schedule to that enactment. *C* will also be entitled to succeed to the property of *B* under section 15 of the enactment. Conversely *B* will be entitled to succeed to the property of *C* as mother under section 8 of that enactment read with class I of the Schedule to the same and failing any heir of *C* falling under Class I of that Schedule, *A* will become entitled to succeed to the property of *C* as father who is one of the heirs specified in class II of the Schedule to that enactment. The position of children in the above case will be the same for instance if proceeding had been adopted in court for a declaration of nullity of the marriage of the parents and decree granted on the ground that the marriage was void as being in contravention of the rule relating to the bar of sapinda relationship.

(4) In none of the cases illustrated above *C* can claim to inherit the property of any person other than *A* or *B* solely by operation of the status of legitimacy conferred on him by this section; and conversely, it is submitted, no person other than *A* or *B* can claim to succeed to the property of *C* solely relying on the rule relating to legitimacy enacted in this section. In certain cases reliance may be placed on the provisions of the Hindu Succession Act, 1956, under which illegitimate children are deemed to be related to one another [Proviso to section 3(1)(j)].

**17.** Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code (XLV of 1860) shall apply accordingly.

Punishment of bigamy.

Sections 11 and 17 do not offend Article 15(1) of the Constitution (*d*1).

Clause (1) of section 5 introduces monogamy in the law applicable to Hindus by enacting as an essential condition of marriage that neither party must have a spouse living at the time of marriage. A marriage in contravention of that condition is a nullity. A prior subsisting marriage is a civil disability which renders marriage with any person whose prior marriage is subsisting void *ab initio* with the result that the parties to such marriage are not husband and wife. Section 11 lays down *inter alia* the rule that any such marriage solemnized after the commencement of this Act is void. This section also in terms lays down that such marriage is void. This section reproduces that rule and also declares that the provisions of sections 494 and 495 which impose punishment for the offence of bigamy are applicable in case of any such marriage.

**"Solemnized": Proof of Solemnization.**—It now clearly emerges from decisions of the Supreme Court that *prima facie* the expression "whoever—marries" in section 494 of the Penal Code must mean "whoever marries validly" and "whose marriage is a valid one". If the marriage is not a valid one according to the law applicable to the parties, no question of its being void by reason of its taking place during the lifetime of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of the law. One of the conditions of a

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(*d*1) *Sambireddy* v. *Jayamma* ('72) A.A.P. 156 (F.B.).

valid marriage under the Act requires that it must be "solemnized". The word 'solemnize', in this connection means to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and in due form it cannot be said to be solemnized. It is therefore essential for the purpose of this section that the marriage, to which section 494 of the Penal Code applies on account of this section, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom. It has accordingly been held by the Supreme Court in the undermentiond cases that the alleged bigamous marriages were not proved to have been 'solemnized' and orders of conviction for the offence of bigamy were set aside (*d*2). The view was also taken that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case (*d*3). The legal position summarised above was reaffirmed by the Supreme Court in a recent decision (*d*4). It has also got to be shown that the first marriage was a valid marriage duly solemnized.

*Injunction.*—There is no provision of the Act under which a wife apprehending a second marriage by her husband can ask for an injunction restraining the husband from committing bigamy. Such marriage would be void. The present section applies only when bigamy is committed (*d*5).

Reference may be made to the Notes under section 11.

*Venue of trial.*—The jurisdiction to deal with an offence under this section read with section 494 of the Penal Code will be governed by section 177 of the Criminal Procedure Code and not section 19 of this Act (*d*6).

Punishment for contravention of certain other conditions for a Hindu marriage.

**18.** Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v) and (vi) of section 5 shall be punishable—

(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

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(*d*2) *Bhaurao* v. *State of Maharashtra* ('65) A.S.C. 1564; *Kanwal Ram* v. *Himachal Pradesh Administration* ('66) A.S.C. 616.

(*d*3) *Kanwal Ram supra.*

(*d*4) *Priya Bala* v. *Suresh Chandra* ('71) A.S.C. 1153. Also see *Rabindra Nath Dutt* v. *State* ('69) A.C. 55; *Bolaram* v. *Suryaja* ('69) A. Assam 90; *Ram Singh* v. *Sushila Bai* ('70) A. Mys. 201; *Rabindra Kumar* v. *Prativa* ('70) A. Tripura 30; *Phankari* v. *State* ('65) A.J. & K. 105; *Subbarayudu* v. *Venkatiah* ('68) A.A.P. 107. Also see *In re Raghava Reddy* ('68) A.A.P. 117 (Custom of Reddi Community in Telangana).

(*d*5) *Umashankar* v. *Radha Devi* ('65) A.P. 220.

(*d*6) *Krishnaswami* v. *Krishnaswami* ('67) A.M. 241.

(c) in the case of a contravention of the condition specified in clause (vi) of section 5, with fine which may extend to one thousand rupees.

No commentary is called for on this beyond the Note of the Joint Committee: "It is desirable to provide for the punishment of persons contravening the other important conditions for a Hindu marriage specified in clause 5 (S. 5). Clause 17 (S. 17) has already made provision for the punishment of bigamous marriages and this clause seeks to punish persons who contravene the conditions specified in sub-clauses (iii), (iv), (v) and (vi) of clause 5 (S. 5). In framing the punishment the Joint Committee have had in mind the gravity of the offence in each case and the punishments prescribed for certain similar offences in the Child Marriage Restraint Act, 1929." The words in the initial part of the section are explicit and make it abundantly clear that punishment is prescribed under it only on the parties whose marriage is solemnized in contravention of the specified conditions. The section may be read with the provisions of the Child Marriage Restraint Act, 1929.

## JURISDICTION AND PROCEDURE

Court to which petition should be made.

**19.** Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

**"Petition".**—Where a "suit" instead of a "petition" as required by this section is filed in a court having jurisdiction under this Act to entertain the same the judgment and decree passed by such court would not be without jurisdiction (*d7*).

**Jurisdiction.**—This section lays down certain rules relating to jurisdiction. It is only the 'district court' as defined in section 3(*b*) that has jurisdiction to entertain and try matters arising under the Act (*e*). [See "District Court" *infra*]. The section regulates the venue and lays down that any petition under the Act, for instance for judicial separation or divorce, shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

(i) the marriage of the parties was solemnized; or

(ii) the husband and wife reside at the time of the presentation of the petition; or

(iii) the husband and wife last resided together.

Three possible territorial limits are contemplated by the section for the purpose of jurisdiction. One is the territorial jurisdiction of a district court

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(*d7*) *Krishneshwari* v. *Ramesh Chandra* ('65) A.A. 228. Also see *Umashankar* v. *Radha* ('67) A.P. 220.

(*e*) This section has no application to the trial of any offence created by the Act which must be tried by the courts empowered to try criminal cases: *Gowri Thimma Reddy* v. *The State of Andhra Pradesh.* Nor has the section application to a suit for divorce based on customary law saved by operation of S. 29(2).

within which the marriage was solemnized referring thereby to the place where the rites and ceremonies of the marriage were performed. No question of residence of the parties arises when a petition under the Act is presented to such court. The other two relate to the place of residence of the parties within the territorial limits of a "district court." The expression "the husband and wife reside or last resided together" is used in section 3(3) of the Indian Divorce Act, 1869. The word "together," in the expression "the husband and wife reside or last resided together", it was held, under that Act, governs only the words "last resided" and not the word "reside." The district court has, therefore, jurisdiction to hear any petition under the Act where the parties last resided together outside its jurisdiction but at the date of the petition are residing within its jurisdiction but separately from each other (*f*). The parties might have after their marriage resided together in more places than one in India. In such a case the question where they last resided together would be material for the purpose of jurisdiction because it is their residence in the last of such places that gives jurisdiction to the court and not their residing together in any other place or places prior to that. The place where the husband and wife last resided together contemplated by the section is a place within the jurisdiction of any district court in India and therefcre if the husband and wife after residing together for some time at any place in India go to a foreign country and after residing there begin to live separately the district court within whose jurisdiction they last resided in India would have jurisdiction to entertain a petition under the Act (*g*). The section gives the petitioning spouse the choice of selecting the forum either as the district in which the marriage was solemnized or the district where the husband and wife last resided together with the further choice that the petition may also be presented to the district court within whose local jurisdiction the parties may be residing at the time of the filing of the petition. This last can of course only be possible if both the parties, though living separately from each other, happen to reside within the jurisdiction of the same district court at the date of the filing of the petition.

". . .**reside . . . resided . . .**"—The word 'reside' or 'resided' has to be construed according to the supposed intention of the Legislature. The cognate expression "last resided" takes colour from the word "reside" and the same meaning should be given to these words (*g*1). The word reside is capable of being understood in its ordinary sense of having one's home or dwelling permanently, as well as in an extended sense. A mere sojourn which is casual or what is sometimes described as "mere passage residence" or the residence of a traveller passing from one place to another on his travels would not be such residence as is sufficient in law. The residence, however, need not necessarily be permanent. It would be enough if it is *bona fide*, with an element of continuity about it so that even if temporary it is something more than being merely casual or for a passing purpose. There must be *animus manendi*. There are decisions under other matrimonial enactments where the identical words "reside" and "last resided" have been used and

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(*f*) *Borgonha* v. *Borgonha* (1920) 22 Bom. L.R. 361, 44 Bom. 924, *Kershaw* v. *Kershaw* ('30) A.L. 916, 918; *Leadon* v. *Leadon* ('26) A. Oudh 319; *Walsh* v. *Walsh* (1927) 29 Bom. L.R. 308, 311.

(*g*) *Desouza* v. *Desouza* (1935) 37 Bom. L.R. 55.

(*g*1) *Jagir Kaur* v. *Jaswant Singh* ('63) A.S.C. 1521, 1524.

there are cases on either side of the line on the question as to when residence which though temporary can be said to amount to residence within the meaning of these words. In the ultimate analysis the decision must largely rest on the facts and circumstances of the particular case. In *Jagir Kaur* v. *Jaswant Singh* (*g*2) decided by the Supreme Court, which was a case under section 488 of the Criminal Procedure Code, the words "resides" and "last resided" came up for consideration. Although the analogy cannot be said to be perfect, the observations made there are sure to be very useful in cases arising under the present section: "a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen a particular place his abode depends upon the facts of each case."

The residence must be *bona fide* and not casual or as a traveller (*i*) or taken up merely for the purpose of presenting a petition to any particular court and with a view to enabling that court to entertain the same. A person who merely comes in and uses his presence at a place within the jurisdiction of a court as the means of obtaining the benefit of the rule cannot be said to reside at that place. "Taking the word (residence) in its ordinary acceptation, it conveys the idea, if not of permanence, at any rate of some degree of continuance; . . . To serve as a foundation for this important branch of the court's jurisdiction . . . the residence . . . must be something more than occupation during occasional and casual visits within the local limits of the court, more especially where there is a residence outside those limits marked with a considerable measure of continuance" (*j*).

Some different considerations, however, must arise in case of persons who do not have any fixed home or settled abode at any particular place. Every person is deemed in law to have some place of residence and so if he has no fixed home question may arise whether he can be said to reside at the place where he is actually staying at the time of the filing of the petition. And where the husband and wife did not have any fixed marital home at any place after their marriage question may arise whether they can be said to have resided together where they last lived together. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is applicable and the context in which it is found. It does seem, therefore, that in cases of the nature indicated above a somewhat extended meaning would be given to the words "reside" and "last resided together." In a number of cases decided under the Indian Divorce Act, 1869, some of which (*k*) were characterised as extreme ones in a later decision of the Bombay High Court (*l*), a very wide and extended meaning was given to these words and husband and wife who had last lived together at any place for a few days were held for the purpose of jurisdiction to have "last resided together" at that place. It was pointed out in the above decision that those extreme cases could not be taken as a start-

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(*g*2) ('63) A.S.C. 1521, 1524. Also see *Desouza* v. *Desouza* above; *Lalithamma* v. *Kannan* ('66) A. Mys. 178. Reference may also be made to *Saroja* v. *Emanuel* ('65) A. Mys. 12 (spouses having no common permanent home).

(*i*) *Wadia* v. *Wadia* (1913) 15 Bom. L.R. 593, 602; *Panthaky* v. *Panthaky* (1941) 43 Bom. L.R. 569, 574-576; *Carol* v. *Carol* ('33) A.A. 39. Also see *Robey* v. *Robey* ('31) A.C. 121; *Flowers* v. *Flowers* (1910) 32 All. 203.

(*j*) *Banerjee* v. *Banerjee* (1899) 3 Cal. W.N. 250.

(*k*) *Bright* v. *Bright* (1909) 36 Cal. 964; *Murphy* v. *Murphy* (1920) 22 Bom. L.R. 1077.

(*l*) *Walsh* v. *Walsh* (1927) 29 Bom. L.R. 308, 311. Reference may also be made to *Saroja* v. *Emmanuel* ('65) A. Mys. 178.

ing point in considering the question of the duration of so-called residence. Moreover, it must be noticed that, although the identical expressions are used in both the enactments, those decisions were under an Act the scheme of which on the point of jurisdiction was in some respects different and an examination of those cases will show that in some of them the courts acted with considerable hesitation (*m*). It is submitted that the expression should neither be strained to amplify the jurisdiction of the court nor narrowed to minimise it. They permit of being understood in a broad and somewhat elastic sense in case of parties who did not or do not have any place of abode of a permanent character. They do not, however, in the context of the present enactment permit of the very wide import given to them in some of those decisions. Even in the broad sense attributable to them there must be some element of a home or abode because the residence of a person is by implication a home of that person. Mere casual or temporary visit to a place or temporary sojourn in a place would not satisfy the requirement of the section. There must be an element of continuance though the degree of continuance is not capable of precise definition.

**Denial of marriage.**—The court which entertains any petition under this section would necessarily have jurisdiction to decide the issue of existence of the relationship of husband and wife (*mm*).

**District Court.**—It is only the "district court" as defined in section 3(*b*) that has jurisdiction to entertain and try matters arising under the Act. According to section 3(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act. A court coming within the purview of this definition has exclusive jurisdiction and therefore a Munsif (not invested with jurisdiction under section 3) has no jurisdiction to decide, for instance, a petition for restitution of conjugal rights filed after the coming into operation of the Act (*m*1). So also exclusive jurisdiction has been conferred on the City Civil Court (Calcutta) without any qualification and a suit for declaration of nullity of marriage cannot be brought on the Original Side of the Calcutta High Court (*m*2).

A Division Bench of the Calcutta High Court (*m*3), disagreeing with a decision of the Punjab High Court (*m*4) has taken the view that the effect of the present section read with section 3(*b*) is that the proceeding is to be started before the District Judge, that is the application on which it would commence, would have to be presented before him and that he alone would have the power to entertain it or its initiation but once it is entertained by him, it is amenable to his powers of assignment or transfer under the relevant

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(*m*) For instance see *Bright* v. *Bright*, 36 Cal. 964, 966.

(*mm*) *Gurdial Kaur* v. *Mukand Singh* ('67) A. Punj. 235.

(*m*1) *Bootan Bai* v. *Durgaprasad* ('59) A.M.P. 410; *Bikram Singh* v. *Sudarsan Singh* ('61) A. All 150; *Balwant Kunwar* v. *Addl. Munsiff, Dehra Dun* ('59) A. All. 7; *Bharawan Bai* v. *Lila Ram* ('63) A. Punj. 118. Also see *Pushpadevi* v. *Radhey Shyam* ('72) A. Raj. 260.

(*m*2) *Monika Das Gupta* v. *Promode Kumar* ('60) A.C. 577.

(*m*3) *Ajit Kumar* v. *Kanan Bala* ('60) A.C. 565; 64 C.W.N. 246. Also see *Ram Pal* v. *Ajit Kaur* ('62) A.J. & K. 42. Reference may also be made to *Rajamma* v. *Krishnama* ('64) A.A.P. 460.

(*m*4) *Janak Dulari* v. *Narain Dass* ('59) A. Punj. 50.

Civil Courts Act and such powers have not been taken away or curtailed by the present Act.

On the question of "District Court" and jurisdiction reference may be made to the undermentioned cases (*m*5).

Reference may be made to the undermentioned case regarding the area or territory over which a judge empowered by Notification can exercise the special jurisdiction (*m*6).

Reference may also be made to Notes under S. 3(b) *ante*.

**20.** (1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

Contents and verification of petitions.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

Sub-section (1) requires that the petition for any relief under the Act must distinctly set out the nature of the case and the facts on which the claim to relief is founded. It is also necessary for the petitioner to state in the petition that there is no collusion between the parties to the marriage. Section 21 rules that subject to the provisions of the Act and Rules that may be made by the High Court under the Act all proceedings shall be regulated by the provisions of the Civil Procedure Code. The Rules framed by the various High Courts under section 21 of the Act require that, in addition to the particulars required to be given under Order VII, r. 1, of the Civil Procedure Code and sub-section (1) above, every petition for judicial separation, nullity of marriage and divorce shall contain certain particulars. It is incumbent on the petitioner to state in the petition all those particulars to enable the respondent or respondents to meet the allegations made by the petitioner. The Rules made by the High Courts in most cases require that every petition under the Act shall be accompanied by a certified extract from the Hindu Marriage Register maintained under section 8 of the Act. They also provide for impleading the necessary parties to such proceedings; for contents of application for leave under section 14 of the Act; for contents of written statement by respondent in answer to the petition; for contents of intervenor's petition and answer to the same; and contents of application for alimony and maintenance.

Sub-section (2) rules that the statements contained in every petition shall be verified by the petitioner or some other competent person in the manner

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(*m*5) *Narendra Nath* v. *Sudarshan Sekhar* ('69) A. Manipur 93 (additional district judge); *Laxman Singh* v. *Kesharbai* ('66) A.M.P. 166 (Madhya Pradesh Civil Courts Act); *Girwar Singh* v. *Premavati* ('72) A.A. 474 (Judge Small Causes Court enjoying powers under S. 3(b)); *Dal Chand* v. *Swarn Pratap* ('65) A.A. 46; *Krishnaswami* v. *Ramesh Chandra* ('65) A.A. 228; *Laxmansingh* v. *Kesarbai* ('66) A.M.P. 166.

(*m*6) *Tayawwa* v. *Chinnappa* ('62) A. Mys. 130

required by law. Order VI, Rule 15, of the Civil Procedure Code, lays down the mode of verification of pleadings.

**"Statements . . . in petition . . . may be referred to as evidence".**—Under the general rules of practice and procedure the verification of a plaint is not evidence on which a suit can be decreed even if the defendant does not appear at the hearing (*n*). In England the Divorce Court has a discretion to allow affidavit evidence but the view that is preferred is that as a general rule such evidence should not be allowed save in exceptional cases (*o*). Section 47 of the Indian Divorce Act, 1869, contains a provision similar to that in the present section. In a Bombay case it was pointed out that although technically, the court is entitled to refer to the allegations in a properly verified petition the court should invariably follow the practice that the parties must give *viva voce* evidence in every case unless there are some very good reasons to the contrary (*p*). It is submitted that the ordinary practice should be departed from in cases under the Act only in exceptional circumstances. The court has a discretion vested in it but the discretion would be exercised sparingly and with caution and only in special and extraordinary situations.

Application of Act V of 1908.

**21.** Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908).

**Procedure regulated by Civil Procedure Code and High Court Rules.**—Except as is otherwise provided in the Act, all matters of procedure under the Act are to be regulated by the Civil Procedure Code. This section confers on the High Court power to make rules regulating the procedure to be adopted for the purpose of carrying into effect the various provisions of the Act. The rules to be framed by the High Court must be only for the specified purpose and consistent with the provisions of the Act both substantive and adjectival. There are a number of sections in the Act which lay down rules touching matters of procedure and any rule framed by the High Court which is inconsistent with or deprives a person of the benefit of any of those rules would be of no effect and would be *ultra vires* the powers of the High Court in that behalf. Section 41 of the Special Marriage Act, 1954, recognises the rule-making powers of the High Court but the rules framed under that Act must be consistent both with the provisions of the enactment itself as well as the provisions of the Civil Procedure Code. It may be noted that it is not necessary that the rules framed by the High Court under this Act should be consistent with the provisions of the Civil Procedure Code. In matters relating to which there is no provision in the Act and are not regulated by the Rules

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(*n*) *Ross & Co.* v. *Scriven* (1916) 43 Cal. 1001, 1010-1012, 34 I.C. 235.

(*o*) *Gayer* v. *Gayer* (1917) P. 64 (C.A.); *Studdy* v. *Studdy* (1859) 1 Sw. & Tr. 321, 324. Also see Rule 25 of the Matrimonial Causes Rules, 1950. In recent years courts in England show some leniency in the matter of allowing affidavit evidence when there is no danger of injustice being done.

(*p*) *Premchand* v. *Bai Galal* (1927) 29 Bom. L.R. 1336, 1345. Also see *Kaushalya* v. *Lal Chand* ('72) A. Raj. 253.

made by the High Court the procedure to be followed under the Act in all proceedings must be regulated, as far as may be, by the Civil Procedure Code. It has accordingly been held that the provisions of Order 7 Rule 1 (*pp*), Order 9 Rr. 8, 9 and 13 and Orders 11 and 22 of the Code apply to proceedings under this Act (*p*1). So also would the provisions of section 100 of the Civil Procedure Code relating to second appeals be applicable to decrees passed under this Act. The scope of the second appeal would be the same as that under the Civil Procedure Code and the High Court will not interfere with a finding of fact (*p*2).

**"Decree": Section 2(2) C.P. Code.**—See Notes under section 28 *post*.

**Inherent powers of Court: Stay of Proceedings.**—In proceedings under the Act the Court regulates the same by the Code of Civil Procedure and if necessary will have recourse to its inherent powers under the Code (S. 151) on principles which are well-established. Court does not compel a wife who has obtained an order for maintenance *pendente lite* and costs under section 24 *post* to take out execution proceedings where the order is not carried out by the other party and in case of proceedings by the husband for any relief under the Act will stay the same till the interim order is carried out (*p*3).

**Provisions of the Act touching matters of procedure.**—There are some provisions of the Act which relate to procedure and some which only incidentally affect procedural matters. Sections 19 to 28 of the Act are headed "Jurisdiction and Procedure" and must particularly be referred to in all matters arising under the Act:

S. 19 deals with the question of jurisdiction;

S. 20 lays down rules relating to contents and verification of petitions;

S. 21 deals with power of the High Court to make rules regulating the procedure to be adopted in proceedings under the Act. Subject to such rules, all proceedings are to be regulated by the Civil Procedure Code;

S. 22 permits of proceedings under the Act being conducted *in camera;*

S. 23 deals *inter alia* with the standard of proof and casts on the court the duty, where it is possible so to do, to endeavour to bring about a reconciliation between the parties;

S. 24 deals with orders for maintenance *pendente lite* and costs;

S. 25 deals with orders for permanent alimony and maintenance;

S. 26 deals with matters affecting custody of minor children;

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(*pp*) *Dal Chand* v. *Swarn Pratap* ('65) A.A. 46; *Chander Prakash* v. *Sudesh Kumari* ('71) A. Delhi 208 (Or. 7 R. 7).

(*p*1) *Tirukappa* v. *Kamalamma* ('66) A. Mys. 1; *Gangadevi* v. *Krushna Prasad* ('67) A. Orissa 19; *Suhas Pande* v. *Manohar Pande* ('71) A.B. 183 (Order 22). Also see *Sunanda* v. *Venkata Subba Rao* ('57) A.A.P. 424; *Sunanda* v. *Gundopant* ('61) A. Bom. 225; (1961) Bom. 296; 63 Bom. L.R. 125.

(*p*2) *Jicubai* v. *Ningappa* ('63) A. Mys. 3; *Kusum Lata* v. *Kampta Prasad* ('65) A.A. 280.

(*p*3) *Anita* v. *Birendra Chandra* ('62) A.C. 88; *Bhuneshwar Prasad* v. *Dropta Bai* ('63) A.M.P. 259; *Malkan Rani* v. *Krishna Kumar* ('61) A. Punj. 42; *Dr. Tarlochan Singh* v. *Mohinder Kaur* ('63) A. Punj. 249 (1963) 1 Punj. 74. Also see *Halsbury's Laws of England* 3rd Ed. Vol. 8 p. 22 § 41; *Ramappa* v. *Bojjappa* ('63) A.S.C. 1633; *Ramachandra Rao* v. *Kowsalya* ('69) A. Mys. 76.

S. 27 deals with matters affecting certain property which may jointly belong to the husband and wife;

S. 28 relates to enforcement of decrees and orders and appeals against decrees and orders in proceedings under the Act.

**Appeal.**—The principles on which a Court of Appeal interferes with findings of fact by the court of first instance are well established. Equally well established are the principles which guide the Court of Appeal when it is asked to examine orders passed by the court of first instance in the exercise of its discretion. Reference may be made to Notes under section 28 *post.*

**Co-respondent.**—Under the rules made by some of the High Courts it is provided that in every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner "shall" make such person a co-respondent (*p*4). In the undermentioned case it has been held that under the rules framed by the High Court of Punjab an adultress joined as a co-respondent is neither a necessary nor a proper party in a petition filed by a wife against her husband on ground of adultery (*p*5).

**Intervention: Power of court to allow intervention on terms.**—Section 31 of the Matrimonial Causes Act, 1950, lays down the following rule:

> "In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just."

The Special Marriage Act, 1954, does not contain any similar provision but section 41 of that enactment in recognising the power of the High Court to make rules regulating procedure draws particular attention to the desirability of framing rules on the question of 'intervention' in certain proceedings by any person not already joined as a party.

Rules framed by some of the High Courts under the present Act do not provide for 'intervention.' Where the rules framed by a High Court under the present Act do not contain any provision on the question of intervention, doubt may arise whether it would be competent to the Court under Order 1, R. 10 (2) of the Civil Procedure Code, to permit intervention by any person not joined as a party to the proceeding. Serious doubt was raised about the power of the court in this behalf in some matters arising under the Divorce Act, 1869 (*q*). It would be clearly in the interest of justice that a party who is named in proceeding under the suit as being a person with whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been made in the petition. The question is one of importance and it is submitted that the power of the court *ex proprio motu* to direct addition of a proper party in order to enable it effectually and completely to adjudicate upon and settle all the questions in the matter, under sub-rule (2) of Order I, rule 10

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(*p*4) For instance see *Maganlal* v. *Dahi* ('71) A. Guj. 33.

(*p*5) *Sarla* v. *Shakuntala* ('66) A. Punj. 337.

(*q*) *Stuart* v. *Stuart* (1935) 57 All. 884. And see *Ramsay* v. *Boyle* (1903) 30 Cal. 489.

of the Code, if liberally interpreted, is wide enough to enable it to direct addition of any such party.

**Cross-petitions.**—Under the Special Marriage Act, 1954, the court can give relief to the respondent on petition for divorce without a separate petition for the purpose. Section 35 of that enactment is as under:

> "If in any proceeding for divorce, the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

The present Act does not contain any similar provision. It seems that the Legislature did not deem it necessary to make any express provision for cross-petitions but left the matter to be dealt with by the High Court under the rule-making power conferred by section 21.

**Damages.**—Rules framed by some High Courts contain express provision relating to granting of damages against a co-respondent. Question may arise whether in the absence of any such special Rule the court can in proceedings under the Act grant damages against a co-respondent. It is submitted that the court would lean in favour of the exercise of such power though the matter is not entirely free from doubt. In *Jaswantrai* v. *Vimal Vaidya* it was held that no such claim can be joined in a proceeding under the Act since the Rules framed by the Bombay High Court (applicable in Gujarat) did not contain any such provision (*q*1).

**Res judicata.**—As a general rule the doctrine of *res judicata* applies as much in matrimonial cases as in others. It is sometimes said that in matrimonial jurisdiction since public interest is an important consideration the matter is not concluded by *estoppel per rem judicatam* and the doctrine cannot operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before the court (*r*). This principle of public interest is sound by itself but apt to create some misapprehension. The question whether the trial of any matrimonial cause or any issue is barred by *res judicata* or not must be decided by reference to sec. 11 of the Civil Procedure Code bearing in mind that the section is not exhaustive of the circumstances in which an issue may be *res judicata*. The application of the rule by the court, as is now well settled, should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. "Charges which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for not only does the common law doctrine of estoppel apply, but since in matrimonial causes a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship. The rule applies not only to the actual point of decision in the previous case, but also to every point which properly belonged to the

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(*q*1) ('63) A. Guj. 152: *Rajalingam* v. *Lingayya* ('64) A.A.P. 308 (Rule 9 of the High Court Rules).

(*r*) *Hudson* v. *Hudson* (1948) P. 292, 293; (1948) 1 All E.R. 773.

subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (*s*).

A distinction, however, must be made between *res judicata* as against a party charged with a matrimonial offence and as against a party putting forward a charge against the opposite party. It is one thing to say that a party who brings charges is not entitled to repeat allegations which have already been the subject of previous proceedings and have already been determined against him or her and another to say that a party should not be prevented from denying charges brought against him. For in the latter case the statutory duty on the court, to inquire into the truth of a petition which is properly before it, intervenes and a party is not prevented from denying charges and the court sees that relief is not improperly obtained by a petitioner merely through some technical rule (*t*).

A wife filed a petition for relief on the ground of her husband's adultery and cruelty. The charges were denied and her petition was dismissed. She then filed a petition for relief on the ground of the husband's desertion. It was held that: (i) since the allegation of adultery had been dismissed in the previous petition she could not now allege that she had reasonable grounds for belief in such adultery; (ii) the allegations of threats of violence and of actual assault, which repeated the allegations in the previous petition, had been held not to amount to cruelty and could not now be relied on as "grave and weighty matters" to support a charge of constructive desertion; (iii) other allegations relied on as constructive desertion were such as could and should have been raised in the earlier proceeding in support of charge of cruelty and not having been specifically raised they could not now be relied on: (iv) but the remaining allegation of desertion *simpliciter* had not been investigated in the former petition and could be tried in the second petition (*u*).

The undermentioned cases afford some illustrations of the applicability and inapplicability of the doctrine of *res judicata* in matrimonial cases (*u*1).

**Costs.**—In matrimonial causes costs are in the absolute discretion of the court and in determining whether an unsuccessful husband or wife should be directed to pay the costs of the other party each case must be considered on its own merits and there is some indication in the Act itself that the discretion of the court being unfettered it may have regard to the question whether the unsuccessful spouse has separate means sufficient to pay the costs (*v*). The practice under analogous enactments has been not to make any order for costs against an unsuccessful wife unless she has separate means sufficient to pay the costs. If her petition was groundless or if she had made wild charges against the husband the court took that into consideration and not only refused to make any order for costs in her favour but mulcted her in costs (*w*). The scheme of the present enactment is not to sanction any practice as to costs simply for the reason that such practice was followed under other analogous legislation but to leave the matter of costs to the discretion of the court and treat both the husband and wife on the same footing as would appear from

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(*s*) This statement of the law given in an unexceptionable way in *Rayden on Divorce* was quoted with approval in a case: *Bright* v. *Bright* (1953) 2 All E.R. 939, 947. Reference may also be made to *H.* v. *H.* (1928) 30 Bom. L.R. 523.

(*t*) *Bright* v. *Bright* (1953) 2 All E.R. 939, 946.

(*u*) *Bright* v. *Bright, supra.*

(*u*1) *Krishna Pillai* v. *Subhadra Amma* ('71) A. Kerala 44 [Judgment in *rem* and *res judicata*]; *Siddaiah* v. *Penchalamma* ('63) A.A.P. 158 [Previous decision by Munsif's Court in a suit for maintenance inoperative as *res judicata* in subsequent suit for judicial separation]; *Kusum Lata* v. *Kampta Prasad* ('65) A.A. 280 [Consolidation of proceedings and *res judicata*].

(*v*) See Section 24.

(*w*) *Milne* v. *Milne & Fowler* (1871) L.R. 2 P. & D. 202, 204; *Millward* v. *Millward and Andrews* (1887) 57 L.T. 569, 570; *Barker* v. *Barker* (1950) 1 All E.R. 812. Reference may also be made to *Noronha* v. *Noronha* (1948) 50 Bom. L.R. 477.

section 24. In any proceeding under the Act the court, it is submitted, would not subscribe to any set practice but would consider each case on its own merits and in exercising its discretion would have regard to the conduct of the parties; the means of the parties; the blame to be apportioned to one or other of the spouses for the break-up of the matrimonial home; and the attitude taken up by the parties in the conduct of the proceeding itself.

**22.** (1) A proceeding under this Act shall be conducted *in camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

Proceedings may be *in camera* and may not be printed or published.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

**Hearing in camera.**—This section lays down certain limitations on the general rule that all suits—including matrimonial suits—should be heard in open court (*x*) and that every court of justice should be open to every person. In *Scott* v. *Scott* (*y*) which is the leading English decision on the subject the view was expressed that the general rule as to publicity must yield to the paramount duty of the court to secure that justice is done and that in exceptional cases it is open to a party in a matrimonial suit to show that justice cannot be done otherwise and to apply for a hearing *in camera* and even for the prohibition of subsequent publication of the proceedings. The rule was not based on the ground of public decency but on the principle that in some cases the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the court (*z*). Section 53 of the Indian Divorce Act, 1869, confers wide powers on the court and lays down that the whole or any part of proceedings under that Act can be heard if the court thinks fit, with closed doors. Section 33 of the Special Marriage Act, 1954, lays down that a proceeding under that Act shall be conducted *in camera* if either party thereto or the court so thinks fit to do. That section and the present section are *in pari materia*.

If either party so desires the proceedings under the Act must be conducted *in camera*. Even where no such desire is expressed by any party the court may in its discretion direct that the proceedings shall not be in open court but bearing in mind the following observations of the Privy Council on the subject which are instructive: "But publicity is the authentic hall-mark of judicial as distinct from administrative procedure. The public at large are directly interested in them (divorce and marriage) affecting as they do, not only the status of the two individuals immediately concerned but, not remotely

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(*x*) Cf. Or. 18, R. 4, Civil Procedure Code.

(*y*) *Scott* v. *Scott* (1913) A.C. 417. Reference may also be made to *McPherson* v. *McPherson* (1936) 38 Bom. L.R. 468 (P.C.); *Cleland* v. *Cleland* (1913) L.T. 744; *Re Martindale* (1894) 3 Ch. 193.

(*z*) See per Lord Loreburn in *Scott* v. *Scott* *supra*.

when taken in the mass, the entire social structure and the preservation of wholesome family life throughout the community" (*a*).

**Restriction on publication and newspaper reports.**—The section also lays down the strict rule that it shall not be lawful for any person to print or publish any matter relating to any proceedings under the Act (including newspaper reports) except with the previous permission of the court. The operation of this restriction is not confined to proceedings held *in camera* and the rule applies to all proceedings under the Act whether held in open court or otherwise. The rule is enacted so that reports of judicial proceedings relating to marital disputes may not produce an unhealthy influence on the public and to control those who cater to the prurient minded members of the public who revel in the unsavoury details of such cases. Any violation of the rule relating to printing and publication of any such matter has been made punishable under sub-section (2). In England there is a special enactment, the Judicial Proceedings (Regulation of Reports) Act, 1926, which regulates the publication of any particulars relating to matrimonial suits. Names of the parties, concise statement of the charges, decision of the court and some other matters are however, permitted to be published and the restrictions are substantially confined to indecent details calculated to injure public morals. The present section lays down that nothing in relation to any such proceeding can be printed or published without the previous permission of the court.

Decree in proceedings.

**23.** (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of sub-section (1) of section 10, or in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted,

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(*a*) *McPherson* v. *McPherson*, 38 Bom. L.R. 468, 473, 474.

then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

**Power and duty of the court.**—This section contains some vital clauses of considerable importance and consequence relating to the power and duty of the court in the matter of granting any of the reliefs recognized under the Act. In the main it follows the language of section 34 of the Special Marriage Act, 1954, in which the Legislature has partly adopted the phraseology of section 4 of the English Matrimonial Causes Act, 1950. But the provisions are not *in pari materia* in all respects.

The initial words of the section adopt the well-established principle of matrimonial law that decrees of dissolution of marriage are to be made only upon strict proof. Consent to a decree, direct or indirect, is not permissible. Proceedings under the Act are not of the character of ordinary suits and the standard of proof required is that the court must be satisfied that the ground for relief is established beyond reasonable doubt. It makes no difference whether the proceeding is defended or not. The court must vigilantly see that all the requirements of law are fulfilled and the safeguards provided in the section are duly observed. The language employed in sub-section (1) clearly shows that clauses (b) to (e) and the latter part of clause (a) lay down certain absolute bars to the granting of any relief under the Act. The words at the close of sub-section (1) "*then, and in such a case, but not otherwise, the court shall decree such relief accordingly*" emphasize that relief in any proceeding under the Act cannot be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief. Such conduct or disability is an absolute bar to the petitioner's right to seek relief from the court. The words also emphasize that connivance, condonation, collusion and unnecessary or improper delay are absolute bars to the granting of relief where they apply to the particular ground on which relief is sought.

Sub-section (1) in effect lays down the following rules:

(1) A decree for restitution of conjugal rights (*b*), judicial separation (*c*), declaration of nullity of marriage (*d*), annulment of voidable marriage (*e*), or divorce (*f*) can be granted only when any ground for granting the relief asked for is established to the satisfaction of the court. See "Standard of Proof" *infra*.

(2) No relief can be granted to the petitioner if any of the absolute bars apply to the facts of the case.

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(*b*) S. 9.
(*c*) S. 10.
(*d*) S. 11.
(*e*) S. 12.
(*f*) S. 13.

The petition must be dismissed if the court is satisfied that the petitioner, though able to establish the ground for granting relief, is in any way taking advantage of his or her own wrong or disability for the purpose of such relief [cl. (a)];

The petition must be dismissed if the court is not satisfied that the petitioner has not in any manner been accessory to or connived at or condoned the act or acts of adultery where the petition is on that ground (*g*), or has not in any manner condoned the cruelty where the petition is on that ground [cl. (b)];

The petition must be dismissed if the court is not satisfied that there is no collusion between the parties [cl. (c)];

The petition must be dismissed if the court is not satisfied that there has not been any unnecessary or improper delay in instituting the proceeding [cl. (d)];

The petition must be dismissed if there is any legal ground for not granting the relief [cl. (e)].

(3) Where the court is satisfied that any ground for granting the relief asked for exists and is also satisfied that none of the bars laid down in the sub-section apply to the facts of the case, *it shall decree such relief.*

**Standard of Proof: Corroboration.**—It is a firmly established rule that the ground for relief in a matrimonial cause should be strictly proved. Reference has already been made to the subject under the heads of desertion (*h*), cruelty (*i*) and adultery (*j*). The standard of proof in case of all proceedings under the Act is that the court must be satisfied beyond all reasonable doubt that the ground for relief is proved and normally the court requires that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated. While the analogies and precedents of criminal law should have no authority in matrimonial causes the court would ordinarily be justified in requiring, not as a matter of law but as a rule of prudence, that where possible corroborative evidence should be led in order to satisfy the court that the allegations made are well founded. As for corroboration in case of adultery it has been observed that corroboration must be independent testimony which connects or tends to connect the offending spouse with the offence. Evidence of mere opportunity is not sufficient to constitute corroboration, since opportunity may or may not be used (*j*1). But there is nothing to prevent the court from passing a decree even on uncorroborated testimony of the petitioner. The background of the case and surrounding circumstances may often furnish some corroborative evidence. In *Bipin Chander* v. *Prabhawati* (*k*) the Supreme Court referred to the law on the

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(*g*) See S. 10(1)(f) and S. 13(1)(i).
(*h*) pp. 714, 715, *supra.*
(*i*) p. 725, *supra.*
(*j*) pp. 730-731, supra.
(*j*1) See *Senat* v. *Senat* (1965) 2 All E.R. 505 and cases there cited.
(*k*) (1956) S.C.R. 838, 59 Bom. L.R. 322; *Vira Reddi* v. *Kistamma* ('69) A.M. 235. Also see *William* v. *William* ('34) A. Pat. 475 [cruelty]: *Joseph* v. *Ramamma* (1922) 45 Mad. 982 [adultery]. Reference may also be made to *Jyotish Chandra* v. *Meera Guha* ('70) A.C. 269 [adultery]; *Sachindranath* v. *Nilima* ('70) A.C. 38; *Galler* v. *Galler* (1954) 1 All E.R. 536; *Fairman* v. *Fairman* (1949) 1 All E.R. 938, (1949) P. 341.

subject in England and observed that though corroboration is not required as an absolute rule of law in proof of a matrimonial offence the court insists upon corroborative evidence unless its absence is accounted for to the satisfaction of the court.

The section requires that before decreeing any relief in any proceeding under the Act *the court must be satisfied*—

(a) that the ground for relief exists, meaning thereby that it is established, and

(b) that to the granting of such relief there is no bar of any kind mentioned in the section.

The expression "satisfied" used in similar context has come up for consideration in England and the question has been discussed whether "satisfied" meant something less than "satisfied beyond reasonable doubt." It would seem from recent decisions that the courts in England have come down on the side of the view that there is no distinction to be drawn between "satisfied" standing alone and the same expression accompanied by the words "beyond reasonable doubt."

In the Supreme Court case mentioned above (decided under a different enactment) it was observed that it was well settled that in proceedings for divorce the petitioner must prove the alleged offence beyond all reasonable doubt. The present section itself lays down a standard and puts adultery, cruelty and other matrimonial offences on the same footing. What is required is that there should be a strict inquiry into the matter. The word "strict" is sufficiently apt to describe the measure and standard of proof and it is submitted that on a true construction, the expression "satisfied" used in this section does not connote anything less than proof beyond reasonable doubt or as it is sometimes said strict proof. The following observation of Lord Macdermott in a case decided by the House of Lords in England (*l*) should prove useful: "The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be satisfied, in respect of a ground for dissolution, with something less than proof beyond reasonable doubt." The evidence must go beyond a mere balance of probabilities and must satisfy what was described as the "guarded discretion of a reasonable and just man".

In *White* v. *White* (*l*1) the Supreme Court was in general agreement with the decision of the House of Lords in *Preston Jones* v. *Preston Jones* (*l*2) as laying down the correct test that the court must be satisfied beyond reasonable doubt about the commission of the matrimonial offence. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. It need not amount to certainty. The Supreme Court has also accepted this

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(*l*) *Preston Jones* v. *Preston Jones* (1951) A.C. 391, (1951) 1 All E.R. 124, 138; Lord Simmonds expressly adopted this language, *ibid*, p. 127. Reference may be made also to *Blyth* v. *Blyth* (1966) 1 All E. Rep. 524 (H.L.).

(*l*1) (1958) S.C.R. 1410.

(*l*2) See f.n. (*l*) above.

principle of proof beyond reasonable doubt in *Bipin Chander* v. *Prabhavati* (*l*3). In England, however, in a later decision in *Blythe* v. *Blythe* (*l*3) some judges in the House of Lords have expressed the view that the word 'satisfied' did not mean satisfied beyond reasonable doubt and a matrimonial offence could be proved by a preponderance of probability and that the degree of probability depended on the gravity of the offence on the principle that "in proportion as the offence is grave so ought the proof to be clear". In *Bastable* v. *Bastable* (*l*3) the court of appeal in England observed that this principle should be applied until the matter has been further considered by the House of Lords and further guidance had been received. The Supreme Court, as already pointed out, has accepted the rule of proof beyond reasonable doubt in case of matrimonial offences and that will continue to be the rule to be applied by courts under the Act. Reference may further be made to Notes under "Condonation" *infra* for standard of proof required to establish condonation.

**Admissions.**—It is not unusual to find observations in some decided cases to the effect that judgment by admission is unknown to matrimonial cases. The court insists on strict proof that is proof beyond reasonable doubt of the matrimonial offence. Therefore, as a matter of practice it does not act on a mere admission or confession unless there is corroboration. There is, however, no absolute rule of law of evidence which precludes the court from acting on an admission. Of course, considerable caution is required and the court will act on any such admission only after ruling out the possibility of any collusion. In *Mahendra* v. *Sushila* (*l*4) the Supreme Court observed:

> "Admissions are to be ignored on grounds of prudence only when the court, in the circumstances of a case, is of the opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it would be proper for the court to act on those admissions without forcing the parties to lead other evidence to establish the facts admitted, unless of course the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted."

**No decree merely by consent of parties.**—It is a well established rule of matrimonial jurisdictions that no judgment for dissolution of marriage can be obtained by consent of parties and it has repeatedly been said that judgment by default or by consent is unknown in matrimonial causes. Consent to a decree direct or indirect is inadmissible as was observed by the House of Lords in the undermentioned case (*l*5). A decree for restitution of conjugal rights may, however, stand on a somewhat different footing. It has been held by a full bench of the High Court of Punjab and Haryana that a consent decree can be passed in such a case in certain circumstances and it will depend upon the facts of each individual case whether such a decree is a good decree or not and if it is so passed it will not amount to a nullity (*l*6). It can form the basis of divorce proceedings under section 13(1A)(ii). A decree for judicial separation passed merely by consent of parties cannot be regarded as valid and the court may decline to grant a decree for divorce under section 13(1A)(i) in case of any such consent decree (*l*7).

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(*l*3) (1956) S.C.R. 838, 852; *Blyth* v. *Blyth* (1966) 1 All E.R. 524 (H.L.); (1966) A.C. 643. Reference may be made to *Bastable* v. *Bastable* (1968) 3 All E.R. 701. Also see *Sachindranath* v. *Nilima* ('70) A.C. 38.

(*l*4) ('65) A.S.C. 364, 372.

(*l*5) *Russell* v. *Russell* (1924) A.C. 687, 736.

(*l*6) *Joginder Singh* v. *Pushpa* ('69) A.P. & H. 397.

(*l*7) *Hirakali* v. *Awasthi* ('71) A.A. 201.

*False defence.*—In matrimonial proceedings the court is so vigilant to see that the burden of proof is properly discharged by the petitioner that though the putting forward of a false defence may destroy the respondent's credibility that in itself is not regarded as sufficient to establish the truth of the petitioner's case. The court does not ignore the possibility that a spouse "conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse" (*l*8).

Though not determinative of the case the court can take into consideration the fact that the respondent had put forward a false defence. It may do so in examining the probabilities of the case and in assessing the case of the petitioner (*l*9).

**". . . whether defended or not'.**—A decree in any matrimonial proceeding under the Act is to be made only upon strict proof of the ground relied upon by the petitioner and it makes no difference whether the proceeding is defended or not. In an *ex parte* case it is not enough for one of the parties to come forward and say something exactly following the terms of the Act. The proper course for the court, in an undefended proceeding, is to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner relies for the relief that is claimed (*m*). The court must watch vigilantly to see that the evidence on which it acts is such only as it is entitled to receive. The fact that by allowing the proceedings to go undefended both the parties appear to be equally anxious to see that relief is granted is precisely a reason why the court should be strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting evidence which is inadmissible (*n*). The court must also satisfy itself that the safeguards provided in the section are duly observed and insist upon corroborative evidence in proof of a matrimonial offence (*n*1).

**Discretion of the court: ". . . then, and in such a case, but not otherwise, the court shall decree such relief accordingly".**—A question of considerable importance and some difficulty must arise as to whether the language of the present section recognizes any discretion in the court in the matter of granting or withholding relief in cases where the ground for granting relief exists and none of the absolute bars laid down in the latter part of cl. (a) and clauses (b) to (e) apply to the facts of the case. The words at the end of sub-section (1) *"then, and in such a case, but not otherwise, the court shall decree such relief accordingly"* suggest that the Legislature has in the present section given a complete enactment and where none of those bars can be shown to apply to the facts of the case the court is bound to give relief and has no discretion to withhold the same. The identical words "then, and in such a case, but not otherwise, the court shall decree such relief accordingly" are used in sub-section (1) of section 34 of the Special Marriage Act, 1954, which deals with duty of court in passing decrees in proceedings under that Act. The language of clauses (b), (d), (e) and (f) of that section is practically identical with that employed in clauses (b) to (e) of the present section. But section 34 of that Act does not contain any rule similar to that in the

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(*l*8) *Preston Jones* v. *Preston Jones supra* per Lord Normand at p. 405. Also see *Bipinchandra* v. *Prabhavati* ('57) A.S.C. 176, 188; *Sachindranath* v. *Nilima* ('70) A.C. 38.

(*l*9) *Vira Reddi* v. *Kistamma supra.* Also see *Mahendra* v. *Sushila supra.*

(*m*) *Walsh* v. *Walsh* (1927) 29 Bom. 308, 310. Also see *Alopbai* v. *Ramphal* ('62) A.M.P. 211.

(*n*) *Russell* v. *Russell* (1924) A.C. 687, 736.

(*n*1) quoted in *Anupama* v. *Bhagaban* ('72) A. Orissa 163.

latter part of clause (a) of the present section which prevents a petitioner from taking advantage of his or her own wrong or disability even though the ground for relief may be shown to exist. That section read with section 35 of that Act although it does not in terms so state would seem to leave it to the court to decide whether relief should or should not be granted to a petitioner who for instance is himself or herself shown to have been guilty of adultery, cruelty or desertion. In any such case the court may give to the respondent the same relief to which she or he would have been entitled if she or he had presented a petition seeking such relief. In England section 4 of the Matrimonial Causes Act, 1950, contains the provisions that the court *is not bound to pronounce a decree* of divorce (nor a decree for judicial separation) and *may* dismiss the petition if it finds that the petitioner has been guilty—

(a) of adultery committed during the marriage, or

(b) of unreasonable delay in presenting or prosecuting the petition; or

(c) of cruelty towards the other party to the marriage, or

(d) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself, from, the other party before the adultery or cruelty complained of; or

(e) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

It will be noticed that the court in England has a discretion in all such cases to grant or withhold the relief claimed by the petitioner even though the ground for relief complained of may be established. Decisions in England show that the discretion vested in the court, though said to be regulated discretion, is in a way unfettered. In *Blunt* v. *Blunt* (*o*) the House of Lords adopted the view that the matters to be considered in the exercise of this discretion cannot be reduced to any rules of an exhaustive character and the utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion. There are on the other hand judicial statements of the nature that a loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon and its exercise is likely to be the refuge of vagueness in decision and the harbour of half-formed thoughts; and that under cover of the word 'discretion' a conclusion is apt to be formed upon a general impression of facts too numerous and minute to be perfectly brought together and weighed and sometimes not perfectly provided (*p*). Perhaps these considerations weighed with the legislature in not adopting the rule of English law on the subject or that in the Indian Special Marriage Act, 1954, to cases to be decided under the present Act. It will also be noticed that the latter part of clause (a) of the present section deals substantially with cases of the nature where discretion is exercised by the court in England on the ground of any wrong or misconduct of the petitioner and enacts that a decree shall not be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of the relief. The scheme and

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(*o*) (1943) A.C. 517; (1943) 2 All. E.R. 76. IP. & D. 644.
(*p*) *Morgan* v. *Morgan and Porter* (1869) L.R.

framework of the English enactment, the Indian Special Marriage Act, 1954, and the present Act are not identical and little, if any, assistance is to be derived from the knowledge that under the analogous enactments a measure of unfettered discretion is vested in the court. To ascertain the law under the present enactment it is necessary to consider the present section as it is and it is submitted that no such discretion as hitherto understood can be exercised by the court in cases to be decided under the present Act and even though it may appear that both the parties are in the wrong, relief should not be denied to the petitioner where the court is satisfied that the ground for relief has been established and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. Reference may be made to Notes under cl. (a) *infra*.

**Petition for divorce: Judicial separation may be granted.**—In a petition for divorce where the court is not satisfied that the ground on which it is founded is established it would be competent to the court to grant relief by way of judicial separation if the evidence before the court is sufficient to satisfy the court that a ground for such relief exists (*q*). The desirable course would be to allow an amendment of the petition, raise a proper issue, and then determine the matter.

**Cl. (a): ". . . taking advantage of his or her own wrong or disability. . . ."**—The latter part of clause (a) read with the words at the end of sub-section (1) "then and in such a case, but not otherwise" makes it abundantly clear that the court cannot pass a decree granting any relief under the Act in favour of a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief and it is not enough that the petitioner has established the ground on which relief is sought; and if that is so his or her own wrong or disability is an absolute bar to the relief sought by the petitioner. The rule is based on the principle of justice that a wrongdoer should not be permitted to take advantage of his or her own wrong or disability while seeking relief at the hands of the court in any matrimonial proceeding. Thus for instance relief on the ground of adultery of the respondent, cannot be granted to a petitioner whose own adultery or any other wrong (such for example desertion) has in any serious degree contributed to the misconduct of the respondent: Similarly no relief can be granted to a petitioner—where the ground of the petition is adultery or unsoundness of mind or desertion and the petitioner has been guilty of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion; or where the ground of the petition is cruelty the petitioner was himself or herself guilty of extreme provocation or of cruelty or had without reasonable excuse deserted or had without reasonable excuse separated himself or herself from the respondent and it appears that in seeking relief from the court on any of these grounds the petitioner is taking advantage of his or her own wrong; and similarly where the ground of the petition is failure on the part of the respondent to comply with a decree for restitution of conjugal rights (*r*) the petitioner has himself or herself prevented compli-

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(*q*) *Browne* v. *Browne* ('37) A. Oudh 52; *Fowle* v. *Fowle* (1878) 4 Cal. 260.

(*r*) See p. 751, *supra*.

ance of the terms of the decree by the respondent. The 'wrong' (*s*) of which a petitioner may be said to take advantage and which disentitles him or her to relief under the Act even if the ground on which the petition is founded is established, though a compendious and a broad phrase, must be understood in a restrictive sense. It is submitted that it means some matrimonial offence on the part of the petitioner or some matrimonial wrong-doing which must be regarded as a grave and weighty matter or as something grave and convincing. And the mere fact that the petitioner also is not free from blame is not enough to invite the operation of the rule. It is of the essence of the application of the rule that the 'wrong' or 'disability' must be of such a grave nature that to grant relief to the petitioner notwithstanding the same would be to permit the petitioner to take advantage of his or her own wrong. Each case must depend on its own facts and circumstances and it is not possible to expect a comprehensive statement as to what may constitute 'wrong' within the ambit of the rule. In arriving at its conclusion the court will certainly have regard to the intendment and scheme of the Act which is to discourage divorce but not withhold relief when the marriage has completely failed or broken down. The present rule is not intended to cause great hardship or drive parties to act in collusion with one another.

Reference may be made to Notes under section 13(1A) (i) and section 13(1A) (ii) *ante*.

Reference may be made to Notes under "Insincerity: Approbation" at pp. 737-738 *supra*.

**Connivance.**—Where the ground for relief is that adultery was committed by the respondent as specified in s. 10 or that the respondent is living in adultery as specified in section 13 it is the duty of the court to inquire, so far as it reasonably can, into the matter and satisfy itself that the petitioner was not accessory to the offence and that there was no connivance on his part of the act or acts complained of. Clause (b) of sub-section (1) lays down this rule.

Connivance is anticipatory willing consent or culpable passive acquiescence in a course of conduct reasonably likely to lead to the commission of adultery. To constitute connivance, active corruption is not necessary but corrupt intention is essential. Passive acquiescence with the intention and in the expectation that guilt will follow may suffice; but there must be the element of consent express or implied. Mere inattention, negligence, folly, dullness of apprehension, or imprudence are not connivance. What is to be considered is the intention of the party and not his wisdom. Where there is active consent the intention is impliedly corrupt and the defence is complete. But where it has to be implied from certain acts or conduct it must be shown to have proceeded from a corrupt motive. The doctrine rests on the principle of the Ecclesiastical Courts that the petitioner cannot take advantage of his own wrong and must "come with clean hands" and has its source and its

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(*s*) The mere fact that a wife was living separate from her husband will not disentitle her from seeking divorce on the ground [section 13(2)] that the husband had married a second wife in case of a marriage solemnized before the Act came in operation: *Mohanlal* v. *Mohan Bai* ('58) A. Raj. 71.

limitations in the maxim *volenti non fit injuria*. It is not necessary, however, to show that the spouse against whom connivance is alleged was an accessory before the fact. That is stated in the section as a separate matter for consideration.

It is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first (*t*).

The expression 'passive acquiescence' used in the present context is apt to be misleading if the element of intention and consent is left out of account. A husband who having reason to suspect that his wife commits adultery seeks proof of it and keeps a watch on her or employs an agent to do so or so conducts himself that the wife gets an opportunity for its continuance is not guilty of connivance if he does nothing to encourage her in the commission of the offence (*u*). But if the petitioner deliberately fosters and encourages situations to arise and knows that adultery is likely to result he is guilty of connivance and it is no answer that the motive was to obtain conclusive proof (*v*).

In a case in England a note of warning was given by Lord Merriman (*w*) which it is submitted must not go unheeded. "Much of the difficulty in dealing with the question of connivance arises from the fact that in the past judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case."

When it is said that connivance is an absolute bar it does not mean that adultery with one person which has been connived at excludes all relief for all time in respect of subsequent adultery with another person. Once the court has found connivance it must investigate all the circumstances, including the lapse of time between the adulteries, and then decide whether or not the connivance has spent its force before the subsequent adultery has been committed (*x*).

**Condonation.**—Clause (b) of sub-section (1) in terms lays down the effect of the doctrine of condonation. It rules in substance that:

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(*t*) *Churchman* v. *Churchman* (1945) 2 All E.R. 190, 194, (1945) P. 44; *Mudge* v. *Mudge* (1950) 1 All E.R. 607. Reference may be made to *Richmond* v. *Richmond* (1952) 1 All E.R. 838.

(*u*) *Douglas* v. *Douglas* (1950) 2 All E.R. 748; *Mudge* v. *Mudge* (1950) 1 All E.R. 607, (1950) P. 173. *Rumbelow* v. *Rumbelow and Hadden* (1965) All E.R. 767 [husband "wilfully blind" to wife's adultery].

(*v*) *Manning* v. *Manning* (1950) 1 All E.R. 602.

(*w*) *Churchman* v. *Churchman* (1945) 2 All E.R. 190, 195.

(*x*) *Gorst* v. *Gorst* (1951) 2 All E.R. 956, 957.

a petition for judicial separation on the ground of adultery specified in section 10(1) (f), or

a petition for divorce on the ground that the other spouse is living in adultery specified in section 13(1) (i), or

a petition founded on cruelty [section 10(1) (b)],

shall be dismissed, unless the court is satisfied that the petitioner has not in any manner condoned the adultery or cruelty.

Adultery and cruelty are in terms stated in clause (b) of this section as condonable marital offences. Clause (b) is also explicit that condonation is an absolute bar to the granting of any relief in case of the offences under sections 10(1) (f), 13(1) (i) and 10(1) (b). The court has no discretion in the matter and if it is satisfied that the petitioner has in any manner condoned the act or acts of adultery or the cruelty complained, the petition must be dismissed.

The Act does not define 'condonation.' Nor has any compendious definition touching all its aspects been judicially given. The generally accepted meaning is that it is forgiveness and reinstatement with knowledge of all material facts. It is regarded as forgiveness express or implied for a breach of a matrimonial offence with the implied condition that the offence will not be repeated. In respect of its operation condonation is described as "blotting out of the offence" so as to restore the offending spouse to the same position which he or she occupied before the offence was committed. The phrase "blotting out of the offence" is not used in this context in its literal sense because an offence having been committed cannot actually be blotted out, and because it is recognised that condonation is always coupled with an implied condition of the offending spouse being in future of good behaviour. Where there is no breach of this implied condition and no fraud in the matter forgiveness stands as complete, absolute and irrevocable. Therefore, condonation consists of a factum of *reinstatement* and *animus remittendi*. It rests on the principle that in a case where *status quo ante* between the spouses has been restored, that which is forgiven must be regarded in the eye of the law as forgotten and obliterated; and since the result is obliteration of the condoned offence it cannot be used for any purpose whatever (unless subsequently revived) and the condoned spouse becomes *rectus et integer*. This is the foundation of the doctrine of condonation (*z*).

Condonation has been the subject of many decisions and dicta in the courts in England. It has been emphasised that there are two elements in condonation, the first being forgiveness, and the second being reinstatement. The implications of condonation were authoritatively stated by Lord Simon L.C. in *Henderson* v. *Henderson* (*a*): Condonation involves forgiveness confirmed or made effective by reinstatement. The essence of the matter is —taking the case where it is the wife who has been guilty of matrimonial offence—that the husband with knowledge of the wife's offence should confirm his forgiveness by reinstating her as his wife. Whether this further rein-

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(*z*) *Chandrabhagabai* v. *Rajaram* (1955) 57 Bom. L.R. 946, 949.

(*a*) (1944) A.C. 49; (1944) 1 All E.R. 44.

statement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. It is clearly established that this forgiveness is conditional—conditional on the condoned spouse thereafter fulfilling in all respects the obligations of marriage—so that, if any matrimonial offence is afterwards committed by him or her—whether or not the same as that condoned and whether or not in itself giving ground for divorce or judicial separation—the condonation ceases to have effect. The offence condoned and all its consequences are for all purposes revived. It is this characteristic of revival of the condoned offence which invited the observation that the expression forgiveness is misleading as an interpretation of condonation since it is only conditional and that the real import of condonation is "a conditional waiver of the right of the injured spouse to take matrimonial proceedings" (*b*). It will be seen that no description of condonation would give its true and full import without stressing its essential characteristic of reinstatement which postulates an intention to forgive and remit the wrong.

Reinstatement of the offending spouse is a prime requirement of the doctrine and mere forgiveness of the matrimonial offence is not sufficient though of course where there is satisfactory evidence of reinstatement after knowledge of the offence it may not be difficult to conclude that the offence was or must be deemed to have been forgiven. There is a distinction between forgiveness and condonation and the distinction lies in the fact that condonation implies a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse (*c*). Reconciliation is the test of condonation. Condonation need not be express; it may be implied from the conduct of the parties and circumstances of the case. Though not a matter of an agreement in the strict sense there must be an intention to forgive on the part of offended spouse and willingness to be forgiven by the other. It is not a unilateral matter.

"Forgiveness" must be understood not in any psychological or theological sense implying that no resentment at the wrong is any longer felt, but in the legal sense as implying merely that the legal remedy is waived (*c*1). Forgiveness must have the element of being mutual. There would be no condonation if the guilty spouse did not wish to be forgiven (*c*2).

Though there is a presumption against condonation which is an affirmative defence it is a defence favoured by the law.

**Knowledge of the matrimonial offence.**—Condonation to be effective and binding must rest on reinstatement and *animus remittendi*. The intention to forgive and subsequent reinstatement must be with knowledge of the material facts of the antecedent guilt. It is sometimes said that condonation can take place only when the offended spouse has full knowledge of all the circumstances of the particular offence forgiven (*d*). Mere suspicion of the offence

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(*b*) *Cramp* v. *Cramp and Freeman* (1920) P. 158. Also see *Perry* v. *Perry* (1952) 1 All E.R. 1076, 1080, (1952) P. 203.

(*c*) *Emmanual* v. *Mandakini* ('46) A.N. 69, 71; *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091, 1109.

(*c*1) Rayden on Divorce 10th Edition p. 284 note (a).

(*c*2) *Ford* v. *Ford* (1970) 3 All E.R. 188.

(*d*) *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091; *Emmanual* v. *Mandakini* ('46) A.N. 69.

would not invite the operation of the doctrine (*e*). Belief in the fact that the offence had been committed followed by forgiveness and return to cohabitation may suffice even if there was not full knowledge of all the circumstances of the offence. But mere belief of itself does not constitute knowledge (*f*).

**Continuance or resumption of sexual intercourse.**—The fact that the husband cohabited with the wife for some months even after knowledge that she had had sexual intercourse with another person would be sufficient to constitute condonation (*f*1). It would be repugnant to decency and good sense to allow a husband to say that he had had sexual intercourse with his wife and yet did not forgive her because he did not intend to remit the wrong done to him; he would be thereby approbating and reprobating the marriage. In England the decision of the House of Lords in *Henderson* v. *Henderson* (*g*) is conclusive on this point and there is no reason why the same principle should not be applicable in cases arising under the present enactment. It was said by Lord Simon L.C. in that case that where sexual intercourse had taken place, "this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect." The sole exception is in the case of fraud. Sexual intercourse, therefore, constitutes reinstatement of the wife even though the husband intended it only as a means of bringing about a reconciliation which was not effected. The principle, however, has not been applied in the reverse case of condonation by the wife and it has been held that an act of sexual intercourse is not conclusive proof that she has condoned her husband's matrimonial offence and that it does not raise an irrebuttable presumption that cohabitation has been resumed (*h*). It may be asked why there should be this difference at a time when it is usually said that both the spouses should be placed on the same legal footing. The answers suggested are that circumstances may make it difficult for a wife to refuse sexual intercourse and her consent should not be regarded as an unequivocal act and secondly that the husband should not be allowed to say that it is not conclusive evidence because of the extreme prejudice which the wife may suffer if she has a child as a result of it. The principle stated in an old case (*i*) in the Ecclesiastical Courts in England by Lord Stowell may be found useful in cases arising under the present enactment: "The effect of cohabitation is justly held less stringent on the wife, she is more *sub potestate*, more *inops consilli*; she may entertain more hopes of recovery and reform of her husband." In the House of Lords case referred to above it was pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations (*j*).

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(*e*) For a useful discussion on the question of "knowledge" see *Burch* v. *Burch* (1958) 1 All E.R. 848.

(*f*) *Burch* v. *Burch*, supra.

(*f*1) *Chandra Mohini* v. *Avinash* ('67) A.S.C. 581.

(*g*) (1944) A.C. 49, (1944) 1 All E.R. 44; *Maslin* v. *Maslin* (1952) 1 All E.R. 477; *Viney* v. *Viney* (1951) 2 All E.R. 204, (1951) P. 457; *Wells* v. *Wells* (1954) 3 All E.R. 491.

(*h*) *Mummery* v. *Mummery* (1942) 1 All E.R. 553, (1942) P. 107.

(*i*) *Beeby* v. *Beeby* 1 Hag. Ecc. 793.

(*j*) *Henderson* v. *Henderson*, *supra*, at p. 45.

**Forgiveness is conditional but condonation is not a contingent contract.**—Language is to be met with in numerous decisions that forgiveness is conditional. The condition rather implied by law as the basis of it than expressed in so many words is said to be that the forgiven spouse will not in future commit any "matrimonial wrongdoing" or any "matrimonial misconduct" or any "matrimonial offence" or "a breach of the marriage vows." In an oft-quoted passage (*k*) the matter has been put thus: "The plain reason and the good sense of the implied condition is that 'you shall not only abstain from . . . (the offence in question), but shall in future treat me—in every respect treat me—with conjugal kindness'—on this condition I will overlook the past injuries you have done me." It would seem that the more illuminating statement is that of Lord Simon (*l*): "Conditional on the condoned spouse thereafter fulfilling in all respects the obligations of marriage." This has considerable bearing on the question of revival of the matrimonial offence. See "Revival of the matrimonial offence," *post*.

Condonation, however, is not a contract or a contingent contract. It is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife's deliberately misrepresenting her true state of mind (*m*).

**Revival of matrimonial offence.**—Reinstatement of the guilty spouse which postulates an intention to forgive and remit the wrong being conditional, the necessary legal implication is that if any matrimonial offence is afterwards committed the condonation ceases to have effect, or, as it is sometimes said, is cancelled and the offence condoned and all its consequences are for all purposes revived. The condition involved in reinstatement is not that the same matrimonial offence will not be committed in future but, as already pointed out, that the condoned spouse will in future fulfil in all respects the obligations of marriage (*n*). It is not necessary that the subsequent offence should be *ejusdem generis* as the original offence. The phrase "matrimonial offence" used in this context in relation to the future conduct of the condoned spouse is not to be understood as a statutory expression but merely as one used compendiously to include any violation of the obligations of marriage though mostly the future acts complained of are of the nature of adultery, cruelty or desertion. It is not necessary, therefore, that this subsequent matrimonial offence need be such as would of itself give adequate ground for divorce or judicial separation. Thus for instance where the condoned offence was adultery it will not be incumbent on the forgiving spouse to establish an act or acts of adultery but proof of gross misconduct falling short of adultery will suffice (*o*). And commission by the condoned spouse of a matrimonial offence less

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(*k*) *Durant* v. *Durant* (1825) 1 Hag. Ecc. 733, 762.

(*l*) *Henderson* v. *Henderson*, *supra*.

(*m*) *Henderson* v. *Henderson*, *supra*.

(*n*) *Henderson* v. *Henderson*, *supra*; *Premchand* v. *Bai Galal* (1927) 29 Bom. L.R. 1336.

(*o*) *Kemp* v. *Kemp* (1953) 2 All E.R. 553; *Moreno* v. *Moreno* (1920) 47 Cal. 1068. Reference may also be made to *Cundy* v. *Cundy* (1956) 1 All E.R. 245.

than legal cruelty will be sufficient if the conduct complained of is such as, if persisted in, will make married life together impossible (*p*). And wilful neglect in providing reasonable maintenance for a wife can revive condoned cruelty (*p*1). Language is to be met with that even slight acts of matrimonial wrongdoing by the condoned spouse may be sufficient to revive the condoned offence and that the more serious the original offence the less grave need be the subsequent matters. These statements are, of course, unexceptionable but they must be understood in their proper context and as giving no more than a comparative idea of the matter. A good deal less may be sufficient but the matter must be approached with great care and caution. In case, for instance, of condoned cruelty of a serious nature, when the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her spouse goes back on that implied condition alone. It can hardly be said that there should be a repetition of the whole course of ill treatment or that there should be even the same kind or degree of ill treatment. The homely metaphor that the camel needs protection from the last straw which is to break its back or even from the penultimate straw which threatens to do so has not remained judicially unnoticed and may perhaps serve to explain the principle. The test would be: Are the various acts of subsequent breaches of conjugal kindness such as to make life between husband and wife impossible or tend to make it impossible? If the marriage breaks down afresh by reason of the subsequent conduct of the guilty spouse without any fault of the other innocent party, the latter is entitled to rely on the original guilty act as a ground for relief.

The rule that condonation is conditional and that therefore if any matrimonial offence is committed after condonation there is a revival of that which was condoned does not mean that the condonation remains conditional for all time to come. It is true that the guilty party is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached, where, by his or her good behaviour, the guilty party may become worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, and the time may come when the proper inference is that the forgiveness is no longer conditional but has become absolute (*q*). Thus for instance if adultery has been condoned say for seven years a wife may not be entitled to say that it is revived because the husband has on one occasion slapped her face (*r*). Applying the same principle it was held that where certain incidents alleged to have taken place amounted to acts of cruelty but the parties had thereafter lived a normal married life for some years, a subsequent act alleged to amount to cruelty would not have the effect of reviving previous cruelty (*s*).

**Condonation in case of offences other than adultery or cruelty.**—It is true that there is no reference in clause (b) of sub-section (1) to condonation as

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(*p*) *Richardson* v. *Richardson* (1949) 2 All E.R. 330 (C.A.); *Thompson* v. *Thompson* (1912) 39 Cal. 395.

(*p*1) *Dunn* v. *Dunn* (1962) 3 All E.R. 587.

(*q*) *Beale* v. *Beale* (1950) 2 All E.R. 539, 540.

(*r*) *Richardson* v. *Richardson* (1949) 2 All E.R. 330, 332.

(*s*) *Beale* v. *Beale, supra.*

regards a petition by the wife on the ground that her husband has been guilty of rape, sodomy or bestiality [Section 13(2)(ii)] but in those cases condonation may be made applicable by analogy (*t*). Even if no such analogy is permissible there would not be much difficulty because if a wife were to petition for divorce on any of these grounds after forgiving the guilty husband the factor of delay would mostly be present and disentitle her from getting relief. The doctrine of condonation, as already pointed out, is inappropriate and inapplicable to the offence of desertion (*u*).

**Standard of proof.**—This clause required that the court should be 'satisfied' that the petitioner has not condoned the act or acts complained of before relief can be given in cases covered by it. In England it has been held by the Houses of Lords in *Blyth* v. *Blyth* (*u*1) that it is not incumbent that condonation should be established beyond reasonable doubt and that so far as bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone. It is submitted that under the present section though the standard is the same for all matters there is nothing in the decisions of the Supreme Court relating to standard of proof in case of matrimonial offences which can be said to militate against acceptance of the above view in respect of bars like connivance or condonation.

**Collusion.**—Clause (c) of sub-section (1) lays down that the court shall pass a decree in any proceedings under the Act only if it is satisfied *inter alia* that the petition is not presented or prosecuted in collusion with the respondent. If the initiation of any proceeding under the Act be procured, or its conduct (especially if abstention from defence be a term) provided for by agreement between the parties, or their agents, that constitutes collusion (*v*). Collusion may consist in an understanding express or implied that the court shall be deceived by misrepresentation, exaggeration or suppression of facts. There must be present an element of corruption or perversion of justice.

It is the duty of the court to inquire, so far as it reasonably can, into the matter and satisfy itself that there is no collusion between the parties. If there is reason to suspect collusion between the parties the court will examine the matter with anxious care because collusive bargains affecting matrimonial causes tend to pervert the course of justice and seek to prevent the court from retaining control in such matters which it is its duty to exercise.

There is a presumption of innocence, which, however, may be counterbalanced by circumstances which lead to suspicions. In such a case the party who is seeking relief from the court must discharge the legal burden of negativing collusion and satisfy the court that there has been no collusion between the parties or their agents (*w*). As to standard of proof in the matter of collusion reference may be made to Notes under "Standard of Proof" in the matter of condonation *supra.*

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(*t*) *Perry* v. *Perry* (1952) 1 All E.R. 1076, 1082, (1952) P. 203.

(*u*) See p. 715, *supra.*

(*u*1) (1966) 1 All E.R. 524.

(*v*) *Churchward* v. *Churchward and Holliday* (1895) P. 7; *Ste. Croix* v. *Ste. Croix* (1917) 44 Cal. 1091.

(*w*) *Lowndes* v. *Lowndes* (1950) 1 All E.R. 999, 1003, 1004, (1950) P. 223.

The parties, often quite reasonably, in anticipation of a divorce make arrangements in respect of such matters as joint property or household, the maintenance of the wife, the custody of the children and sometimes as to costs. Such arrangements are not collusive so long as they do not tend to pervert the course of justice. They often have to be made as a matter of necessity. They only amount to collusion if one party or the other uses them as a bribe—for instance, if a husband promises excessive maintenance as a bribe to pursuade his wife to bring divorce proceedings or, if he promises to let the wife have the custody of the children to induce her to abstain from defending herself. Parties may even compromise a claim for damages in divorce proceedings so long as the agreement does not tend to pervent the course of justice and it is brought to the notice of the court and sanctioned by the court. The reason why these matters have to be brought before the court is that the judge can inquire whether there is collusion or not. Unless sanctioned by the court such arrangements are invalid. It is, therefore, the duty of the parties and their professional advisers to bring such facts to the notice of the court (*x*).

**Delay.**—Clause (d) lays down unnecessary or improper delay in instituting proceeding as one of the absolute bars to the granting of any relief under the Act. The scheme and framework of the present Act on the question of discretion of the court in the matter of granting or withholding relief is, as already pointed out (*y*) different from that of other analogous legislations. Unreasonable delay in presenting or prosecuting a petition for divorce or judicial separation is not an absolute but a discretionary bar under English Law (Matrimonial Causes Act, 1950, section 4) and the Indian Divorce Act, 1869, and it will be necessary to bear that in mind in determining cases which fall for consideration under the present clause when reference is made to decisions under such analogous law. An examination of cases decided under the English law and the Indian Divorce Act, 1869, under the head of discretion will show that they were founded on considerations which are not now particularly emphasized in England and it will be noticed that the more modern trend is to exercise a liberal discretion in many instances when formerly a decree would have been refused on the ground of unreasonable delay. An authoritative statement on the subject of discretion was given by Lord Simon L.C. in the leading case of *Blunt* v. *Blunt* (*z*) where the chief considerations which ought to weigh in helping the court to arrive at a just conclusion were indicated. It was also observed in that case that one consideration of a general character which must be regarded as of primary importance in the matter of the operation of discretionary bars was the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It was also observed that in recent years this consideration had operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused. Applying the principles enunciated in the above case courts in

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(*x*) *Teale* v. *Burt* (1951) 2 All E.R. 433, 434, (1951) P. 438.

(*y*) P. 783, *supra*.

(*z*) (1943) A.C. 517; (1943) 2 All E.R. 76.

England have in the recent decisions condoned what was admittedly culpable delay and granted decrees for divorce (*a*).

The expression "unnecessary or improper delay" it is submitted connotes culpable delay. In England it has been held that the expression "unreasonable delay" used in the Matrimonial Causes Act, 1950, in section 4(2), proviso (i), envisages culpable delay (*b*). Though the court under the present section has no discretion in the matter and is bound to refuse relief where there is unnecessary or improper delay in instituting proceeding and is not empowered to condone the same it would seem that the absolute bar would be permitted to operate only in cases of culpable delay. Consideration of the application of the bar of delay may arise in a variety of cases and it would be impossible to expect rules which may be of assistance in all cases (*b*1). Nor does it seem possible to list cases in which delay would be regarded as falling short of the rule which bars relief where it is unnecessary or improper. Delay resulting from ignorance of law has under analogous law been sometimes accepted as not unreasonable. Delay caused by the petitioner's want of means and the poverty of the petitioner would not be regarded as unnecessary or improper delay (*b*2). Unwillingness to involve members of the petitioner's family in family difficulties; regard for their feelings (*c*); consideration of the honour and prestige of the family; fear of scandal and desire to avoid a final break-up if possible; reasonable hope of reconciliation are some of the factors which have been taken into consideration by courts when they are relied upon for the purpose of showing that delay was not unnecessary or improper. Patience and forbearance on the part of a spouse and particularly the wife and considerations of welfare and position and interest of children of the marriage may warrant putting off legal action for redress and the court would in any such case be extremely slow in holding that there was unnecessary or improper delay in instituting the proceeding. Absence of a showing of disadvantage to the respondent can also be a factor which may weigh with the court. It must be noted that cases determined on the footing that delay is not an absolute bar to relief in matrimonial causes but a matter of discretion with the court would not be of great assistance in applying the present section which lays down a definite rule and an absolute bar to the granting of any relief under the Act. Therefore, the question would not be whether discretion should or should not be exercised in favour of a petitioner where there is delay but whether there is satisfactory explanation for the delay.

Where the ground of the petition for judicial separation or divorce is adultery and there is an issue as to unnecessary or improper delay or where it appears to the Court that there has been undue delay in instituting the proceeding, there are two questions in such case which first require to be considered, namely, when did the petitioner first know or had reason to believe

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(*a*) *Purton* v. *Purton and George* (1956) 3 All E.R. 952; *Key* v. *Key* (1956) 3 All E.R. 955.

(*b*) *Key* v. *Key* (1956) 3 All E.R. 955, 956.

(*b*1) Reference may be made to *S.* v. *R.* ('58) A. Delhi 79 where a delay of six years after the parties began to live separately was held satisfactorily explained. Also see *Leela* v. *R. A. Singh* ('63 A. Raj. 178; *A.* v. *B.* ('67) A. Punj. 152 (pre-Act marriages); *Nirmoo* v. *Nikka Ram* ('68) A. Delhi 260 (eleven years: pre Act marriage); *Lalithamma* v. *Kannan* ('66) A. Mys. 178 (pre-Act marriage).

(*b*2) *Moreno* v. *Moreno* (1920) 47 Cal. 1068; *Key* v. *Key* (1956) 3 All E.R. 955; *Becker* v. *Becker* (1966) All E.R. 894.

(*c*) For instance see *S.* v. *R.* ('68) A. Delhi 79; *Jyotish Chandra* v. *Meera Guha* ('70) A.C. 266 (avoidance of scandal).

that the respondent had committed adultery? and, when did the petitioner first take action in order to obtain the relief? A further question to be considered is whether there is some reasonable explanation for the delay and if there is some explanation which is satisfactory the delay cannot be said to be unnecessary or improper (*c*1). Inordinate and unexplained delay in applying for restitution of conjugal rights can result in dismissal of the application (*c*2).

The principle and the basis of the rule is that delay is a material factor because if unexplained it may lead to the inference that there was collusion between the parties, or acquiescence in the injury or indifference to the same or some wrong motive for seeking relief after slumbering over the matter in sufficient comfort for an inordinate period after the ground for relief had arisen. Whether the delay in instituting proceeding is unnecessary or improper would depend on the facts and circumstances of each case. There is no magic in any particular period. A petitioner may not readily be charged with improper or unnecessary delay where any element of the nature indicated above is shown to have existed.

At the same time the court will not permit itself to be used as a place to which a party to a marriage can come for redress whenever it suits him or her to do so, having in the meantime held the weapon of redress over the head of the other party to the marriage. Delay in such a case would be highly improper (*d*).

*Delay and proceeding for nullity on ground of impotence.* In England it is well-settled law that delay in bringing a suit for nullity on ground of impotence is not, apart from statutory provision to the contrary, in itself a bar, though it throws a special burden of proof upon the petitioner. Under the present section delay, if shown to the satisfaction of the court to be unnecessary or improper, in instituting any proceeding under the Act, which obviously included proceeding for nullity of marriage under section 12 (1) (a) would be a bar to the relief.

**Cl. (e): . . . legal ground why relief should not be granted.**—The legal grounds contemplated by this clause and which operate as bar to any relief under the Act are grounds stated in the various provisions of the Act itself. A ground for relief cannot be said to exist or to have been established if the requirements of the ground and the conditions relating to the same are not fulfilled and presumably the clause was inserted *ex abundanti cautela*. Thus for instance where in case of a ground for relief a period of time is prescribed in the Act within which a petition founded on such ground should be presented (*e*) the court has no power to entertain such petition after the expiry of that period. In such a case the court has no discretion in the matter and the petition must be dismissed. Similarly the court has no power to decree

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(*c*1) Reference may be made to *Thimmappa* v. *Thimmavva* ('72) A. Mys. 234, 235, 236 where the court has expressed agreement with the above.

(*c*2) *Shanti Devi* v. *Ramesh Chandra* ('69) A.P. 27.

(*d*) *Llewellyn* v. *Llewellyn* (1955) 2 All E.R. 110. For an instance of "unnecessary or improper delay" see *Teja Singh* v. *Sarjit Kaur* ('62) A. Punj. 195.

(*e*) See section 12(2)(*a*)(i) and section 12(2)(*b*)(ii).

relief on any ground under the Act where any mandatory requirement of the Act which affects the ground itself is not satisfied.

**Sub-section (2): Reconciliation.**—This sub-section casts on the court the duty, in the first instance, in every matrimonial cause, where it may appear that there may be some chance of saving the marriage, to make every endeavour to bring about a reconciliation between the parties. Any attempt of this nature is always laudable and it is incumbent on the court to take such steps in the matter as may seem prudent having regard to the nature and circumstances of the case. Failure on the part of the trial court to make any such attempt would be a serious omission but it cannot affect the jurisdiction of the court or render the decree invalid. In the undermentioned cases the High Court remanded the matter on the ground that this sub-section had been overlooked by the trial court (*e*1).

It would be competent to and indeed desirable on the part of the appellate court as also the court hearing a second appeal, if reasonably possible, to make an endeavour to bring about a reconciliation between the parties (*e*2).

**24.** Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

Maintenance *pendente lite* and expenses of proceedings.

**Maintenance pendente lite.**—The right of a wife for maintenance is an incident of the status or estate of matrimony. In general, therefore, the husband is bound to defray the wife's costs of any proceeding under the Act and to provide for her maintenance and support pending the disposal of such proceeding. The doctrine of alimony, which expression in its strict sense means allowance due to wife from husband on separation from certain causes, has its basis in social conditions in England under which a married woman was economically dependent and almost in a position of tutelage to the husband and was intended to secure justice to her while prosecuting or defending proceedings under matrimonial law. It is also recognised that when the wife has separate means sufficient for her defence and subsistence she should not be entitled to alimony nor costs during the proceeding; and if the husband has neither property nor earning capacity the court would not award any interim alimony. It is on these principles that the law relating to matrimonial causes provides for rules for payment of maintenance *pendente lite* and expenses of proceedings by the husband to the wife. This section adopts those principles

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(*e*1) *Anupama* v. *Bhagaban* ('72) A. Orissa 163; *Raj Rani* v. *Harbans Singh* ('72) A.P. 392.

(*e*2) *Jivubai* v. *Ningappa* ('63) A. Mys. 3. Also see *Raj Rani* v. *Harbans Singh* ('72) A.P. 392. *Contra Trilok Singh* v. *Savitri Devi* ('72) A.A. 52.

and goes one radical step further when it lays down that any such order can be made not only in favour of the wife but also in favour of the husband (*f*). The expressions 'respondent' and 'petitioner' in the section obviously refer to the respondent and petitioner to the interlocutory application for alimony *pendente lite* and for provision for costs and not to the petitioner and respondent to the substantive petition. There is no scope for doubt that the application under the section can be made by a spouse who may be the petitioner or the respondent to the substantive proceeding for any of the reliefs under the Act. Nevertheless a contrary contention seems to have been raised in some cases and discountenanced (*g*).

The amplest discretion is conferred on the court and an order for maintenance *pendente lite* and costs of the proceeding, as the initial words of the section clearly state, can be made in any proceeding under the Act (*h*). The section is explicit that the making of the order is a matter of discretion with the court and rules that *the court may make the order* in favour of the wife or the husband as the case may be, where it is shown that such spouse has no independent income sufficient for her or his support and the necessary expenses of the proceeding. The section also lays down that the amount of interim maintenance that one spouse may be ordered to pay to the other must be such as appears reasonable to the court in the exercise of that discretion and directs the court that in doing so it must have regard to the petitioner's own income and the income of the respondent. The court is empowered under this section to make an order which is to operate during the proceeding—*pendente lite*—and where the matter is carried in appeal only the appellate court would have power to make any interim order for maintenance pending the disposal of the appeal (*i*). The order granting alimony *pendente lite* under this section is appealable (section 28) but the appellate court as in case of any discretionary order would interfere only if the order is arbitrary or capricious or made in disregard of any sound principle.

Any decision under the present section on the subject of alimony must necessarily turn on the circumstances of each case and no fixed rules can be expected on the question. In case of ordinary or small incomes a rough working rule adopted by some courts in India under some analogous legislation is to assess the amount at one-third of the aggregate income of the husband and wife less the wife's income. It is submitted that in cases falling for determination under this section there can be no datum line but this rough working rule may be of some use in fixing the amount of interim maintenance in proceedings under the Act. In case of very large income the court would not have regard to any notional rule in exercising its discretion in the matter and the proportion may be less. It is essential to note that there can be no rigid rule in maintenance as to the proportion to be given and it would be an error to decide first what the proportion should be and then to examine the

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(*f*) Reference may be made to the Notes at p. 803, *infra*.

(*g*) *Kamala Sindhi* v. *Shama Sindhi* (1958) 60 Bom. L.R. 633; *Rameshwar Nath* v. *Kanta Devi* ('57) A. Punj. 85; *Nanjappa* v. *Vimal Devi* ('57) A. Mys. 44. *Gopendra Nath* v. *Prativa Rani* ('62) A.C. 455, *Rajkumari* v. *Trilok Singh* ('59) A. All. 628; *Baburao* v. *Sushila* ('64) A.M.P. 73.

(*h*) As to the form and contents of any application under the section see the Rules framed by the various High Courts.

(*i*) In England it has been held that the Court of Appeal has no power to make an order for interim payment pending appeal but that is on a different ground; *Cavendish-Bentinck* v. *Cavendish-Bentinck* (1948) 2 All E.R. 265.

other relevant factors. The court will take all the circumstances of the case into account and arrive at a proper solution having particular regard to the factors which are mentioned in the section. Reference may be made to Notes under section 25 "Assessment of Quantum . . ." .

**Denial of marriage.**—The mere fact that the respondent denies the factum of marriage is no bar to the power of the court to make an order under this section. Of course, a good *prima facie* case about the marriage would have to be made out by the petitioner before any such order would be made by the court in case of any such contention being raised by the respondent (*ii*).

**Hindu Adoption and Maintenance Act, 1956.**—Section 18 of the Hindu Adoption and Maintenance Act lays down the rule relating to the personal legal obligation of a husband to maintain his wife. The mere fact that a wife has adopted proceedings under that section is no bar to her claiming any relief under this Act and also claiming interim maintenance under the present section. The very object and purpose of the present section is to provide immediate relief to her in any proceeding adopted by her under this Act (*iii*).

**Matter ordinarily decided on affidavits.**—Application for interim maintenance is as a general rule and practice disposed of on affidavits like other interim application in civil proceedings (*ii*2) unless the court finds that the matter cannot be so disposed of properly. Then only the court would proceed to record evidence before deciding the matter.

**". . . in any proceeding under this Act."**—An order for maintenance *pendente lite* and costs of the proceedings can, as the initial words of the section clearly state, be made in any proceeding under the Act, viz. for restitution of conjugal rights, judicial separation, divorce or nullity of a void or voidable marriage. When a fact of marriage is acknowledged or proved alimony follows subject of course to the discretion of the court in the matter having regard to the means of the parties and it would be no answer to the claim for maintenance *pendente lite* that the marriage was void *ipso jure* or was voidable. The court regards it as prudent to adhere to the principle that a marriage *de facto* carries the right to alimony *pendente lite*.

The subsequent dismissal of the substantive petition does not exonerate a party from the liability already incurred under an order made under this section (*i*1).

If the ground for interim maintenance is made out the court cannot impose any conditions on the spouse claiming such maintenance (*i*2).

When the substantive petition itself is dismissed there can be no question for making any order thereafter under this section (*ii*3).

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(*ii*) *Jain* v. *Jain* ('68) A.C. 405.

(*ii*1) *Simhachalam* v. *Papasmma* ('73) A.A.P. 31 [claim made by wife in proceedings for restitution of conjugal rights by the husband].

(*ii*2) *Vinay Kumar* v. *Purnima* ('73) A. Raj. 32.

(*i*1) *Muniratnam Naidu* v. *Shantamma* ('71) A. Mys. 25.

(*i*2) *Latika Ghosh* v. *Nirmal Kumar* ('68) A.C. 68.

(*ii*3) *Nirmala Devi* v. *Ram Dass* ('73) A.P. & H. 48.

An order for maintenance *pendente lite* and costs would enure during the pendency of the suit and an independent application would be necessary to the appellate court if any such maintenance or costs are sought pending any appeal (*i*3).

*Pending appeal.*—The appellate court has jurisdiction and power to make an interim order in terms of this section (*i*4).

**Assessment of quantum: "having regard to the petitioner's own income and the income of the respondent".**—The section lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another the court must have regard to the petitioner's own income and the income of the respondent. The analogous provision in the Special Marriage Act, 1954, is similarly worded though under that enactment it is only the wife who is entitled to claim alimony *pendente lite*. Section 36 of the Indian Divorce Act, 1869, lays down that the amount to be paid to the wife *pendente lite* may be such as the court deems just and also provides that such alimony shall in no case exceed one-fifth of the husband's average net income for the three years preceding the date of the order. In England the powers of the court in the matter of making such orders have been from time to time extended by statute and the court is now empowered to make such interim orders for the payment of alimony as it "thinks fit" (*j*). Where the parties are unable to agree, the normal proportion of the amount of alimony allotted to the wife is one-fifth of the total income of the husband and wife less the wife's income. The more recent trend in England, however, is not to lay stress on any such rigid arithmetical rule but have regard to the disposable income of the husband and the income of the wife and assess the amount after taking into consideration all the facts and circumstances of the case including the conduct of the parties (*k*).

**". . . has no independent income sufficient . . ."**—An order for maintenance *pendente lite* or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is also implicit in the section that the order would not be made if the respondent to the application is shown to have no property nor earning capacity, or is shown to have a very small income. But the fact that the respondent is not receiving any income from property for the time being would not be sufficient answer to the claim if the court is satisfied that the property owned by the respondent is substantial.

**Discretion of the court.**—The court exercises a wide discretion in the matter of granting alimony *pendente lite* but the discretion is judicial and not

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(*i*3) *Mukan Kanwar* v. *Ajit Chand* ('61) A. Raj. 51; (1960) 10 Raj. 1500.

(*i*4) *Annapurnamma* v. *Ramakrishna* ('59) A.A.P. 49. Reference may also be made to *Subba Rao* v. *Anasuyamma* ('57) A.A.P. 170; *Arya Kamar* v. *Ila* ('68) A.C. 276.

(*j*) Matrimonial Causes Act, 1950, Sections 19, 20 and 22.

(*k*) In *Chichester* v. *Chichester* (1936) 1 All E.R. 271, (1936) P. 129, the President Sir Boyd Merryman enunciated certain broad principles which though they relate mainly to the question of securing permanent maintenance are referred to in England as of considerable guidance on the question of alimony *pendente lite*. Reference may also be made to *Griffith* v. *Griffith* (1957) 1 All E.R. 494; *Waller* v. *Waller* (1956) 2 All E.R. 234, (1956) P. 309; *Rose* v. *Rose* (1950) 2 All E.R. 311; *Mukan Kunwar* v. *Ajeetchand* ('58) A. Raj. 322; 9 Raj. 483; *Prasana Kumar* v. *Sureswari* ('69) A. Orissa 12; *Sushila Devi* v. *Dhani Ram* ('65) A.H. Pra. 12.

arbitrary or capricious. It is to be guided on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the section and having regard to the object of the Act. The fact that there is a plea to the jurisdiction of the court does not affect the power of the court to allot alimony *pendente lite* (*l*); nor does the plea affect the court's power to make an order for the necessary expenses of the proceeding under the section (*m*). As a general rule the court deems it prudent to adhere to the principle that a marriage *de facto* carries the right to alimony *pendente lite* and primarily has regard to the means of the parties. The court would not be in a position to judge of the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. At the same time there is nothing in the section to prevent the court from taking into consideration the conduct of the parties. A comparison of the language of this section with that of section 25 which deals with permanent alimony and maintenance shows that under latter section the conduct of the parties is an important factor for consideration in awarding the same. The words "conduct of the parties" do not appear in the present section but the conduct of the parties would not be ignored by the court in making the order asked for or in assessing the amount of alimony. The matter is one for the court to deal with as it thinks just and reasonable in its unfettered discretion and the court has the power to make an order for alimony *pendente lite* for instance in favour of a respondent wife notwithstanding the wife's adultery. In considering an application for such an order the court would take into account all relevant circumstances, including the adultery, the conduct of the parties and any plea of conduct conducing or condonation (*n*). Cases are conceivable in which although the court has power to award alimony *pendente lite,* no order may be made. Thus, for instance, in case of a wife who has brought cohabitation to an end by admitted misconduct for which the husband is not to be blamed or in case where the conduct of the erring spouse is shown to have caused exceptional hardship to the other or where the erring spouse is shown to have been guilty of exceptional depravity the court may refuse to grant alimony *pendente lite.* The section confers on the court a general power to make orders for alimony *pendente lite* and the court would take into consideration the whole of the circumstances of the case although the prime consideration even in such cases would be the means of the parties.

In the exercise of its discretion under this section it is open to the court to grant interim maintenance from the date of demand for same by serving a notice on the other side after institution of the proceeding and not necessarily from the date of the application for the same (*n*1).

The court can in the exercise of its discretion vary an order for interim maintenance if there is such change in the circumstances of the parties justifying variation (*n*2).

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(*l*) *Ronalds* v. *Ronalds* (1875) L.R. 3 P. & D. 259.
(*m*) *Smith* v. *Smith* (1923) P. 128.
(*n*) *Waller* v. *Waller* (1956) 2 All E.R. 234, (1956) P. 300; *Welton* v. *Welton* (1927) P. 162.
(*n*1) *Sobhana Sen* v. *Amar Kanta Sen* ('59) A.C. 455.
(*n*2) *Devki* v. *Purshotam* ('73) A. Raj. 2.

**Costs.**—It is sometimes expressed that a wife petitioner or respondent is entitled to have her costs secured. The old principle that the husband alone must foot the bill may now be said to have disappeared. The section in effect rules that the court can in the exercise of its discretion direct any party to the proceeding whether husband or wife and whether petitioner or respondent to the substantive proceeding to pay the applicant wife or husband the expenses of the proceeding pending the hearing of the proceeding if it appears to the court that such applicant has no independent income sufficient for her or his necessary expenses of the proceeding. The court has absolute discretion in the matter and each case would be determined on its own merits. Reference may be made to Notes under 'costs' at p. 776 *supra*.

Also see Notes under 'Discretion of the court' above.

**Appeal: Section 28.**—There is difference of opinion among the High Courts on the question whether an appeal lies against an order of the court of first instance on an application for maintenance *pendente lite* and expenses of proceedings started under the Act. Section 28 makes definite provision for appeal and lays down that "all decrees and orders made by the court in any proceedings under the Act. . . . may be appealed from under any law for the time being in force" and that "there shall be no appeal on the subject of costs only" and the difference of opinion has arisen from different interpretations given by the High Courts to the language of that section. *See Notes under section 28 post.*

**Enforcement of Order: Stay of proceedings if necessary.**—See Notes under section 21 *ante* "Inherent powers of Court: Stay of proceedings."

**25.** (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

Permanent alimony and maintenance.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such

party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

**Permanent alimony and maintenance.**—The section, although it recognises the right of the wife and the husband to be in *equali jura* in the matter of maintenance when a decree is passed granting relief in any matrimonial cause, is primarily intended to secure maintenance and support for the wife in whose favour a decree is made granting any of the reliefs under the Act. In the majority of cases that come before the court the decree is for judicial separation or for divorce on the ground of the delinquency of the other spouse who is charged with having committed adultery or cruelty or with desertion. The obligation of the husband to provide for his wife's maintenance and support does not come to an end simply on the passing of a decree for any of the reliefs which the court is empowered to grant under the Act even when the decree is in favour of the husband. The court is empowered to direct that the amount to be paid by one spouse to another shall be in the form of a gross sum or in the form of monthly or other periodical payments. The duration of such payments is limited to the life of the applicant. The court is also empowered to vary, modify or rescind any such order in view of change in the circumstances of any party. The order would be rescinded upon proof of remarriage or unchastity of the party in whose favour it has been made.

The right to maintenance being a statutory right a party cannot contract herself or himself out of the same. Thus a wife cannot bind herself by agreement with her husband to forgo her right of applying to the court for maintenance in matrimonial proceedings between them (*o*). The principle will not, however, apply to an undertaking given by a party to the court not to ask for variation of an order for maintenance made by the court (*p*).

The section makes departure in certain respects from the analogous rules relating to payment of permanent alimony and maintenance enacted in the Special Marriage Act, 1954, and the Matrimonial Causes Act, 1950. An order for maintenance can be made under the section not only in favour of the wife but may be made in favour of the husband by the court passing any decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriage. The rule is unique in the history of matrimonial legislation and did not find place in the draft Code submitted by the Hindu Law Committee. Under the Special Marriage Act and other analogous legislation the wife alone is entitled to ask for alimony *pendente lite* and permanent alimony or permanent maintenance. In England the Matrimonial Causes Act, 1950, makes one exception and lays down in sections 19 and 20 that on any petition for divorce or judicial separation the court may make orders for alimony *pendente lite* and for permanent alimony and maintenance in favour of the husband where a wife has filed a petition for divorce or judicial separation against the husband on the ground of his insanity. The Bill as origin-

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(*o*) *Hyman* v. *Hyman* (1929) A.C. 601 [Deed of separation]. Reference may be made to *Barucha* v. *Bharucha* (1945) 47 Bom. L.R. 514 and cases there cited.

(*p*) *Russell* v. *Russell* (1956) 1 All E.R. 466, (1956) P. 283.

ally presented did not contain any provision for granting alimony *pendente lite* or permanent alimony or maintenance to the husband. But as the Joint Committee observed the change was made to "secure that 'alimony' is payable in either case, that is to say, where the husband has no independent income but the wife is possessed of means, she shall be as much answerable for the payment of 'alimony' as the husband normally is." The juristic capacity of women emphasized in the Constitution has been equalized by the present enactment in matters of marriage and divorce and by the Hindu Succession Act, 1956, in matters of inheritance and succession with that of other citizens though the recent legislation has not eliminated some of their privileges. The present rule though it introduces an unusual and somewhat grotesque feature in this branch of the law, has the merit of enabling the court to grant effective relief in deserving cases, for instance that of a destitute husband against whom preceedings under the Act are adopted by the wife and decree is passed on the ground of his insanity or his being afflicted with leprosy or where for instance a wife who is possessed of substantial property has unreasonably deserted the husband who has no independent income.

The section refers to the payments to be made under it by one spouse to another as maintenance and does not use the expression permanent alimony though that expression is used in the marginal note to the section. Permanent alimony is the expression used under English law in the context of provision ordered to be made by the court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactments in England is a historic development of law. Before the first Divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce *a mensa et thoro* (judicial separation) and the allowance allotted to her was named permanent alimony which was as a general rule one-third of the husband's income. The operation of the rule was extended and the same principle was applied in cases decided under the successive Divorce Acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief and that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nullity of marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished her character as wife and the name of the husband. It will be noticed that the law enacted in the present section adopts those general principles of English law and makes them applicable to the case of either spouse. The basal thought is that a spouse who is compelled to seek relief by way of restitution of conjugal rights or judicial separation or dissolution of marriage by divorce (*q*) or secures annulment of it for no fault attributable to such spouse, should in the matter of maintenance and support be entitled to expect to be in the same position in which she or he would have been if the other spouse had properly discharged his or her marital obligations or had not disabled himself or herself from discharging the same (*qq*).

**Discretion.**—The section vests the court with wide discretion in the matter of making orders for maintenance and support of one spouse by the other where it passes any decree for restitution of conjugal rights, judicial separation, dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable. In the undermentioned case (*q*1) the view has been expressed that a second wife whose marriage with the respon-

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(*q*) The order for maintenance can be made *inter alia* in a case where divorce is decreed on the ground of presumption of death under section 13(vii) if the respondent is subsequently found to be alive: *Deacock* v. *Deacock* (1958) 2 All E.R. 633.

(*qq*) Reference has been made to this passage in *Dharamshi* v. *Bai Saker* ('68) A. Guj. 150, 153.

(*q*1) *Narayanaswami* v. *Padmanabhan* ('66) A.M. 394. *Contra Dayal Singh* v. *Bhajan Kaur* ('73) A.P. & H. 44.

dent was a nullity on the ground that the husband had a wife living at the time of his marriage with her, is not entitled to alimony or maintenance under this section. It is submitted that the present section applies *inter alia* to a marriage which may be void under section 11 read with section 5(1) and the correctness of the above view must be doubted. The amount of permanent alimony or permanent maintenance to be granted and in some degree the question whether or not it should be allowed in any such case is a matter within the discretion of the court. That discretion, though of the amplest, has to be exercised judicially according to established principles of law and upon an equitable view of all the circumstances of the case having particular regard to the conduct of the parties and their property and income. Also see Notes under "Order can be made in favour of unsuccessful spouse" *infra.*

**". . . court exercising jurisdiction under this Act".**—An order for maintenance under the present section can be made only by the court to which the substantive petition for restitution of conjugal rights, or judicial separation or dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable had been presented under section 19 of the Act and which has heard the same. The application for maintenance may be incorporated in the substantive petition itself or may be in the form of a separate application but must be in conformity with the rules of pleading that may have been prescribed by the Rules made by the High Court in that behalf and contain all the particulars required by such Rules.

**". . . at the time of passing any decree or at any time subsequent thereto . . ."**—The application for maintenance may be made at the time of passing of the decree for restitution of conjugal rights or judicial separation, or dissolution of marriage by divorce or annulment of the marriage on the ground that it is void or voidable or even at any time subsequent thereto (*q*2) and there is no bar of limitation in the matter of presentation of such application. Nor would delay however great in presenting the application be any bar to the claim for maintenance. Section 23(1)(d) which in effect lays down that no relief will be granted under the Act where there has been unnecessary or improper delay in instituting the proceeding applies only to substantive proceedings for any of the reliefs mentioned above and not to an application for maintenance under this section which provides only for ancillary relief and is incidental to any such proceeding for substantive relief. Section 37 of the Special Marriage Act, 1954, contains provisions which are *in pari materia.* The position, however, under the Indian Divorce Act, 1869, which followed the English Law is materially different (*r*) and continues to be somewhat different under the English Matrimonial Act of 1950. Under the relevant provisions of the latter enactment and the Matrimonial Causes Rules, 1950, an application for permanent alimony may be made at any time after a decree for judicial separation or for restitution of conjugal rights, as the case may be, has been pronounced; but no application for maintenance in

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(*q*2) *Dharamshi* v. *Bai Saker supra*; *Durga Das* v. *Tara Rani* ('71) A.P. & H. 141; *Nathulal* v. *Mana Devi* ('71) A. Raj. 208.

(*r*) Section 37.

case of proceedings for divorce or nullity of marriage can be made later than two months after final decree except by leave of the court (*s*).

The words "at the time of passing any decree or any time subsequent thereto" indicate that an order for permanent alimony or maintenance in favour of the wife or the husband can only be made when a decree is passed granting any substantive relief under the Act and not where the main petition itself is dismissed (*t*) or withdrawn (*t*1). The rule postulates that if no request for alimony was made at the time of passing the decree an application for same may be made subsequently. It does not mean that where such application was rejected at the time of passing of the decree it could be renewed subsequently (*tt*1). The position would be different if the subsequent application can be made under sub-section (2). The rule laid down in the section relates only to ancillary relief which is incidental to the substantive relief that may be granted by the court although the incidental relief may be given to either party to the petition (*t*2) The expression "any decree" has been used having regard to the various kinds of decrees which may be passed under the provisions of the Act and includes a decree for restitution for conjugal rights (*t*3). A decree for restitution of conjugal rights against the petitioner is, therefore, no bar to his or her claim for alimony or compensation under this section if the case is otherwise a fit one for such relief (*t*3). In any such case it is not necessary that the party should file a separate suit for maintenance under the Hindu Adoption and Maintenance Act, though of course, the court in passing any order under this section would bear in mind the provisions of that Act (*t*4).

**". . . on application made to it by either the husband or the wife . . ."**— An order for permanent alimony or maintenance under this section can be made not only in favour of the wife but may be made in favour of the husband by the court passing any decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriage (*u*); the application can be made by either party to the substantive petition whether petitioner or respondent to the substantive petition and not merely the petitioner to the same; and as already pointed out in the Notes under the preceding head an order for permanent alimony or maintenance in favour of the wife or the husband can only be made where a decree is passed granting substantive relief in any such proceeding and not where the main petition itself is dismissed because the section relates only to ancillary relief. A respondent to any such petition which is dismissed who wants this ancillary relief will have to adopt substantive proceedings for any relief under the Act and the question of maintenance can arise if such proceeding terminates successfully in his or her favour.

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(*s*) See sections 19 to 22 of the Matrimonial Causes Act, 1950, and Rules 44 to 46 of the Matrimonial Causes Rules 1950.

(*t*) *Devasakayam* v. *Devamony* (1923) 46 Mad. 133. *Minarani* v. *Dasarath* ('63) A.C. 428; *Akasam Chinna* v. *Parbati* ('67) A. Orissa 163; *Purushotam* v. *Devki* ('73) A. Raj. 3.

(*t*1) *Shantaram* v. *Hirabai* ('62) A.B. 27; (1962) Bom. 125; 63 Bom. L.R. 76.

(*tt*1) *Susheela* v. *Jagannadham* ('64) A.A.P. 247.

(*t*2) The view expressed in this paragraph has been accepted by the High Court of Gujerat in *Dharamshy* v. *Bai Saker supra* and *Harilal* v. *Lilavati* ('61) A. Guj. 202, 206. Also see *Shantaram* v. *Malti* ('64) A.B. 83. Also see *Sisir Kumar* v. *Sabita Rani* ('72) A.C. 4.

(*t*3) *Ram Piary* v. *Piara Lal* ('70) A.P. & H. 341; *Nathulal* v. *Mana Devi* ('71) A. Raj. 208.

(*t*4) *Seeta Ram* v. *Phooli* ('72) A. Raj. 313.

(*u*) See p. 803, *supra*.

**Order can be made in favour of unsuccessful spouse.**—The language of the section is wide enough to empower the court to make an order of allotment of permanent alimony or for permanent maintenance in favour of the respondent against whom the decree has been passed and there is nothing to prevent the court from making any such order if in the exercise of the discretion vested in it the court deems it just to do so having regard to all the relevant facts and circumstances of the case including the conduct of the parties.

**Discretion.**—In England it has been held that an order for permanent alimony can be made by the Court in favour of a wife even if a decree for judicial separation has been passed against her on the ground of her adultery (*v*) or cruelty (*w*). The discretion has also been exercised by courts in England and permanent maintenance awarded to the respondent in cases where decree of nullity has been passed against her on the ground that she had a husband living at the time of marriage (*x*) and where the marriage has been annulled on the ground of wilful refusal on her part to consummate the marriage (*y*). It has there been held that in all cases under this head the court has an absolute discretion vested in it to be exercised according to the circumstances of each case. So in a case where the wife was found guilty of adultery and divorce was granted, the court, being satisfied that she was in delicate health and quite unable to support herself and earn her own living and that she was entirely without means and had no friends or relations who would support her, ordered the petitioner to secure to her the sum of £1 per week for life *dum sole et casta vixerit* although the petitioner's conduct had been unimpeachable and he had opposed the making of the order (*z*).

So wide is the discretion vested in the court under the present section in this behalf that an order under it may for instance be made in favour of a wife even if a decree for judicial separation has been passed against her on the ground of adultery or cruelty or desertion on her part. The discretion is judicial and would be exercised in favour of a spouse found guilty of matrimonial misconduct only where the court is satisfied that such an order should be made in the interest of justice. The same considerations would apply where the court passes a decree for any other relief under the Act and the respondent though shown to have been guilty of a matrimonial offence or to have been in the wrong can ask for an order for permanent maintenance even when dissolution of marriage by divorce or annulment of the marriage is decreed against the respondent (*zz*). There is, however, some conflict of decisions on the subject. In a case decided by the High Court of Kerala (*z*1) a finding of unchastity was recorded against the wife and decree for judicial separation was passed against her and it was held that no order for maintenance could be passed in her favour under sub-section (l) of this section because the court had no discretion whatever in the matter. In a

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(*v*) *Goodden* v. *Goodden* (1891) P. 395; (1892) P. 1 (C.A.).

(*w*) *Prichard* v. *Prichard* (1864) 3 Sw. & Tr. 523; 10 L.T. 789.

(*x*) *Ramsay* v. *Ramsay* (1913) 108 L.T. 382.

(*y*) *Dailey* v. *Dailey* (1947) 1 All E.R. 847; (1927) 2 All. E. R. 269 (C.A.).

(*z*) *Ashcroft* v. *Ashcroft and Roberts* (1902) P. 270. Reference may be made to the observations on the exercise of discretion over maintenance in *Clear* v. *Clear* (1958) 2 All E.R. 353, 357, 358.

(*zz*) *Dharamshi* v. *Bai Saker* ('68) A. Guj. 150.

(*z*1) *Raja Gopalan* v. *Rajamma* ('67) A. Kerala 181.

case decided by the High Court of Jammu and Kashmir (*z*2) agreement was expressed with the above view. In the latter case the wife who claimed maintenance had been living in adultery and on the merits of the case the court would not in any case have exercised its discretion in her favour. In both these cases reliance was placed on the provision contained in sub-section (3) of this section. The High Court of Calcutta, on the other hand, has expressed the view that the matter is one of discretion with the court and that the court would not in the exercise of its discretion award any maintenance to the guilty wife unless there are very special circumstances (*z*3). In another decision, the same High Court, has expressed the view that in any such case the guilty wife would be entitled to a bare subsistence allowance and that she would lose that right when she was able to earn a living (*z*4). It is submitted that sub-section (3) should not be so read as to leave no discretion whatever in the court in the matter of awarding maintenance to an erring wife simply on the ground that she had been found to have committed adultery and relief had been granted to the husband on that very ground. The matter is one of discretion with the court under sub-section (1) and the discretion would be exercised only after taking into consideration all the aspects of the case including her conduct and maintenance would be awarded to her if so required by ends of justice. Being a matter of discretion there can be no hard and fast rule applicable to all cases. Sometimes the task is not easy but the court if it decides to award maintenance has to fix the amount as best as it can. There can be no set of fixed principles applicable to all cases of the nature that may fall for consideration under this head and the decision must rest on the facts of each case and the sense of propriety and moral justice of the court. The respondent would be in a strong position when the decree has gone against the respondent on the ground of insanity or the respondent's suffering from leprosy or on any ground where though relief is granted to the petitioner it cannot be said that the respondent was guilty of any matrimonial offence or any blameworthy conduct.

**". . . while the applicant remains unmarried."**—These words refer to the duration of the liability, that is to say, that the permanent alimony cannot be directed to be paid after the applicant remarries (*z*5).

**Resumption of cohabitation.**—Resumption of cohabitation by the parties in certain cases of orders for maintenance awarded under this section, as for instance, in a case of a decree for judicial separation, may have the effect of nullifying the order for maintenance. Whether there has been any such resumption would not depend so much on the duration of the period of such resumption but would depend on the animus of the parties and their attitude in coming together again (*z*6).

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(*z*2) *Sardari Lal* v. *Vishano* ('70) A.J. & K. 150.

(*z*3) *Sachindra Nath* v. *Banamala* ('60) A.C. 575.

(*z*4) *Amar Kanta* v. *Sovana Sen* ('60) A.C. 438.

(*z*5) *Seshadri* v. *Jayalakshmi* ('63) A.M. 283; (1963) 1 Mad. L.J. 11; (1963) Mad. 384. Also see *Minarani* v. *Dasarath* ('63) A.C. 428.

(*z*6) *Ansuya* v. *Rajaiah* ('71) A.A.P. 296. Reference may be made to *Haddon* v. *Haddon* (1887) 18 Q.B. 778. Cf. *Meenakshi Ammal* v. *P. S. Muthukrishna* ('61) A.M. 380.

**". . . gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant".**—The section empowers the court to award for the maintenance and support of the applicant a gross sum or to direct monthly or other periodical payments to be made by the respondent to the applicant. The matter is of the discretion of the court (*a*) and ordinarily the court as well as the parties prefer that the payments should be periodical and a gross sum is generally awarded when the parties are agreeable to any such arrangement. The periodical payments are to be for a term not exceeding the life of the applicant.

**Assessment of quantum: having regard to the income and property of the respondent and the applicant and the conduct of the parties.**—The section lays down that in arriving at the quantum of permanent alimony or permanent maintenance the court must have regard to the respondent's own income and property and the income and property of the applicant and the conduct of the parties and the amount may be such as seems to the court to be just. The section it will be noticed leaves the matter to the discretion of the court while stressing that the means of the parties and their conduct are factors which should always be regarded. It would not be helpful to refer to the immense range of decisions of courts in England on the subject or to the decisions of courts in India under the Indian Divorce Act of 1869 or other analogous legislation. Danger lies in phrases used aptly enough in a particular context and opinions useful in their own sphere being treated as riders to the actual statutory language but the principles on which those decisions rest can be of guidance in determining what factors may or may not be taken into account in assessing the amount of permanent maintenance to be awarded under the section.

In England it is not unusual to refer to and have regard to what is described as the basis of one-third of the total income of the husband and wife less the wife's income. The more recent trend, however, is not to lay stress on any such rigid arithmetical rule but have regard to the disposable income of the husband and the income of the wife and assess the amount after taking into consideration all the facts and circumstances of the case including the conduct of the parties. The 'one-third' rule had its origin in the practice of Ecclesiastical Courts in fixing permanent alimony while granting divorce *a mensa at thoro* (judicial separation) and in numerous instances the proportion was applied by court in assessing permanent maintenance to be awarded after a decree of divorce. The supposed arithmetical rule has been critically examined in recent decisions and one summation is (*b*): "Although the considerations which applied in the Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed by the section under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount."

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(*a*) Reference may be made to *Taylor* v. *Bleach* (1915) 17 Bom. L.R. 56.

(*b*) *Stibbe* v. *Stibbe* (1931) P. 105, 110. Also see *Gilbey* v. *Gilbey* (1927) P. 197.

In view of the express provisions of this section it is not necessary for the court, while determining the amount of permanent alimony or permanent maintenance to a Hindu wife or husband, to look back to the history of English matrimonial law nor need the court concern itself with any difference or change of opinion expressed in particular cases in England. There is no reason for assumption of a fixed arithmetical rule even in case of allotment of permanent alimony where the decree is only for judicial separation. The mode of assessment of the amount of permanent alimony or permanent maintenance is entirely a matter of discretion of the court. A rough working rule may have some usefulness in application for maintenance *pendente lite* and it is submitted that even if any such working rule is evolved as of some guidance in case of such interim orders it is not necessary nor desirable that for assessment of permanent alimony or permanent maintenance there should be any notional or *prima facie* rule which has regard to arithmetical proportions. The question cannot be one of arithmetic and must remain entirely of discretion. It would be an error to decide first or even assume what *prima facie* the proportion should be and then to examine the other relevant factors. The court would take all the circumstances of the case into account and arrive at a solution having regard to the means of the parties and their conduct giving due weight to considerations of good sense and fairness. There can be no set of fixed principles applicable to all the varying types of cases which must fall for consideration under this section and the decision must rest on the facts of each case and the broader grounds emphasized in the section and ultimately the sense of propriety and justice of the court.

The section does not purport to lay down any rigid rule or indicate any yardstick for the purpose nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court while stressing that the means of the parties and their conduct are essential factors to which regard must always be had. It has to consider all the pertinent circumstances involving each of the parties. The elements and factors to be considered include everything having legitimate bearing on present or prospective matters affecting lives of both the parties which can obviously not be susceptible of proper enumeration. In the exercise of its discretion the court has to select or emphasize such of the factors as are appropriate to the facts of the particular case—in addition to the prime factors which touch the means and conduct of the parties—such for instance as the status and station in life of the parties, duration of the marriage, support and education of children, the ability of the spouses to earn and their future prospects as also their age, health and sex and the reasonable wants of the applicant. In a leading case on the subject of maintenance the Privy Council pointed out, though in a somewhat different context, that maintenance depended upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the parties, a survey of the condition and necessities and rights of the members of the family, the scale and mode of living and the age, habits and wants and class of life of the parties. It is out of a great category of circumstances, many of them small in themselves, that a reasonable induction is to be made by the court in arriving at a fixed sum (*c*).

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(*c*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.P.C. 128.

In estimating the amount of permanent alimony or permanent maintenance the court while dealing with the factor of income would not focus its attention only on the disposable income of a spouse in the year preceding the making of the order, but would normally have regard to the earnings in previous years and probable earnings in the future (*d*). A mode often adopted is to take into account the average of earnings during the previous three years. The disposable income would be arrived at after deducting the expenses of earning it. There are other deductions also which the court would take into account. They would include liabilities if any for income-tax, super-tax and other allied taxes (*e*). The support and education of the children of the marriage would be an important item to be taken into account under this head. The court would also have regard to the number of other persons entitled to maintenance from the respondent under the provisions of the Hindu Adoptions and Maintenance Act, 1956. The mode of living of the parties in the matter of expenses while cohabitation or the marriage lasted may be considered but would not be a reliable index because the past mode of life of the parties may have been on a penurious or miserable scale or on the other hand on an extravagant scale. But if the scale was suited to the position and status of the parties that may be a factor to be considered in the estimate where there is no reliable data on the point of income. It would be necessary to consider the overall financial position of the spouses and their necessities having regard not merely to their income but their property, debts, liabilities (*f*) and obligations and other factors to some of which reference has already been made. A reasonable induction would require consideration of various elements and factors which cannot all be listed.

The section speaks of the income and other property of the respondent to the application for maintenance and the conduct of the parties and unlike sec. 19(2) of the English Matrimonial Causes Act, 1950, does not in terms state the "ability of the husband" as a factor to be taken into consideration. But it would seem that the court would under the present section take that element also into consideration as for instance where it appears that the husband has so arranged his affairs as to show that he has no property at all or very little property and the court may in the particular circumstances of a case make a strict and stringent order against him (*g*). It would also be open to the court, where the circumstances of the particular case so require, to take into account the earning capacity of the husband as well as the wife (*h*). The court has ample discretion and in a deserving case may ascertain not only what moneys the husband had, but what money he could have had if he liked and take into consideration his capacity and ability to provide maintenance. The court will look at the realities and not permit itself to be misled by appearances.

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(*d*) *Sherwood* v. *Sherwood* (1929) P. 120.

(*e*) *Dayrell-steyning* v. *Dayrell-steyning* (1922) P. 280, 282; *Stibbe* v. *Stibbe* (1931) P. 105, 109, 110; *Sherwood* v. *Sherwoood* (1928) P. 215. Reference may also be made to *J.* v. *J.* (1955) 2 All E.R. 617, (1955) P. 215.

(*f*) Ordinary premiums to be paid on life insurance policy taken out by the husband on his own life would not be treated as deductions but in respect of policies for other benefits such for instance as education of children reasonable amounts of premia would be taken into consideration.

(*g*) *Donaldson* v. *Donaldson* (1958) 2 All E.R. 660 affords an instance of this. Reference may also be made to *J.* v. *J.* (1955) 2 All E.R. 617, (1955) P. 215.

(*h*) Reference may be made to the observations in *Griffith* v. *Griffith* (1957) 1 All E.R. 494, 495, 496.

The mere circumstance that the wife had been living apart for a number of years and was able to earn a living is not sufficient ground for not making an order of maintenance under this section in her favour (*h*1). The court will not take into account the fact that the wife is sure to get assistance or even substantial assistance from her brother or other relation, for such help would from its very nature depend on the will of such other person (*h*2) and may not by itself be a ground for refusing alimony under this section and the court would take into consideration all the relevant factors including conduct of the parties and their means (*h*3).

**"Conduct of the parties".**—The means of the parties and their conduct are primary considerations to which the court is directed to address itself in assessing permanent alimony or permanent maintenance to be awarded under the section. Where a matter is contested and evidence led on the issue of maintenance at the hearing of the petition the court is in a better position to determine the same. Difficulty may arise when an application for maintenance is made after a decree has gone *ex parte* or where at the hearing of the petition the question of maintenance was not determined and in a subsequent application the respondent wants to rely on the conduct of the petitioner for the purpose of opposing the same because in such a case the issue as to the matrimonial offence charged and proved against the respondent would be *res judicata*. It has been held in England (*i*) that in such a case the husband is barred from asserting matters inconsistent with the decree. Further, he is, for reasons of public policy, prohibited from asserting matters (of which he knew) which would reasonably have been expected, if proved, to provide an effective answer to the petitioner or to produce a different result at the trial. This prohibition would probably not extend to matters of which he was ignorant at the time of the trial but which he might have known but for his own carelessness.

There are cases where the earlier conduct of the wife has contributed to the final break-up of the marriage although such conduct would provide no effective answer to the petition and would not amount to conduct conducing. It would not be just to put such conduct beyond the scope of inquiry. The rights of a wife who has always been selfish and unloving ought not to be identical with those of a wife who has always been loving and unselfish. Where the husband's income leaves available for an injured wife only enough to supply the bare necessities of life, the difference may be negligible, but where the husband's means enables the amount to be more generous the court would not allow a bad wife the same amount that it would have otherwise awarded. The court would not include in the consideration petty or irrelevant acts but would keep the matters in issue within reasonable limits. It would seem that the court can take into consideration relevant evidence of the conduct of the parties both before and after the marriage (*j*). Reference may also be made to Notes under "Discretion" *supra*.

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(*h*1) *Leela Devi* v. *Manoharlal* ('59) A.M.P. 349.

(*h*2) *Subramanyam* v. *Saraswathi* ('64) A. Mys. 38.

(*h*3) *Seshadri* v. *Jayalakshmi* ('63) A.M. 283; (1963) 1 Mad. L.J. 11, (1963) Mad. 384.

(*i*) *Duchesne* v. *Duchesne* (1950) 2 All E.R. 784; *Restall* v. *Restall* (1930) P. 189. Reference may also be made to *J.* v. *J.* (1955) 2 All E.R. 617.

(*j*) *Lindsay* v. *Lindsay* (1934) P. 162, 166. Also see *Nathulal* v. *Mana Devi* ('71) A. Raj. 208, 211.

**". . . may be secured, if necessary, by a charge . . ."**—An order for permanent alimony or permanent maintenance made by the court does not of itself create any charge upon the property of the respondent whether joint or separate until it is fixed by a decree of the court or agreement of the parties. The right is liable to be defeated by a transfer of the respondent's property to a *bona fide* purchaser for value without notice of the claim for alimony or maintenance. Section 39 of the Transfer of Property Act deals with transfer of property in such cases. Where maintenance has been made a charge upon the immovable property of the respondent and the property is subsequently sold, the purchaser must hold it subject to the charge. The present section empowers the court to direct that the gross sum or periodical payment awarded by it for maintenance and support of the applicant shall be a charge on the immovable property of the respondent.

**Agreement not to sue for maintenance.**—On general principles no agreement between the parties can deprive the court of its right to grant maintenance or to renew the question of maintenance. The rules laid down in this section cannot be overriden by any such arrangement or agreement and the discretion of the court remains unfettered. The question of any such agreement *inter partes* was examined by the House of Lords in the undermentioned case (*j*1). It may be noticed that in England there is now some legislation on the subject (*j*2).

**Sub-sec. (2): Variation of order.**—This sub-section confers ample power on the court to vary, modify or discharge any order for permanent alimony or permanent maintenance that may have been made in any proceeding under the Act under the provisions contained in sub-section (1). In exercising the power the court would have regard to the 'change in the circumstances of the parties.' There must be some material alteration in the circumstances of the parties and the court would not modify an order simply because there has been some slight alteration in their circumstances. The section does not in terms so state but it would seem that 'conduct' which falls within the meaning of sub-section (1) and which has to be considered for the purpose of that sub-section may properly be taken into account when an application is made for variation or a rescission of the order (*k*).

**Sub-sec. (3).**—It is important to note that an order made by the court for permanent alimony or permanent maintenance is not to operate after remarriage of the party in whose favour the order is made. In such a case if an application is made to the court it is incumbent on the court to rescind the order on proof of such marriage. The court has a discretion, as already pointed out, to make an order for permanent alimony or permanent maintenance in favour of a spouse who had been guilty of a matrimonial offence, for instance, adultery. But the court is directed by this section to cancel any such order if it is satisfied that after the passing of the order the party in whose favour the order was made has not remained chaste and it is incumbent on the court to rescind the order on proof of the fact that such party has had sexual inter-

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(*j*1) *Hyman* v. *Hyman* (1929) All E.R. 245 (H.L.).

(*j*2) See *Wright* v. *Wright* (1970) 3 All E.R. 209.

(*k*) Section 28(3) of the Matrimonial Causes Act, 1950, is differently worded. Reference may be made to *Hayfield* v. *Hayfield* (1957) 1 All E.R. 598.

course with any person. This applies to both the spouses but an exception is made in case of a husband against whom a decree of divorce had been granted under section 13(2) on the ground that before the Act came into force he had another wife who was alive at the time of the presentation of the petition and an order for permanent maintenance had been passed in his favour under the present section. The operation of this sub-section will be invited in his case only if he has had sexual intercourse with any woman outside wedlock, that is with any woman other than that wife.

In case of payment of monthly or periodical sums the court can rescind the order only as regards future payments. As to on order directing payment of a gross sum it cannot be rescinded under this provision (*k*1).

**Appeal.**—The order awarding or refusing to award alimony and maintenance under this section is appealable (*l*). But the appeal being against an order made in exercise of the discretion of the court of first instance the matter is not open to review in the sense that the appeal court can be asked to reassess the evidence and substitute its discretion for that of the court which has passed the order. The position in this class of cases was clearly stated by Asquith L.J. in the undermentioned case (*m*): "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions. . . . It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere." An appeal also lies against any order (*n*) made under sub-sections (2) and (3).

**Second Appeal.**—What should be the quantum of permanent alimony is essentially a question of fact and no second appeal can lie unless it is shown that the court had misdirected itself or exercised its discretion on a wrong principle. Such, for instance, would be the case if it had failed to take into account any of the relevant factors set out in the section or taken into account extraneous or irrelevant factors (*n*1).

**26.** In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending,

Custody of children.

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(*k*1) *Nanigopal* v. *Renubala* ('65) A. Orissa 154. Also see *Blanche Somerset* v. *Bleach* ('15) A.B. 50; *Goodhall* v. *Goodhall* ('38) A.A. 121.

(*l*) Section 28 *post*. *Seshadri* v. *Jayalakshmi* ('63) A.M. 283; (1963) 1 Mad. L.J. 11. (1963) Mad. 384.

(*m*) *Bellenden* v. *Satterthwaite* (1948) 1 All E.R. 343, 345; *J.* v. *J.* (1955) 2 All E.R. 617.

(*n*) Section 28 *post*.

(*n*1) *Dharamshi* v. *Bai Saker* ('68) A. Guj. 150; *Umiyaben* v. *Ambalal* ('66) A. Guj. 139.

and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

The jurisdiction of the court to make provision for custody, maintenance and education of minor children under this section depends on the following requisites being fulfilled:

(i) The application must be made in any proceedings under the Act, and
(ii) it must relate to "minor children."

The orders contemplated by the section may be made, varied, suspended or revoked from time to time and even after the termination of the proceedings by passing of any decree as if the proceedings were still pending.

The primary and paramount consideration for the court in making any order under this section would be the welfare of the minor. In a petition by a wife in proceeding for judicial separation for custody of a male child below five years of age the court would bear in mind the provisions of section 6 of the Hindu Minority and Guardianship Act, 1956 (*n*2). Reference may be made to Notes under sections 6(a) and 13 of the Hindu Minority and Guardianship Act, 1956 *post*.

The term children in this section would seem to include not only legitimate children but those deemed to be legitimate by operation of section 16 in case of void and voidable marriages as also children the marriage of whose parents was the subject-matter of any proceedings under this Act. Although the word "children" in a statute *prima facie* means legitimate children that meaning is displaced in the context in which the word appears in this section and it embraces a wider category than that of legitimate children. In a case decided by the House of Lords (*o*) under section 26(1) of the Matrimonial Causes Act, 1950, where the language used is somewhat similar, though not *in pari materia*, it was held that an order for custody of an illegitimate child of the parties born two years prior to their marriage could properly be made under that section. There seems no reason why an order with respect to the custody, maintenance and education of illegitimate minor children of the parties though not legitimated *per subsequens matrimoniam* in spite of subsequent marriage between them should not be made under the present section. The test of jurisdiction under the present section is the parenthood and not the legitimacy of the child. But the child with relation to whose custody, maintenance and education an order is made must be a child of the parties to the proceeding under this Act. The case of a child born during marriage, but not child of the husband, would not be covered by this section and it would seem the court would have no power to make an order for custody of such child under this section (*p*).

Adoption under Hindu law has the effect of transferring the adopted boy from his natural family into the adoptive family. A son adopted in accordance with that law prior to the commencement of the Hindu Adoptions and Maintenance Act, 1956, would if a minor be a 'child' of the adoptive parents within the ambit of this section. So also would the section extend to the case of

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(*n*2) *Chander Prabha* v. *Prem Nath* ('69) A. 429. Delhi 283.
(*o*) *Galloway* v. *Galloway* (1955) 3 All E.R.
(*p*) Reference may be made to *Webb* v. *Webb* (1952) 1 All E.R. 527.

a minor child, boy or girl, adopted after the commencement of that Act where the child had become the adopted child of both the parties between whom there was any subsequent proceeding under this Act.

In custody proceedings the court will take into consideration all the relevant evidence that may be adduced before it and will not exclude any fresh or additional evidence relevant to the matter under consideration simply on the ground that it did not form part of the material on which the issues in the proceedings were determined, for to do so would result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the minor children, namely, to ascertain what directions would best serve the interest of the children themselves (*q*).

**27.** In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

Disposal of property.

The rule laid down in this section is intended to prevent multiplicity of litigation in respect of certain property between parties to any proceeding under the Act by laying down in effect that an application with respect to any property presented at or about the time of marriage to both the husband and the wife may be made by either party to such proceeding and that the court may in the exercise of its discretion make provision for disposal of such property as it deems just and proper. The application must be made before the proceeding terminates and the order may be made at the time of passing of the decree or liberty may be reserved to the parties to apply for an order for disposal of such property in the proceeding on any subsequent date. The operation of the rule is confined only to property presented to the parties at or about the time of marriage and which belongs jointly to them (*qq*). Other disputes relating to any property between the parties must be the subject-matter of ordinary legal proceedings and cannot be entertained by the Matrimonial Court (District Court) constituted under the Act. In the undermentioned case the view, however, has been expressed that in proceedings under the Act the court has inherent power to pass an appropriate decree in regard to property which may belong solely to the husband or to the wife (*qq*1). In the absence of statutory authority the court trying matrimonial causes has no jurisdiction to deal with the property rights of the parties or to dispose of any property jointly owned by them.

**28.** All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of the original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

Enforcement of, and appeal from, decrees and orders.

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(*q*) Reference may be made to the general observations on the subject in *Corbett* v. *Corbett* (1953) 2 All E.R. 69, (1953) P. 205.

(*qq*) Reference may be made to *Mahalaxmiamma* v. *Radhakrishna Rao* ('68) A. Mys. 229.

(*qq*1) *Kamta Prasad* v. *Om Wati* ('72) A.A. 153 (wife's ornaments).

Provided that there shall be no appeal on the subject of costs only.

**Enforcement of decrees and orders and appeals from decrees and orders.—** This section refers to the mode or manner of executing decrees and orders passed by the court in any proceeding under this Act. It does not lay down any special rules for the purpose but states that such decrees and orders are to be executed in the like manner as the decrees and orders of a court exercising original civil jurisdiction which would be in accordance with the provisions relating to execution of decrees and orders contained in the Civil Procedure Code. This section also lays down that both *decrees* and *orders* made by the court in any proceeding under the Act may be appealed against in the like manner. There cannot, however, be an appeal only against any decree or order for costs in any proceeding or application under the Act. This section may be read with section 21.

**Judgment in rem.—**A judgment given by a competent court in exercise of matrimonial jurisdiction conferred under this Act and determining the status of the parties falls within the purview of section 41 of the Evidence Act and would be conclusive not only against the parties to the proceeding but against the whole world. It would operate as a judgment *in rem* (*q*1).

Question sometimes arises as to the effect of the death of a respondent pending an appeal filed in any such case. Reference may be made to the cases noted below (*q*2).

**Appeal: "All decrees and orders . . ."—**This section makes definite provision for appeals and confers a right of appeal against all decrees and orders passed by the court in any proceeding under the Act. There is nothing in the section to indicate a limitation that the right to appeal should be conferred by and exist under some other law for the time being in force like the Civil Procedure Code. As to decrees there can be little controversy but there has arisen a difference of opinion among various High Courts as to the appealability of orders made in pursuance of provisions contained in the Act, in respect of maintenance *pendente lite*, expenses of the proceeding started under the Act, permanent alimony, maintenance and custody of children.

One construction of the section which has found favour with the High Courts of Calcutta (*r*), Madras (*r*1), Gujerat (*r*2), Madhya Pradesh (*r*3), Allahabad (*r*4), Orissa (*r*5), Punjab (*r*6), Rajasthan (*rr*6) and Andhra Pradesh (*r*7) is that an appeal lies against all decrees and orders made by the court

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(*q*1) *Siddaiah* v. *Penchalamma* ('63) A.A.P. 158; *Suhas Pande* v. *Manohar Pande* ('71) A.B. 183; Also see *Sunanda* v. *V. Subba Rao* ('57) A.A.P. 424.

(*q*2) *Suhas Pande* v. *Manohar Pande* ('71) A.B. 183; *Sunanda* v. *V. Subba Rao* ('57) A.A.P. 424.

(*r*) *Sobhana Sen* v. *Amar Kanta Sen* ('59) A.C. 455 (order under section 24). *Contra Gopendra Nath* v. *Prativa Rani* ('62) A.C. 455.

(*r*1) *Seshadri* v. *Jayalakshmi* ('63) A.M. 283 (order under s. 25).

(*r*2) *Harilal* v. *Lilavati* ('61) A. Guj. 202 (order under s. 25); *Lallubhai* v. *Nirmalaben* ('72) A. Guj. 174.

(*r*3) *Rukhmanibai* v. *Kishanlal* ('59) A.M.P. 187.

(*r*4) *Sarla Devi* v. *Balwan Singh* ('69) A.A. 601.

(*r*5) *Snehalata* v. *Jagadish* ('64) A. Orissa 122 (order under section 24).

(*r*6) *Jairath* v. *Jairath* ('67) A. Punj. 148 (order refusing stay); *Sunder Singh* v. *Manna Sunder Singh* ('62) A. Punj. 127; *Tarlochan Singh* v. *Mohinder Kaur* ('61) A. Punj. 508 [orders under s. 24)].

(*rr*6) *Govind Ram* v. *Lila Devi* ('69) A. Raj. 253 [orders under sections 24, 25 and 26].

(*r*7) *Kutumba Rao* v. *Sesharatnammba* ('67) A. A.P. 323 (F.B.) [section 24].

in any proceeding under the Act and that the words at the end "under any law for the time being in force" are only intended to provide for the forum where the appeal would be and such other matters as regards procedure for the hearing of appeals. The construction to the contrary accepted by the High Courts of Bombay (*r*8), Jammu and Kashmir (*r*9), Mysore (*r*10) and Himachal Pradesh (*r*11) is that the section does not say anything positive itself as regards appealability of decrees and orders but merely says that if an appeal lies against any decree or order made in any proceeding under this Act under some law that may be in force at the time (e.g. Civil Procedure Code), then only will an appeal lie and not otherwise. The High Court of Patna has left the question open (*r*12). The section is not happily worded. It is submitted that the former view is preferable.

It does not follow from the foregoing that every order that may be made by a court in any proceeding under the Act is appealable. The court may during pendency of a proceeding under the Act and at the hearing make many orders for which provision is made in the Civil Procedure Code. Orders which are not passed "under the Act" but are merely interlocutory or routine orders passed under the Civil Procedure Code do not become appealable under the present section (*r*13). The words "under any law for the time being in force" relate not only to the forum before which the appeal is to be preferred and the procedure in connection with such appeal but also the jurisdiction and power of the court in dealing with the appeal so filed. Thus a right of second appeal conferred by this section is limited to the grounds set out in section 100 of the Civil Procedure Code and the court will have jurisdiction only on questions of law and not on questions of fact (*r*14).

**Letters Patent Appeal.**—It has been held in the undermentioned cases that an appeal under the letters patent of the High Court is maintainable against an order of a single judge of the High Court passed in appeal against an order made on a petition under the Act. The extent and scope of the inquiry by the Appellate Bench in such letters patent appeal has also been considered in those cases (*r*15).

**Forum of Appeal.**—Where in a petition under the Act a decree is passed by court of the Civil Judge, Senior Division, which court was notified by the State Government under s. 3(*b*) as having jurisdiction in respect of matters dealt with in the Act, the appeal, according to the Bombay High Court, lies to the District Court and not to the High Court (*s*9). Similar in effect are decisions of the Madras (*s*10) and Mysore High Courts (*s*11). But where there is no such Notification specifying any other Civil Court as a District Court and the petition is decided by the Additional District Judge who is

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(*r*8) *Prithvirajsinghji* v. *Shivprabhakumari* ('60) A.B. 164 [section 24].

(*r*9) *Mohan Rani* v. *Mohan Lal* ('65) A. J. & K. 88.

(*r*10) *Muniswamappa* v. *Eramma* ('68) A. Mys. 8 [section 24].

(*r*11) *Sushila Devi* v. *Dehani Ram* ('65) A.H.P. 12 [section 24].

(*r*12) *Bankim Chandra* v. *Anjali* ('72) A.P. 80.

(*r*13) For instance see, *Anita* v. *Birendra* ('62) A.C. 88 (order for stay of proceedings) 65 C.W.N. 786. Also see f.n. (*r*9) above.

(*r*14) *Umiyabhen* v. *Ambalal* ('66) A. Guj. 139.

(*r*15) *Dassi* v. *Dhani Ram* ('69) A.P. & H. 25; *Vira Reddi* v. *Kistamma* ('69) A.M. 235.

(*s*9) *Gangadhar* v. *Manjula* ('60) A.B. 42; (1959) Bom. 1085.

(*s*10) *Valliammal* v. *Priaswamy* ('59) A.M. 510 (1959) 2 Mad. L.J. 152 (to that court to which appeal generally lies). *Ammal* v. *Vanniar* (1959) Mad. 969.

(*s*11) *Mallappa* v. *Mallava* ('60) A. Mys. 292; *Dhulappa* v. *Krishnabai* ('62) A. Mys. 172.

part and parcel of the District Court, the appeal lies to the High Court and not to the District Court (*s*12). In the Punjab, having regard to the provisions of the Punjab Courts Act, it has been held that in case of a petition decided by a Subordinate Judge, first class, empowered by Notification to entertain the same, the appeal lies to the High Court and not to the District Court (*s*13). A Full Bench of the Allahabad High Court has held that an appeal from an order under section 24 by a Civil Judge, who is a District Court within the meaning of the Act, in a proceeding commenced on a petition under the Act which petition does not mention any value on the face of it lies to the High Court and not to the District Court (*s*14).

**Interference by Appellate Court.**—Where a case turns entirely on questions of fact and the credibility of witnesses a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony of conflicting witnesses whom he has seen and heard and a heavy burden is thrown upon the unsuccessful litigant who seeks to reverse the decision (*r*16). On the other hand where the findings as regards facts have been drawn from argumentative inferences from the testimony, oral and documentary, and depend upon the weight of evidence and the inherent probability of the story and not on credibility induced by witnesses by the demeanour or manner in which they answer questions, the trial court is in no better position than the court of appeal in discovering the truth (*s*). These general principles are well established. In a case decided under the Indian Divorce Act the Supreme Court observed (*t*): "if in giving the findings the courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and this Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by this court will be called for." In respect of orders passed by the court of first instance in matters where it exercises discretion the Court of Appeal is very slow to interfere and is guided by somewhat different considerations. Reference may be made to Notes at p. 814 *supra*.

## SAVINGS AND REPEALS

**29.** (1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes (*t*1) or sub-divisions of the same caste.

Savings.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment

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(*s*12) *Ambi Pundalik* v. *Pundalik* ('60) A.B. 521; 61 Bom. L.R. 1167.

(*s*13) *Kalyan Singh* v. *Tej Kaur* ('61) A. Punj. 480; (1961) 1 Punj. 303.

(*s*14) *Paras Ram* v. *Janki Bai* ('61) A. All 395 (F.B.). As to appeal from a decision of the Small Causes Court Judge reference may be made to *Dal Chand* v. *Swarn Pratap* ('65) A.A. 46. Also see *Shesh Narain* v. *Savitri* ('67) A.A. 156.

(*r*16) *Sitalakshmi* v. *Venkata Subrahmanian* (1930) 32 Bom. L.R. 887 (P.C.).

(*s*) *Virappa Chettiar* v. *Periakaruppan* (1945) 47 Bom. L.R. 608 (P.C.). Also see *Simpson* v. *Simpson* (1951) 1 All E.R. 955 (C.A.) (1951) P. 320. Also see *Radha Prasad* v. *Gajadhar Singh* (1960) S.C. 115.

(*t*) *White* v. *White* (1958) S.C.J. 839.

(*t*1) *Kastoori Devi* v. *Chiranji Lal* ('60) A.A. 446.

to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

**Savings.**—A saving clause is generally inserted where there is repeal of any statute and re-enactment of the law on the subject and also inserted at times when it is deemed necessary to except something from the operation of the Act which would otherwise have been included. Sometimes savings are inserted to prevent the effect of certain repeals wholly or in part. Savings are also inserted at times *ex majore cautela* (*u*).

**Sub-sec. (1).**—The validity of a Hindu marriage solemnized after the coming into operation of this Act is to be judged by the relevant provisions of the Act. The validity of a marriage solemnized between Hindus before this Act came into operation has to be judged by the law as it previously existed. The Hindu Marriage Disabilities Removal Act, 1946, laid down: "Notwithstanding any text, rule or interpretation of the Hindu Law or any custom or usage, a marriage between Hindus which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto (a) belong to the same *gotra or pravara,* or (b) belong to different sub-divisions of the same caste." The Hindu Marriages Validity Act, 1949, went a step further and laid down: "Notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu law or in any custom or usage, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to different religions, castes, sub-castes or sects." Both these enactments are repealed by section 30 and effect is given to the rules laid down in them by this Saving contained in sub-section (1). Any marriage solemnized between Hindus if otherwise valid is not to be invalid or deemed ever to have been invalid on any of the grounds mentioned in it.

**Sub-sec. (2).**—Divorce was not known to the general Hindu law but in certain communities divorce was recognised by custom and the courts upheld such custom when it was not opposed to public policy (*v*). The scheme and

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(*u*) *Smith* v. *R.* (1898) A.C. 782; *McLaughlin* v. *Westgarth* (1906) 75 L.J. P.C. 117.

(*v*) See § 441 and Notes thereunder ante: *P. L. Singh* v. *M. M. Singh* ('56) A. Manipur 18. Reference may also be made to *Madho Prasad* v. *Shakuntala* ('72) A.A. 119. Also see *Edamma* v. *Hussainappa* ('65) A.A.P. 455.

object of the present Act is not to override any such custom which recognised divorce and effect is given to the same by the Saving contained in this sub-section. It is not necessary for parties in any such case to go to court to obtain divorce on grounds recognised by custom.

Although divorce was not known to the general Hindu law, in many States, divorce was allowed on certain grounds as the result of special legislation on the subject. Some of those enactments permitting divorce were repealed by section 30 in view of the comprehensive nature of the present Act. Proceedings pending under any of those enactments at the commencement of this Act are expressly saved by sub-section (3).

There are, however, some special enactments permitting divorce on stated grounds which are not repealed by this Act and the object of the present sub-section is not to override them but to permit them to continue in force. Any right conferred by the provisions of any such unrepealed special enactment is saved by sub-section (2) and can be availed of by persons to whom they apply whether the marriage was solemnized before or after the commencement of this Act. A suit for divorce under any such unrepealed enactment would not come within the purview of the present Act and section 19 of the Act which deals with jurisdiction has no application to the same (*w*). Thus, for instance, the right to obtain dissolution of marriage on any of the grounds stated in Travancore Nayar Act (which has not been repealed) in the court of the Munsiff having jurisdiction under that Act remains unaffected by the present Act by reason of this sub-section. The sub-section, as pointed out by a Full Bench of the Kerala High Court, saves the right to obtain dissolution under the Nayar Act and everything necessary, substantial, remedial or procedural to obtain dissolution of marriage under that enactment (*w*1). Similar is the position under Madras Aliyasanthana Act 9 of 1949 (*w*2).

The saving of any right recognised by custom or conferred by any special enactment does not mean that the rights conferred by the present Act are unavailable to a party (*w*3).

In a proceeding adopted after the coming into operation of this Act, it would not be open to a party to rely on any ground for relief recognized under a repealed enactment and the matter would be governed by the provisions of this Act (*x*).

**Sub-sec. (3).**—Section 30 repealed a number of special enactments under which marriage could be annulled or divorce granted. Proceedings adopted by parties under any of those enactments and pending at the date of the commencement of the present Act are expressly saved by this sub-section. Such proceedings may be continued and determined as if this Act had not been passed. The Saving in this sub-section only applies to proceeding pending at the commencement of this Act and not to any proceeding adopted after this Act came into operation.

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(*w*) *Kamala Nair* v. *Narayana Nair* ('58) A.B. 12; *Vasappan* v. *Sarada* ('58) A. Kerala 39.

(*w*1) *Krishna Pillai* v. *Subhadra Amma* ('71) A. Kerala 44 (F.B.).

(*w*2) *Prema* v. *Ananda Shetty* ('73) A.Mys. 69.

(*w*3) *Chellappan Nair* v. *Madhavi Amma* ('61) A. Kerala 311 (F.B.) (1961) 1 Ker. 33 (F.B.).

(*x*) *Sitabai* v. *Ramchandra* ('58) A.B. 116 (F.B.).

As to proceedings for restitution of conjugal rights pending at the commencement of this Act see Notes under section 9 *ante*.

**Sub-sec. (4).**—Section 4 of this Act has overriding effect and any statute in force immediately before the commencement of this Act ceases to have effect in so far as it is inconsistent with any of the provisions contained in this Act. In order to leave no scope for any doubt and out of abundant caution the Legislature has by the Saving contained in this sub-section expressly stated that the Special Marriage Act, 1954, continues to operate with respect to marriages between Hindus solemnized under that Act and nothing contained in this Act is to affect the provisions of that enactment. This sub-section does not, however, mean that the present Act would not apply in case one party to a marriage under this Act subsequently enters into a marriage with another person under the Special Marriage Act. The proviso to section 15 of the present Act would render any such subsequent marriage a nullity if it took place within the prohibited period of time prescribed by the proviso (*x*1).

**30.** [Repeals]. *Repealed by the Repealing and Amending Act, 1960 (58 of 1960), sec. 2 and First Schedule.*

The section, prior to its amendment, was as follows:

The Hindu Marriage Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriages Validity Act, 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 (Saurashtra Act V of 1950) and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952) are hereby repealed.

**Enactments repealed.**—This section enumerated certain enactments relating to the law of marriage and divorce which are now repealed. Although divorce was not known to the general Hindu law, in many States divorce was allowed on certain grounds as a result of special legislation and monogamy was enforced. In view of the comprehensive nature of the present Act some of those enactments were repealed as there was no necessity of having those enactments on the statute-book.

Speaking generally the effect of a repeal without saving would be to obliterate the repealed enactment from the statute-book as completely as if it had never been passed. Reference may be made to Notes under section 29 and section 6 of the General Clauses Act, 1897, which deals with effect of repeal (*y*). The repeal of section 30 has not made any change in the legal position as it abided under the repealed section.

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(*x*1) *Uma Charan* v. *Kajal* ('71) A.C. 307. *Ramchandra* ('58) A.B. 116 (F.B.).
(*y*) Reference may also be made to *Sitabai* v.

# THE HINDU SUCCESSION ACT, 1956

## No. 30 of 1956

## ARRANGEMENT OF SECTIONS

### Chapter I—Preliminary

SECTIONS


1. Short title and extent.
2. Application of Act.
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### Chapter II—Intestate Succession


5. Act not to apply to certain properties.
6. Devolution of interest in coparcenary property.
7. Devolution of interest in the property of a *tarward, tavazhi, kutumba, kavaru,* or *illom.*
8. General rules of succession in the case of males.
9. Order of succession among heirs in the Schedule.
10. Distribution of property among heirs in Class I of the Schedule.
11. Distribution of property among heirs in Class II of the Schedule.
12. Order of succession among agnates and cognates.
13. Computation of degrees.
14. Property of a female Hindu to be her absolute property.
15. General rules of succession in the case of female Hindus.

SECTIONS

16. Order of succession and manner of distribution among heirs of a female Hindu.
17. Special provisions respecting persons governed by marumakkattayam and aliyasantana laws.

*General Provisions relating to Succession*

18. Full-blood preferred to half-blood.
19. Mode of succession of two or more heirs.
20. Right of child in womb.
21. Presumption in cases of simultaneous deaths.
22. Preferential right to acquire property in certain cases.
23. Special provisions respecting dwelling-houses.
24. Certain widows re-marrying may not inherit as widows.
25. Murderer disqualified.
26. Convert's descendants disqualified.
27. Succession when heirs disqualified.
28. Disease, defect, etc. not to disqualify.

*Escheat*

29. Failure of heirs.

**Chapter III—Testamentary Succession**

30. Testamentary succession.

**Chapter IV—Repeals**

31. Repeals.

THE SCHEDULE

# INTRODUCTORY NOTE

The law of inheritance comprises rules which govern devolution of property on the death of a person upon other persons solely on account of their relationship to the former. In Hindu law the joint family system comes first in historical order. The law of inheritance was of later growth and, in general, applied only to property held in absolute severalty as distinguished from property held by the joint family. The joint and undivided Hindu family is the normal condition of Hindu society and the fundamental conception of the Hindu joint family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, that is, its undivided state, if forms a corporate unit, though not a juridical person. The joint family traces its origin to the ancient patriarchal system and the transition from that system to the joint family was a natural and logical development. In the joint family also the paterfamilias was the unquestioned ruler and the authority of the father of the family and some of his exclusive privileges are even now traceable in the rights of the father as the Karta of the joint family, though the principle of *patria potestas* has long ceased to be recognised. The earlier concept of the joint family was somewhat analogous to that of a corporate body and the tendency was to sink the individual in the family. Social conditions, however, underwent considerable transformation and there grew up a body of rules of inheritance under the title *dayavibhaga* which as explained by Vijnaneshwara means division of property which becomes the property of another solely by reason of his relation to the owner. Even under early Hindu law rights of sons (as junior members of the family) were recognised and they acquired equal interest with the father in the ancestral property as coparceners. Partition was an inevitable corollary of this system of coparcenary. And even in case of such a corporate unit self-acquisitions though at first viewed askance had to be recognised and rules of inheritance had to be laid down.

The law of heirship had close connection with the doctrine—"He who inherits the property, also offers the *pinda*" (*a*). It was based upon the principle of consanguinity and the theory of spiritual benefit was a later development. In most cases spiritual efficacy, propinquity and natural love and affection ran in the same lines. But difficulties arose when these ran in diverse lines and schemes of inheritance with some radical differences came into existence in different parts of the country. The difference in the law of inheritance between the two systems of Mitakshara and Dayabhaga, the existence of a number of schools of Hindu law, the matriarchal system prevailing in some southern parts of the country and dissimilar local and family customs obviously could not embrace a whole genus of cases and it was not possible to expect a system which was a homogeneous and consecutive whole. Besides a number of anomalies and some inequitable rules of succession had come into existence due to historical reasons and in some cases to the conservatism of judicial interpreters. Moreover conflicting pronouncements of

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(*a*) Vishnu XI, 40: *Yascharthaharah sa pinda-dayi.*

courts based at times on variant readings of the ancient texts had resulted in congeries of decisions, in case of some of which it was difficult to extract the *ratio decidendi* and not possible to harmonise them with the rest.

In this connection it may also be mentioned that Stridhan had become by far the most complicated and difficult branch of the law of succession. The difficulty of the subject may be gauged from what Jimuta Vahana stated in the Dayabhaga after finishing his discourse on Stridhan. "Thus has been explained the most difficult subject of succession to a childless woman." It must have been seen from the foregoing chapters relating to Succession and Stridhan that women occupied a very dependent position in the family and her rights to hold and dispose of property were generally speaking limited. The partial recognition only of the status of women in matters of property was no doubt understandable under ancient and medieval conditions. But their status had to be fully recognised in modern times of social emancipation and equality.

The principal reform that was called for and one which became a pressing necessity in view of changed social and economic conditions was that in succession there should be equable distribution between male and female heirs and the Hindu Women's limited estate should be enlarged into full ownership. The Hindu Women's Rights to Property Act, XVII of 1937, which introduced important changes in the law of succession by conferring new rights of succession on certain females although it gave better rights to women in respect of property, was found to be incoherent and defective in many respects and gave rise to a number of anomalies. Fragmentary legislation in the form of a number of un-co-ordinated rules did not prove a satisfactory remedy and the mass of floating case-law that grew up was somewhat bewildering and there seemed to be no end to the number of conundrums suggested.

The spacious and complicated structure that was Hindu law in the main remained undigested except by authors. Good exposition of law made by them and good judicial law made by able jurisconsults could not obviously bring the law precisely on a level with the codification of it by the authority of the supreme legislature. It had been generally recognised for a long time that the rules of inheritance should be turned into a body of law, compact in form and easily accessible. A uniform and comprehensive system of inheritance recognising equable distribution between male and female heirs and contained in a series of coherent propositions carefully considered and authoritatively stated was, therefore, a long-felt desideratum.

The Hindu Succession Act came into force on 17th June 1956. It amends and codifies the law relating to intestate succession among Hindus and brings about some fundamental and radical changes in the law of succession. Even if it seems to break violently with the past it has to be conceded that it is characteristic of the age which is one of great ideals and fast changing social, economic and political theories. Hindu law was at no time in its long history static, but was empiric and progressive. It was only after the reduction of India by the British and because of their policy of non-interference in matters of personal law that it ceased to grow with the times. Its principal characteristics of elasticity and assimilation were ignored and the degree of rigidity that

was given to it was such that legislation alone could cope with the felt necessities of the times.

Uniform law of succession: Wide application of the Act.

The Act lays down a uniform and comprehensive system of inheritance and applies *inter alia* to persons governed by the Mitakshara and Dayabhaga School as also to those in certain parts of Southern India who were previously governed by the Marumakkattayam, Aliyasantana and Nambudri systems of Hindu law. The Act applies to any person who is a Hindu by religion in any of its forms and developments including those who have deviated from orthodox standards of Hinduism in matters of ceremonial observances. Buddhists, Jains and Sikhs are also within its ambit. So also are converts or reconverts to any of the four religions—Hinduism, Buddhism, Jainism and Sikhism. A person, therefore, though not strictly a Hindu by religion, is included in the wide connotation given to the expression Hindu (section 2). It is not a mere laconism to observe that it is easier to say who are not Hindus or that the practical separation of Hindus from non-Hindus in the matter of applicability of the Act is not a matter of much difficulty. Clause (c) of sub-section (1) of that section adopts the negative form and in effect lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose of this evidently is to avoid as far as possible detailed and at times complex inquiries into the matter.

Over-riding effect of the Act.

Section 4 of the Act is of vital importance and gives over-riding effect to the provisions of the Act. It abrogates all the rules of the law of succession hitherto applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. The Act also supersedes any other law, contained in any Central or State Legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in the Act.

Scheme of the Act.

The scheme of the Act in the matter of succession to the property of a Hindu dying intestate (after the coming into force of the Act) is to lay down a set of general rules for succession to the property of a male Hindu in sections 8 to 13 including rules relating to ascertainment of the shares and portions of the various heirs which may be described as the Statute of Distribution. It is part of this scheme to enact in sections 15 and 16 separate general rules affecting succession to the property of a female intestate. Section 17 provides for certain modifications and changes in the general scheme of succession to the property of male and female Hindus in relation to persons hitherto governed by the Malabar and Aliyasantana law. The existence of a system founded on matriarchy in certain parts of Southern India in contradistinction to that in the rest of the country which is patriarchal having the common ancestor as the founder of the family and in which relationship is primarily by agnation, has been well established and judicially recognised for a long time. Recently there had found place on the statute-book a number of enactments regulating succession to the property of persons governed by the Marumakkattayam,

Aliyasantana and Nambudri Laws (*d*). Reference to the rules enacted in section 17 of this Act will show that the Legislature while aiming at a uniform code has taken care to provide for suitable modifications having regard to the law of those who favoured the matriarchate. Sections 18 to 28 of the Act are headed "General provisions relating to succession" and lay down rules which are supplementary to the provisions in sections 5 to 17. The rules laid down in those sections are not merely explanatory of the general rules for succession. Some of them enact substantive provisions involving legal principles.

Succession to property of a male intestate.

The two systems of inheritance to the separate or self-acquired property of a male intestate which have hitherto prevailed under the Mitakshara and Dayabhaga Schools are abolished and a uniform system comes into operation as propounded in sec. 8. The three classes of heirs recognised by the Mitakshara, viz Gotraja Sapindas, Samanodakas and Bandhus and the three classes of heirs recognised by the Dayabhaga, viz. Sapindas, Sakulyas and Bandhus cease to exist in case of devolution taking place after the coming into force of the Act. The heirs are divided, instead, into four classes or categories. These are (i) heirs in Class I of the Schedule, (ii) heirs in Class II of the Schedule, (iii) agnates and (iv) cognates. The property devolves firstly upon the twelve preferential heirs mentioned in Class I of the Schedule to the Act and failing such heirs upon the second, third and fourth class of heirs in that order as regulated by sections 8 and 9. Before 1937, the "simultaneous heirs" of a male Hindu dying intestate comprised only the son, the son of a predeceased son and the son of a predeceased son of a predeceased son. The Hindu Women's Rights to Property Act, 1937, added to the list the widows of the first two as well as the intestate's own widow. The outstanding feature of the new scheme of what may for convenience be described as the 'simultaneous heirs' or 'preferential heirs' is that the property devolves in equal shares among the son, daughter, widow and mother of the deceased. Eight other heirs come into this scheme of simultaneous succession by virtue of the doctrine of representation as applied to the case of predeceased son and predeceased daughter. The distribution of property among these preferential heirs is to be in accordance with the four rules laid down is sec. 10. It will be noticed that male and female heirs are treated as equal and without distinction. In Class II of the Schedule are specified heirs who are entitled to succeed in the order of Entries in which certain persons have been grouped together for simultaneous succession like father, brother and sister, and so on. They succeed in case of failure of any of the twelve heirs in Class I. They are also close relations of the male Hindu selected on the principle of natural love and justice. They are the intestate's father; great grandchildren both males and females (except the son's son's son who is an heir in Class I); brother; sister; sons and daughters of brother and sister; father's father and father's mother; step-mother and brother's widow; father's brother and sister; mother's father and mother's mother; and mother's brother and sister. These heirs in Class II do not all succeed simultaneously but in order of the nine Entries in whieh they are grouped. It will be noticed that some close rela-

Four categories of heirs.

(*d*) A number of these are stated in the definitions given in Section 3.

tions of the mother are included among the heirs in this scheme of succession and given preference over the other relations who can succeed only as agnates or cognates. The distribution of property among the heirs specified in Class II of the Schedule, who are entitled to succeed in order of the Entries in which they are placed, is to be in accordance with the rule laid down in section 11. The rules of preference determinative of the order of succession and those relating to the mode or method of reckoning degrees of ascent and descent according to which priority among agnates and cognates is regulated, are stated in sections 12 and 13.

**Property of a female Hindu to bo her absolute property.**

The Hindu women's limited estate in abolished and any property possessed by a female Hindu howsoever acquired is now held by her as her absolute property and she has full power to deal with it or dispose of it by will as she likes. The restraints and limitations on her power cease to exist even in respect of existing property possessed by a female Hindu at the date of the Act coming into force whether acquired by her before or after the commencement of the Act. It is now held by her as full owner and not as limited owner (s. 14).

**Succession to property of a female intestate.**

Under the previous law succession to Stridhan—woman's property—varied according as a woman was married or unmarried and according to the form of her marriage. It also varied according to the source of the Stridhan. The rules of descent of the different schools also varied. The Act abolishes all this and propounds in section 15 a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. That section groups heirs of a female intestate into five categories described as entries (a) to (e). Sons, daughters, children of any predeceased son or predeceased daughter and the husband are her heirs specified in entry (a). They take simultaneously and to the exclusion of those specified in the subsequent entries. Failing all heirs of the intestate female specified in entry (a), but not until then, her property devolves upon the heirs of her husband as laid down in entry (b). Heirs in entry (b) are preferred to those listed in entry (c) who are the mother and father of the intestate. On failure of the mother or father the property devolves upon the heirs of the father [entry (d)] and in case of failure of all the heirs in entries (a) to (d) the property devolves upon the heirs of the mother. This is not, however, a complete statement of the law since there are two important exceptions engrafted upon the general order of succession enacted in the five entries. The exceptions relate to property inherited by the female from her mother or father and property inherited by her from her husband or father-in-law. In case of a female intestate dying without issue property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not upon the husband or the heirs of the husband in accordance with the general order of succession laid down in the entries. Similarly in case of a female intestate dying without issue property inherited by her from her husband or father-in-law (as widow of a predeceased son) will revert to the heirs of the husband in existence at the time of her death and not upon the heirs of the father or mother in accord-

ance with the general order of succession laid down in the entries. No question of the application of either exception can arise where the female intestate dies leaving a son, daughter or a child male or female of any predeceased son or daughter. In such a case, that is when she dies leaving any issue, all her property howsoever acquired devolves upon such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive takes simultaneously with him. The rules relating to the mode or manner of computation of shares of the various heirs are stated in section 16.

The Act, although it deals with succession, has a bearing on other branches of Hindu law such as joint family, adoption, etc., and lays down rules of far-reaching consequences. It prescribes that where a coparcener dies intestate the Mitakshara coparcenery does not necessarily become disrupted. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of the coparcenery, whilst the family remains joint and undivided, can predicate, of the joint family property, that he has a definite share in the same. His interest is a fluctuating interest, capable of being enlarged by deaths in the family and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. Section 6 of the Act, although it does not interfere with the special rights of those who are members of a Mitakshara coparcenery, recognises, without abolishing joint family property, the right, upon the death of a coparcener, of certain of his preferential heirs to claim an interest in the property that would have been allotted to such coparcener if a partition of the joint family property had in fact taken place immediately before his death. Such preferential heirs, to mention some, are the daughter, the predeceased daughter's son and the predeceased son's daughter. There can be little doubt that radical reform was required in the Mitakshara law of coparcenery and that where one of the coparceners dies there should be equable distribution of his property not only in respect of his separate or self-acquired property but also of his undivided interest in the coparcenery property among his male and female heirs and particularly his son and daughter. Some of the indicia of the ancient joint family system had become extinct in consequence of inroads made upon the coparcenery *inter alia* by liberal interpretation of texts relating to partition, by rules founded on equitable considerations affecting payment of debts incurred personally by any member of the coparcenery and principally by the Hindu Women's Rights to Property Act, 1937, which conferred new rights on widows of coparceners. The power of free disposition of property is recognized in every system of law and it was time for Hindu law to fall in line. Probably the best solution would have been to abolish the ancient legal formulæ of acquisition of right by birth and devolution by survivorship since the logical way was to assimilate the Mitakshara to the Dayabhaga in this respect. This would also have the merit of equable treatment of the nearest female heirs of a coparcener and of bringing about uniformity in the law in all parts of India. Sentiment in favour of retention of the Mitakshara coparcenery even in an attenuated form seems to

Mitakshara coparcenary retained in an attenuated form.

have been respected and the rules laid down in section 6 are a compromise having some of the merits and all the demerits which attend such adjustive legislation.

Prior to the coming into operation of this Act, it was a rule firmly established that a Hindu cannot by will bequeath property which he could not have alienated by gift *inter vivos*. A coparcener under the Dayabhaga law, however, could by gift dispose of the whole of his property whether ancestral or self-acquired, subject to the claims of those entitled to be maintained by him. A coparcener under the Mitakshara law has no power to dispose of his coparcenery interest by gift. That rule is not affected by the new legislation but the extension of that conception which disentitled such coparcener to make a bequest of his interest in the coparcenery property so as to defeat the rights of the other members to take by survivorship is now abolished (section 30). Any Hindu male or female may now dispose of by will or other testamentary disposition any property (including in case of a male any interest in a Mitakshara coparcenery), in accordance with the provisions of the Indian Succession Act, 1925, or any other law relating to such dispositions applicable to Hindus. This power of testamentary disposition is, however, subject to the rights of maintenance of persons who are entitled to claim maintenance as dependants of the testator or testatrix. Sections 18 to 21 of the Hindu Adoptions and Maintenance Act lay down rules relating to the rights of maintenance of a wife, widowed daughter-in-law, children, aged parents and other *dependants*. Section 22 of that Act rules that where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of that enactment, the dependant shall be entitled, in accordance with the provisions of the same, to maintenance from those who take the estate.

The general provisions of the Act relating to succession contain rules *inter alia* to the effect that heirs related to a male or female intestate by full blood are to be preferred to those related by half-blood if the nature of relationship is the same in every other respect (sec. 18). Another important rule is that if two or more heirs succeed together to the property of an intestate, they take the property *per capita* and not *per stirpes* unless there is a provision which expressly lays down a contrary rule. Such heirs take the property as tenants-in-common and not as joint tenants (s. 19). Instances of succession *per stirpes* are to be found in the provisions of section 10 which deals with distribution of property among heirs in Class I of the Schedule and Rule II of section 16 which provides that if any son or daughter of a female intestate had predeceased her leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take *per stirpes* (not *per capita*), that is they shall take between them the share which such son or daughter would have taken if living at the time of the intestate's death. A child *en ventre sa mere* who is subsequently born alive has the same right to inherit property as if he or she had been born before the death of the intestate (s. 20).

Some general rules.

Under the texts of the Dharmashastras as interpreted by the courts certain defects, deformities and diseases excluded an heir from inheritance. This was substantially remedied by the Hindu Inheritance (Removal of Disabilities) Act, 1928, which ruled that "no person, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect." Unchastity of certain female heirs, change of religion and loss of caste were among the grounds of exclusion from inheritance recognized by law. Section 28 of the present Act discards almost all the grounds which imposed exclusion from inheritance and rules that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any other ground whatsoever excepting those expressly recognized by any provisions of the Act. The exceptions are very few and confined to the case of remarriage of a widow of a predeceased son, widow of a predeceased son of a predeceased son and widow of a brother and none of them is entitled to succeed to the property of the intestate as such widow, if on the date the succession opens. she has remarried. Remarriage by any such widow subsequent to the vesting of her interest in the property upon death of the intestate is, however, no bar (section 24). In case of other female heirs remarriage is not a bar at any time. Another disqualification stated in the Act relates to a murderer who is excluded on principles of justice and public policy (section 25). Change of religion and loss of caste have long ceased to be grounds of forfeiture of property and the only disqualification to inheritance on the ground that a person has ceased to be a Hindu (in the wide connotation of that expression) is confined to the heirs of such convert (section 26). Where a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants are disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens. The disqualification, it will be noticed, does not affect the convert himself or herself. But the children born to such person after conversion to any religion other than Hinduism, Jainism, Buddhism or Sikhism and the descendants of such children are affected by the disqualification.

Disqualified heirs.

Another change brought about by the Act is that impartible estates [other than those expressly saved by s. 5(ii) and (iii) of the Act] cease to be recognized as such. Such property has now under the Act all the ordinary incidents of property held by a Hindu.

Criticism was not lacking that the Act introduced drastic changes in the Family Law relating to ownership of property of Hindus and particularly of those governed by the Mitakshara and fundamentally altered the rules of intestate and testamentary succession prevailing under both the principal schools of Hindu law. Objection was also raised to the substitution of a new line of heirs which on examination will be found to have been based on natural love and affection. There was also objection to the abrogation of custom and customary laws except in some minor matters. Codification is a well worn subject and reference has already been made in the general Intro-

duction to the relevant considerations which lend support to the fundamental and radical changes brought about by this Act and it is not necessary to rehearse the same. Evolution and expansion are discernible in the successive state of legal thought in India and the traditional law itself had changed from time to time down the centuries. The new legislation is characteristic of the age which is one of great ideals and fast changing theories. There is considerable force in the remark belonging to times long past that rules of succession to property being in their nature arbitrary are in all systems of law merely conventional and even deep rooted traditions must yield to the march of time.

# THE HINDU SUCCESSION ACT, 1956

## ACT No. XXX OF 1956

[17th June 1956]

**An Act to amend and codify the law relating to intestate succession among Hindus.**

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

**Preamble.**—A preamble to an enactment of the Legislature was formerly regarded as key to open the mind of the makers of the Act, and the mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of Legislature has disappeared and it is now regarded as well settled that a preamble cannot either restrict or extend the enacting part when the language and the scope of an Act are not open to doubt. It sometimes happens that a preamble is narrow but the enacting words large. Assistance may be obtained from the preamble to a statute in ascertaining the meaning of the relevant enacting part, since words derive their colour and content from their context. But the preamble is not to affect the meaning otherwise ascribable to the enacting part unless there be a compelling reason and it is not a compelling reason that the enacting words go further than the preamble indicated (*e*). The preamble of the present Act speaks only of the law relating to intestate succession among Hindus. Chapter III of the Act, however, headed testamentary succession, enacts *inter alia* in express and explicit terms that a male Hindu is entitled to dispose of by will his interest in property of a Mitakshara coparcenary and recognises similar power in case of property of a *tarwad* and other family corporations governed by Marumakkattayam and Aliyasantana laws in Southern India. Also see 'Title' at p. 835 *infra*.

**Codifying Act.**—It is clear from the preamble that it is intended by the Act not merely to amend but to *amend and codify* the law relating to intestate succession and as pointed out above the Act in Chapter III lays down certain rules relating to the testamentary capacity of Hindus. The object of codification of a particular branch of law is that, on any matter specifically dealt with by it, such law should be sought for in the codified enactment itself. Where a statute is expressly said to codify the law, the court, as a general rule, is not at liberty to go outside the law so created simply because before the existence of that enactment another law prevailed. Reference may be made in this connection to the Notes at pp. 665-666 *supra* and the decisions there cited.

Question may arise whether this Act is a complete code in the sense of comprehensive legislation dealing with every phase and aspect of the law of succession. In an Act intituled an Act to amend and codify a particular branch of law, in so far as there is express enactment, that alone must be

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(*e*) *Attorney-General* v. *Prince Ernest Augustus of Hanover* (1957) A.C. 436.

looked at since the court is bound by it and can look to nothing else and the express enactment must govern the rights of the parties even though it has radically altered or modified the prior law. The Act, as has already been pointed out, has brought about some fundamental and radical changes in the law of succession previously applied to Hindus. Reference in this connection may be made to s. 4 which gives over-riding effect to the provision of the Act. It follows that with respect to matters for which provisions is made in the Act the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable though such matters are indeed few.

**Rules of interpretation of a statute.**—For some of the rules relating to interpretation see Notes at pp. 666-669 *supra*.

## CHAPTER I

## PRELIMINARY

Short title and extent.

**1.** (1) This Act may be called the Hindu Succession Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

**Title.**—Two propositions are now accepted as quite clear that the title is part of the enactment itself and it is legitimate to use if for the purpose of interpreting the Act as a whole and ascertaining its scope, and that a title cannot be permitted to control or cut down the enacting part of any section by the use of language of less extensive import. The title to the present Act states that the Act relates to the law of succession among Hindus and not merely intestate succession as mentioned in the preamble (*f*1).

**Extent and commencement.**—The Act applies to Hindus in the whole of India except the State of Jammu and Kashmir. It received the assent of the President on 17th June 1956 and came into force on that date.

The general principle of private international law is that the *lex loci* governs matters relating to immovable property and the law of the domicil governs personal relations. The principle is embodied in sec. 5 of the Indian Succession Act. The Draft Bill contained the words "and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories." Those words were removed and it was observed by the Joint Committee, "there are well-defined principles of international law which regulate succession to the immovable property of Hindus domiciled outside India and, consequently, that portion of this clause which provides for extra territorial application of this law has been removed as both unnecessary and inappropriate."

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(*f*1) See sec. 5(1)(*b*), General Clauses Act, X of 1897.

2. (1) This Act applies—

Application of Act.

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim (*ff*1), Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation.*—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

**Persons governed by the Act.**—It must have been seen from § 6(1) that Hindu Law has been applicable to a wide category of persons. The note to clause 2 of the Hindu Marriage Bill stated: "At present, Hindu Law applies (i) to Hindus by birth, and also to Hindus by religion, that is to say, to converts and re-converts to Hinduism, (ii) to illegitimate children where both parents are Hindus, (iii) to illegitimate children where the mother is a Hindu and the children are brought up as Hindus, (iv) to Brahmos, Arya Samajists,

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(*ff*1) A person who had become converted to Islam cannot be regarded as a Hindu simply because such person had inherited property despite conversion by reason of Caste Disabilities Act, *Fakeer Bux* v. *Saira Begum* ('72) A.A. 475.

Lingayats and to persons who may have deviated from orthodox standards of Hinduism in matters of diet and ceremonial observances and to every other person who may be regarded as a Hindu unless he can show some valid local, tribal or family custom to the contrary, and (v) to Jains, Sikhs and Buddhists." The present section substantially codifies the law on the question as it existed at the time of the commencement of this enactment.

Reference may be made to Notes at p. 671 *supra*.

Reference may also be made to §§ 6 and 7 *ante*.

**Sub-section (1)(a): Hindu.**—See p. 671 *supra*.

**Sub-section (1)(b).**—See p. 672 *supra*. Reference may be made to the undermentioned case (*f2*).

**Sub-section (1)(c).**—See p. 672 *supra*.

**Explanation (b).**—See p. 672 *supra*. Reference may also be made to the undermentioned case (*g*).

**Explanation (c).**—See p. 672 *supra*.

**Sub-section (2): Scheduled Tribes.**—See pp. 672-673 *supra*.

**Sub-section (3).**—See p. 673 *supra*.

**3.** (1) In this Act, unless the context otherwise requires—

Definitions and interpretations.

(a) "agnate"—one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;

(b) "aliyasantana law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949 (Madras Act IX of 1949), or by the customary *aliyasantana* law with respect to the matters for which provision is made in this Act;

(c) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males;

(d) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy: and

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(*f2*) *Commissioner of Wealth Tax* v. *Champa Kumari* ('72) A.S.C. 2119 [Jains].

(*g*) *Rosa Marie* v. *Wealth Tax Commissioner* ('70) A.M. 249 [child brought up as Hindu: member of Hindu undivided family].

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(e) "full blood", "half blood" and "uterine blood"—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

*Explanation.*—In this clause "ancestor" includes the father and "ancestress" the mother;

(f) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

(g) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

(h) "marumakkattayam law" means the system of law applicable to persons—

(a) who, if this Act had not been passed, would have been governed by the Madras Marumakkattayam Act, 1932 (Madras Act XXII of 1933); the Travancore Nayar Act (II of 1100); the Travancore Ezhava Act (III of 1100); the Travancore Nanjinad Vellala Act (VI of 1101); the Travancore Kshatriya Act (VII of 1108); the Travancore Krishnanvaka Marumakkathayee Act (VII of 1115); the Cochin Marumakkathayam Act (XXXIII of 1113); or the Cochin Nayar Act (XXIX of 1113) with respect to the matters for which provision is made in this Act; or

(b) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras [as it existed immediately before the 1st November, 1956], and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line;

but does not include the *aliyasantana* law;

(i) "nambudri law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932 (Madras Act XXI of 1933); the Cochin Nambudri Act (XVII of 1113);

or the Travancore Malayala Brahmin Act (III of 1106) with respect to the matters for which provision is made in this Act;

(j) "related" means related by legitimate kinship:

Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

It will be seen that the definitions given in this section are not all intended merely to economise words. Thus for instance the proviso to the definition of the expression "related" lays down a legal principle.

**"Unless the context otherwise requires".**—The definitions and abbreviations given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject-matter. Even when an Act contains a section giving definitions and interpretations the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the court will give such meaning to the expression as will be more in harmony with the context and allow it to prevail over the "artificial conceptions" of the definition clause.

**"Agnates": "Cognates".** Ordinarily *agnates* means relations on the male side, in opposition to *cognates*, relations on the female side. The key words in the definition of agnate are "wholly through males." The expressions must be understood in the technical sense of the definitions and not in the sense in which the expressions *gotraja* and *bandhu* are used in the old law.

**"Aliyasantana law": "Marumakkattayam law": "Nambudri law".**—Section 5 of the Act excludes certain properties from the application of the Act. In the Bill as drafted such exclusions included property succession to which was regulated by various enactments dealing with Aliyasantana, Marumakkatayam and Numbudri laws. That exception was ultimately removed from that section by the Joint Committee. It is consequent upon the removal of that exception in favour of persons governed by those laws that suitable definitions have been inserted in this section in order to facilitate the application of the Hindu Succession Act to such persons. Reference may be made to sections 7 and 17 *post*.

**"Custom": "Usage".**—The definition of the expressions custom and usage very succinctly reproduces the result of numerous decisions of courts under the old law. It will be seen from sec. 4 *post* that any custom or usage hitherto recognised as part of Hindu law in force ceases to have effect after the commencement of the Act with respect to matters for which provision is made in

this Act. The importance of custom must obviously diminish as the system of law ramifies and particularly when the *lex non scripta*, which includes both general custom as well as particular customs, itself becomes the subject-matter of codification.

Reference may be made to sec. 4 *post* and §§ 17-20 *ante*.

**"Full blood: Half blood: Uterine blood".**—The definitions and the Explanation in clause (e) give the meaning of the expressions "full blood," "half blood" and "uterine blood." Section 18 which is one of the general provisions relating to succession lays down the rule about heirs related to an intestate Hindu male or female by full blood being preferred to heirs so related by half blood. Reference has been made to these expressions in the Notes under the relevant sections. The Schedule to the Act contains an Explanation affecting relationship by uterine blood in case of certain heirs.

**"Related": Proviso.**—The general principle of Hindu law is to limit heirship to legitimate issue. The rules of inheritance relating to sapindas and other relations having been based upon marriage and legitimate descent could only be departed from in favour of an illegitimate offspring on the basis of some well-established principle, *e.g.* in case of children of a dancing woman or a prostitute who claim to be related by heritable blood. It is well settled that dancing women or naikins have their peculiar customs and their status recognised in Hindu law. Although grounds of decision have not been uniform and there has been some diversity of judicial opinion on the subject the principle of heritable blood between the offspring of a woman of the naikin class has been accepted and applied by courts in numerous decisions.

The definition of the expression "related" given in this section naturally confines its meaning to legitimate kinship but the legislature has engrafted an important proviso to the same in order *inter alia* to give recognition in matters of succession to the status of illegitimate children and their mother. The proviso in substance has the effect of expanding the definition of 'related' to cover all cases of the nature under consideration. Such children are regarded as related to their mother—though not to their putative father even if his identity may be established—as also to one another and their legitimate descendants are deemed to be related to them and to one another in matters of heirship where any word expressing relationship or denoting a relative is used in the Act. In the Statement of Objects and Reasons it was pointed out that the expression "related" is so defined that the rights of illegitimate children are safeguarded as against their mother and their own legitimate descendants. This definition follows the Rau Committee's draft where it is pointed out that to confine relationship to legitimate kinship might prevent a Naikin's property from passing to her son or daughter and that there is also no reason why Naikin's children should not have mutual rights of inheritance.

**Sub-section (2).**—The general rule of legislative practice is that unless there is anything repugnant in the subject or context words importing the masculine gender used in statutes are to be taken to include females (section 13, General Clauses Act). In matters of succession the general rule would have to be cautiously applied and this sub-section is inserted *ex abundanti cautela*.

Words importing the masculine gender must not be taken to include females unless the context so requires.

**4.** (1) Save as otherwise expressly provided in this Act,—

Overriding effect of Act.

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

**Overriding effect of the Act.**—This section gives overriding application to the provisions of the Act and in effect lays down that in respect of any of the matters dealt with in the Act it seeks to repeal all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. As already pointed out the Act brings about some fundamental and radical changes in the law of succession and the result is that immediately on the coming into operation of the Act the law of succession hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law ceases to have effect with respect to all matters expressly dealt with by the Act. This overriding effect of the express provisions of the Act has been emphasised in numerous decisions. The undermentioned decisions of the Supreme Court afford useful instances of such overriding effect (*gg*). In these decisions it was held that the rights conferred on the female Hindu by section 14(1) make a clear departure from the previous law and such previous law cannot be used for circumventing those rights.

In a case decided by the Supreme Court (*gg*1) a Hindu Jat governed by the customary law of the Punjab alienated some ancestral property without legal necessity. In a suit instituted by one of his sons it was declared that the sale was null and void and not binding on his sons with the result that the sale could not enure beyond his lifetime. He died in 1959 and in litigation which ensued it was held that not only his three sons but also his wife and two daughters were entitled to inherit all his estate including the alienated property even though the wife and daughters were under the customary law incompetent to challenge the alienation.

The Act also supersedes the rules of succession contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all other law shall cease to apply to Hindus in so far as it is inconsistent with any provisions contained in the Act.

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(*gg*) *Punithavalli Ammal* v. *Ramalingam* ('70) A.S.C. 1730; *Munnalal* v. *Rajkumar* ('62) A.S.C. 1493. Also see *Bhuri Bai* v. *Champi Bai* ('68) A. Raj. 139. Reference may also be made to *Gopal Narain* v. *Goenka* ('71) A. Delhi 61.

(*gg*1) *Giani Ram* v. *Ramji Lal* ('69) A.S.C. 1144.

Overriding effect of the Act was recognised when it was held that Punjab Agricultural custom, so far as it was applicable to Hindus, is no longer in force as regards matters of succession which are now governed by the provisions of this Act (*g*1). Similarly in respect of a rule of the law of Kolhapur State relating to *ex post facto* sanction it was held that the rule in so far as it was inconsistent with section 14 of this Act, was superseded by clause (b) of this section (*g*2). Section 9 of the Punjab Debtor's Protection Act which applies only when succession is governed by any rule of custom is no longer applicable to Hindus in the Punjab (*g*3). Reference may be made to the undermentioned decisions which further illustrate the application of the overriding effect of the Act (*g*4).

The Act is a codifying enactment (*h*). It does not merely crystallise or declare the existing law upon the subject but deliberately departs from that law in respect of various matters. It supersedes prior law and lays down the whole of the law of succession in the form of a code and so far as it goes must be read as a complete enactment. Therefore, in cases governed by the Act, appeal to any rule of law of succession previously applicable to Hindus is now permissible only in respect of matters for which no provision is made in the Act (*h*1). Matters affecting succession expressly saved from the operation of the Act, of course, continue to be governed by the previous law statutory or otherwise.

One outstanding exclusion from the operation of the Act is contained in s. 5(1) and relates to succession to property of persons whose marriage is solemnised under the Special Marriage Act, 1954, and to the property of the issue of such marriage. Succession to the property of such persons is regulated by the provisions of the Indian Succession Act and not this Act. Section 5 also specifies certain other property to which this Act does not apply.

The Act does not touch or affect the law relating to joint family and partition—except the limited extent to which sections 6 and 7 have such effect—and the previous law continues to operate in such matters. Thus for instance the right of a mother or widow to a share on partition between the father and the sons in a Mitakshara family or between the sons after the death of the father is not affected or abrogated by this Act. The undermentioned case affords an illustration of this (*hh*1).

So also the Act does not abrogate any rule of customary law relating to customary law in the Punjab relating to restriction on alienation by a male proprietor. The right of reversioners to challenge or control any such alienation cannot be said to have ceased to exist (*hh*2).

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(*g*1) *Taro* v. *Darshan Singh* ('60) A. Punj. 145; I.L.R. (1959) Punj. 2253; for other instances see *Hans Raj* v. *Dhanwant Singh* ('61) A. Punj. 510 I.L.R. (1961) 1 Punj. 369; *Banso* v. *Charan Singh* ('61) A. Punj. 45. As to disposal of ancestral property by will by a Hindu male holder governed by Punjab customary law see *Kaur Singh* v. *Jaggar Singh* ('61) A. Punj. 489.

(*g*2) *Yamunabai* v. *Harihar Pandit* ('60) A.B. 463; 61 Bom. L.R. 1316.

(*g*3) *Ishwar Das* v. *Raj Kumar* ('64) A. Punj. 275.

(*g*4) *Topha* v. *Samman* ('72) A.P.&H. 406 [gift of occupancy rights by widow: S. 59(3) Punjab Tenancy Act]; *Gopi Chand* v. *Bhagwani Devi* ('64) A. Punj. 272 [Delhi Land Reform Act]; *Ramlali* v. *Bhagwanti Bai* ('68) A.M.P. 247 [M.P. Land Revenue Code].

(*h*) See 'Preamble' and 'Codifying Act' at pp. 834, 835.

(*h*1) Thus, for instance, the conception of a reversioner is not wholly abolished by this section. See Notes under S. 14 *post*. Also see *Gangadhar* v. *Saraswati* ('62) A. Orissa 190.

(*hh*1) *Gopal Narain* v. *D. P. Goenka* ('71) A. Delhi 61.

(*hh*2) *Joginder Singh* v. *Kehar Singh* ('65) A. Punj. 407.

Considerable legislation by various States, aimed at prevention of fragmentation of agricultural holdings and securing their consolidation and for the purpose of fixing ceilings and devolution of holdings, has found place on the statute-book in recent years and this section is not intended to override or disturb such legislation. Land policy in different States, though in the main founded on the concept of a Socialistic Welfare State, cannot be expected to be uniform and sub-section (2), therefore, leaves such legislation relating to agricultural land undisturbed. Agricultural land is the bulk of property in India and it may perhaps be said that this provision detracts from the fundamental objective of uniformity of legislation. But the explanation is that what is aimed at is a uniform law for all Hindus and not necessarily a uniform law for all forms of property. It is only matters mentioned in the sub-section that are saved from the operation of the Act and not the right to succeed to agricultural lands. The Delhi Land Reform Act not being one providing for prevention of fragmentation of agricultural holdings is not saved by this sub-section (*h*2). Bhumidari or Bhumiswamy rights are not tenancy rights within the meaning of section 151 of the Madhya Pradesh Land Revenue Code 1954 and the provision in that section is not any provision for prevention of fragmentation of agricultural holdings or for the devolution of tenancy rights (*h*3). A Hindu widow who is allowed to remain in possession of khudkast and sir does not become bhumidar by operation of section 14 of this Act (*h*4). Also see Notes under section 5 *infra*.

**Act is not retrospective in its operation.**—It is a fundamental and firmly established rule of interpretation that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. There is the clear indication in this section read with the other important sections of the Act that it is not intended to have retrospective effect. A contrary rule would have the very serious consequences of prejudicially affecting vested rights and of disturbing titles and legality of past transactions.

The general rule that an enactment like the present should operate only in cases and in respect of facts which come into existence after it was passed —*nova constitutio futuris formam imponere debet, non praeteritis*—has been accepted by the Legislature and the exceptions to its application in the Act are indeed few.

It has been held in a number of cases, such exceptions apart, that the provisions of the Act are prospective and not retrospective in their operation (*h*5). Since the Act is not retrospective in its operation it follows that succession would not be governed by the Act where it opened before the commencement of the Act (*h*6).

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(*h*2) *Gopi Chand* v. *Bhagwani Devi* ('64) A. Punj. 272.

(*h*3) *Ramlali* v. *Bhagunti Bai* ('68) A.M.P. 247. Also see *Indubai* v. *Vyankati* ('66) A.B. 64.

(*h*4) *Prema Devi* v. *Joint Director of Consolidation* ('70) A.A. 238.

(*h*5) *Gurmit Singh* v. *Tara Singh* ('60) A. Punj. 6, *Sampathkumari* v. *Lakshmi Ammal* ('63) A.M. 50 [Section 8]. Also see Notes under various sections.

(*h*6) *Hans Raj* v. *Dhanwant Singh* ('61) A. Punj. 510. Also see f.n. (*h*2) above.

One notable exception is to be found in s. 14 of the Act. As has already been pointed out the Hindu woman's limited estate is now abolished and any property held by a female Hindu howsoever acquired is now held by her as absolute property with full powers of disposal. The restraints and limitations on her power cease to exist even in respect of existing property, so that any property possessed by a female Hindu whether *acquired by her before or after the commencement of the Act,* is now held by her as full owner. This enlargement of the estate of a female Hindu is, therefore, not confined to property acquired by her after the coming into operation of the Act but embraces all property possessed by her even if it was acquired by her at any time prior to the Act if the case falls within the ambit of sec. 14. Another instance where the Act operates retrospectively is to be found in sec. 26 which affects the rights of the descendants of a convert from Hinduism.

## CHAPTER II

## INTESTATE SUCCESSION

### GENERAL

Succession to the property of a Hindu is now governed by the provisions contained in this Chapter. Sections 5 to 17 are grouped under the heading "General" and sections 18 to 28 under the heading "general provisions relating to succession." Succession to the property of a male intestate and a female intestate is not governed by the same rules. The distinction was necessitated by some peculiar conditions in the country. Section 8 lays down certain general rules of succession to the property of a male Hindu dying intestate after the commencement of the Act. Section 15 lays down general rules of succession in the case of a female Hindu. Section 17 lays down certain special rules of succession respecting persons governed by *marumakkattayam* and *aliyasantana* laws.

The Act, as already pointed out, is a codifying enactment and overrides the previous law on the subject of inheritance. Application, therefore, of any rules of succession governing Hindus is now permissible only in respect of matters for which no provision is made in the Act and matters expressly saved from the operation of the Act.

**Inheritance never in abeyance.**—One governing principle of Hindu Law is that inheritance can never be in abeyance. On the death of a Hindu the person who is then his nearest heir or persons who are then his nearest heirs and as such succeed simultaneously to his property, become entitled at once to the property left by him. The right of succession vests in such heir or heirs immediately on the death of the owner of the property.

The same principle underlies the provisions of this Act. Devolution of the property of a male or female intestate upon the heirs declared by the various provisions takes place immediately on the death of the owner and it is in no manner controlled or affected by the fact of postponement or absence of actual physical partition of the property. The share of each heir becomes vested in him and if the heir dies before such partition his or her share will

pass to and become vested in such persons as are his or her heirs. Succession cannot under any circumstances remain in abeyance in expectation of the birth of a preferential heir, where such heir was not conceived at the time of the owner's death (*i*). Where, under this Act, the estate of a Hindu has vested in a person as his heir at the time of his death, it cannot be divested except by the birth of a preferable heir who was conceived at the time of his death (*j*).

**Spes successionis.**—The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer of it. For the same reason, any agreement entered into by him in respect of the inheritance cannot bind persons who actually inherit when the succession opens.

**5.** This Act shall not apply to—

**Act not to apply to certain properties.**

(i) any property succession to which is regulated by the Indian Succession Act, 1925 (39 of 1925), by reason of the provisions contained in section 21 of the Special Marriage Act, 1954 (43 of 1954);

(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act;

(iii) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124), dated 29th June 1949, promulgated by the Maharaja of Cochin.

The Act applies to all property of a deceased Hindu which is not expressly excluded from its operation. The Act applies *inter alia* to agricultural lands (*k*). Sub-section (2) of section 4 saves from the operation of the Act only certain matters there mentioned and does not affect the question of succession to agricultural lands. The Act is not *ultra vires* on the ground that it governs succession to agricultural lands (*k*1).

The section specifically excludes certain properties from the application of the Act.

**Clause** (i) reaffirms that succession to property of Hindus whose marriage is solemnized under the Special Marriage Act, 1954, and to the property of the issue of such marriage is regulated by s. 21 of that enactment and not by any provision of this Act. It has been held by the High Court of Madras that this clause deals only with succession and does not in any way injunct

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(*i*) S. 20.
(*j*) S. 20.
(*k*) *Laxmi Debi* v. *Surendra Kumar* ('57) A. Orissa 1.
(*k*1) *Sant Ram Dass* v. *Gurdev Singh* ('60) A. Punj 462. Also see Notes under section 14 *post*.

a Hindu father from treating a legitimate son of his born in lawful wedlock as per the Special Marriage Act as an undivided member of the Hindu Joint Family. There are some observations in that decision about creation of a joint family by a father at his option, the correctness of which may be doubted (*k*2).

See Chapter I at p. 842.

**Clauses (ii) and (iii)** relate to impartible property. Impartible estates other than those expressly saved by these two clauses are abolished. All impartible property will now under the Act have the ordinary incidents of property held by a Hindu (*k*3). The exception is limited to the impartible estates of Rulers of Indian States succession to which is regulated by special covenants or agreements and to estate, succession to which is regulated by any previous legislation, and the Estate and Palace Funds mentioned in sub-section (iii). For the law relating to impartible property as it stood prior to the commencement of the present Act, reference may be made to §§ 590-594 *supra*.

Devolution of interest in coparcenary property.

**6.** When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

*Explanation 1.*—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

*Explanation 2.*—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

**Devolution of interest in Mitakshara coparcenary property.**—This provision of the Act deals with the question of a coparcener in a Mitakshara

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(*k*2) *Rosa Marie* v. *Wealth Tax Commissioner* ('70) A.M. 249.

(*k*3) *Bhaiya Ramanuj* v. *Lalu* ('68) A.P. 468 [other members of the undivided family become entitled to claim rights in what was impartible property].

coparcenary dying (after the coming into operation of this Act) without making any testamentary disposition of his undivided share in the joint family property. Under the old law a devise by a coparcener in a Mitakshara family of his undivided interest was wholly invalid. But now section 30 of this Act has the effect of laying down that it is competent to a male Hindu in a Mitakshara coparcenary to dispose of by will his interest in the coparcenary property. No question of the application of any of the rules laid down in this section can, therefore, arise where there is testamentary disposition by a male Hindu of his interest in the coparcenary property. Testamentary disposition of all his property by any such person would now under sec. 30 include his interest in the coparcenary property. Nor can the question of applying this section arise in case of a sole surviving coparcener who cannot obviously be said to have died "having at the time of his death an interest in a Mitakshara coparcenary property" (*k*4) nor can the question of applying this section arise in case of a person who is not a coparcener in any coparcenary at the time of his death. Such for instance would be the case where a person dies leaving a daughter and a separated son. His property though vested in him on partition will go by succession under section 8 to the daughter and the separated son. [See illustration 3 under Explanation II *infra*.]

The section although it deals with succession has bearing on other branches of Hindu law such as joint family, adoption and maintenance and lays down rules of far-reaching consequences. It prescribes that where a coparcener dies the Mitakshara coparcenary will not necessarily become disrupted but the surviving coparceners may continue to remain as members of the joint family without arriving at any partition and *subject to the important proviso engrafted on the rule,* the undivided interest of any coparcener in the coparcenary property will on his death devolve by survivorship upon the surviving coparceners.

It may be appropriate to draw attention to certain general principles of inheritance governing the old law before stating the object and effect of the rules laid down in this section and the far-reaching changes brought about by it. The Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property; the rules of succession apply to property held in absolute severalty. The Dayabhaga recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhaga joint family holds his share in quasi-severalty, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mitakshara law. The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate,

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(*k*4) *Arunachlathammal* v. *Ramachandran* ('63) A.M. 255.

of the joint and undivided property, that he, that particular member, has a definite share, e.g., one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. No female can be a coparcener under the Mitakshara law. Even a wife though she is entitled to maintenance out of her husband's property and has to that extent an interest in his property, is not her husband's coparcener. Nor is a mother a coparcener with her sons.

It was generally felt that radical reform was required in the Mitakshara law of coparcenary and that where one of the coparceners died it was necessary that not only in case of his separate property but also in respect of his undivided interest in the coparcenary property there should be equable distribution of that share between his male and female heirs and particularly between his son and daughter. Some of the indicia of the ancient joint family system had become extinct in consequence of inroads made upon the coparcenary *inter alia* by liberal interpretation of texts relating to partition, by rules founded on equitable considerations affecting payment of debts incurred personally by any member of the coparcenary and by the Hindu Women's Rights to Property Act, 1937, which conferred new rights on widows of coparceners. The highest authorities on Hindu law took the view that the Mitakshara coparcenary had lost a number of its characteristics and should therefore be abolished. The power of free disposition of property is recognised in every system of law and it was time for Hindu law to fall in line. Probably the best solution would have been to abolish the ancient legal formulae of acquisition of right by birth and devolution by survivorship since the logical way was to assimilate the Mitakshara to the Dayabhaga in this respect. This could also have had the merit of equable treatment of the nearest female heirs of a coparcener and of bringing about uniformity in the law in all parts of India. But there was some strong sentiment in favour of the retention of the Mitakshara coparcenary even in an attenuated form and the rules laid down in this section are a compromise having some of the merits and all the demerits which attend such adjustive legislation.

**". . . shall devolve by survivorship".**—The initial part of the section stresses that the Act does not interfere with the special rights of those who are members of a Mitakshara coparcenary except to the extent that it seeks to ensure the female heirs and daughter's son specified in Class I of the Schedule a share in the interest of a coparcener in the event of his death by introducing the concept of a notional partition immediately before his death and the carving out of his aliquot share in the coparcenary property as of that date. The Act does not abolish the doctrine of acquisition of right by birth and the right of survivorship which are the invariable concomitants of the Mitakshara coparcenary. The section proceeds first by making provision for the retention of the right by survivorship and then engrafts on that rule the important qualification enacted by the proviso. The proviso operates only where the deceased has left him surviving a daughter's son or any female heir specified in Class I of the Schedule.

*Illustrations*

(a) *A* governed by the Mitakshara school inherits certain property from his father. *A* has a son *B*. The property so inherited being ancestral must be held by *A* in coparcenary with *B*. *A* must hold the property in coparcenary with *B* even if *B* is born after he inherits the property, because *B* acquires an interest in it by birth. If *A* dies intestate leaving him surviving his son *B*, his undivided interest in the coparcenary property will devolve upon *B* by survivorship and not by succession. The property in the hands of *B* being ancestral each son of *B* will upon his birth take an interest in it equal to that of his father. (Reference may be made to §§ 213-215).

(b) *A* and his sons, *B* and *C*, are members of a Mitakshara coparcenary. *A* dies intestate leaving him surviving his two sons who continue to be members of the joint family. *A*'s undivided interest in the coparcenary property will devolve by survivorship upon *B* and *C*, and his separate property will devolve by succession upon *B* and *C* in equal shares in accordance with the rules laid down in sections 8, 9 and 10. The position will be similar if the coparcenary had consisted of *A*, his son *B* and the son or a grandson of a predeceased son *C*.

(c) In case of illustrations (a) and (b) above it is now competent to *A* to dispose of by will in any manner he likes his interest in the coparcenary property.

**Proviso.**—The proviso to the section confers new rights upon the specified female heirs and the predeceased daughter's son of a deceased coparcener and superimposes upon the integrated structure of the law relating to Mitakshara coparcenary a rule intended to be remedial and beneficial. In cases falling under the proviso the interest of the deceased coparcener, if he died without making a testamentary disposition of the same, devolves by intestate succession upon the persons who are among the twelve preferential heirs specified in Class I of the Schedule. They inherit that interest simultaneously (sec. 9) and take it as tenants-in-common and not joint tenants [sec. 19(b)]. The son and daughter mentioned in Class I of the Schedule include an adopted son and adopted daughter. The other heirs specified in Class I include the widow of the deceased intestate and persons related to the intestate by blood as also those related to him by adoption (*l*).

The son and daughter mentioned in Class I of the Schedule include children of a void or voidable marriage who are, by the operation of sec. 16 of the Hindu Marriage Act, 1955, to be deemed to be the legitimate children of their parents.

It is obvious that the expression "surviving" in the proviso qualifies both the "female relative" and the "male relative" following. It is also obvious that the expression "claims through such female relative" means one who traces relationship through a female relative mentioned in Class I of the Schedule. The only male relative specified in Class I and who claims through a female relative in the context of the proviso is the daughter's son that is son of a predeceased daughter of the male Hindu on whose death the devolution takes place (*ll*).

Cases can be imagined where the rule laid down in the proviso and the effect of the repeal of the Hindu Women's Rights to Property Act, 1937, by sec. 31 of this Act, will raise some problems which may not admit of logically consistent answers and some anomalous situations and varying consequences are bound to result. The rule laid down in the initial part of the section

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(*l*) See 'Relative by adoption' at p. 864 *infra*. A.M. 65.
(*ll*) *Ranganathan v. Annamalai Chettiar* ('68)

comes attended with qualifications and by other rules no less important and it is in the light of the *proviso* and the explanations and the other rules of coparcenary law which are not abrogated that the section must be construed. One rule of construction that would probably assist is that that sense is to be adopted which best harmonises with the context and promotes in the fullest measure the object of the Legislature. Another rule of construction applicable to legislation of the type under consideration is that its proper construction and operation can be determined with reference to conditions and contingencies likely to arise after its commencement, because they could presumably have been within the contemplation of the Legislature. Some modification of the coparcenary law as previously applied is obviously intended and it is submitted that in construing the section the court will give full effect to the rule carved out by the proviso by introduction of a statutory fiction.

*See Illustrations* at pp. 852-854 *infra.*

It is not necessary for the proviso to come into operation that the deceased coparcener should have himself been competent to claim partition. Thus for instance the proviso will apply to the case of a minor coparcener. (See §§ 308 and 307.)

Analogous considerations arose when the Estate Duty Act, 1953, was on the anvil. Under the Mitakshara there is no inheritance in case of joint family property, because in case of death of a coparcener there is only devolution of property by survivorship. Evidently such property could not be excluded from the operation of the Estate Duty Act and it is there laid down that for the purpose of taxation the interest of a deceased coparcener should be treated as if his interest in the coparcenary property had been separated from the rest of the coparcenary property just prior to his death. That precedent has been followed in enacting the present rule.

**Explanation I.**—This explanation defines the expression "the interest of the deceased in the Mitakshara coparcenary property" and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the joint family can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed (*m*) and effect must be given to the inevitable corollaries of that state of affairs. But the operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section namely, devolution of interest of the deceased in coparcenary property.

Question of some importance arises whether this notional partition is to have the effect not merely of bringing about devolution of succession of the interest of a deceased coparcener in a Mitakshara family but goes further and

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(*m*) See observations in *State of Bombay* v. *Pandurang* (1953) S.C.R. 773, 778, 779. Reference may also be made to the oft-quoted dictum of Lord Asquith in *East End Dwelling Co. Ltd.* v *Finsbury Borough Council* (1952) A.C. 109.

results in a partition among all the members who would be entitled to a share in the coparcenary property when a regular partition takes place that is to say results in determining and vesting in them their aliquot shares and brings about severance of status among the surviving coparceners. Thus, for instance, where a deceased coparcener leaves him surviving a widow and two sons will the notional partition have the effect of vesting in the widow her aliquot share in the interest of the deceased (which would work out at 1/12 of the coparcenary property) but also of vesting in her and the two sons $\frac{1}{4}$ share each in the coparcenary property as would happen if the result is to be a complete partition brought about by the sons (under schools other than Madras the wife or widow mother gets an equal share on partition among father and sons or among sons after death of the father). The purpose for which the legal fiction is introduced is stated in clear language to provide for devolution by succession of the interest of a deceased coparcener. It is submitted that the purpose of the fiction ends there and its operation should not be extended so as to bring about a regular partition among all the members of the family. Of course in such a case if subsequently there is a partition among the sons the widow mother would get an equal share in addition to the fractional share which had become vested in her under the proviso to the section read with Explanation 1. The High Court of Bombay has taken a different view and held, in a case where a deceased coparcener had left him surviving his widow and a son, that the widow was entitled to claim her aliquot share out of the interest of the deceased coparcener and also a share on the footing that there had been an actual partition between her husband and the son (*m*1). The conclusion was founded *inter alia* on the rule that in construing a legal fiction it would be necessary to assume all those facts on which alone the fiction can operate and also on the celebrated dictum of Lord Asquith to which reference has been made in f. n. (*m*) above. The Supreme Court has pointed out that a legal fiction cannot be stretched or extended beyond its purpose (*m*2). In a decision of a full bench (*m*3) of the High Court of Kerala it was observed that what is provided in this section "is not a partition at all but devolution of interest of a person in coparcenary property. The notional partition mentioned therein is solely for the purpose of ascertaining the extent of such interest as would be subject of devolution when the deceased Hindu died undivided from his coparcener". In a recent decision of the High Court of Andhra Pradesh (*m*4) the view has been expressed that the devolution of the interest of a deceased coparcener on notional partition envisaged in the section cannot have the effect of a partition of the joint family property and disruption of the joint family status. It is submitted that the views taken in the decision of the Bombay High Court referred to above would bring about wide and far reaching consequences much beyond the scope of the statutory fiction operation of which should be limited to its avowed object.

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(*m*1) *Rangubai* v. *Laxman* ('66) A.B. 169 *Contra Shirambai* v. *Kalagoda* ('64) A.B. 263.

(*m*2) *State of Travancore Cochin* v. *Shanmugha Vilas Cashew Nut Factory* (1954) S.C.R. 53, 81, 82. Also see *Bengal Immunity Co. Ltd.* v. *State of Bihar* (1955) 2 S.C.R. 603, 646 [created only for definite purpose: should not be extended: to be limited to the avowed purpose].

(*m*3) *Venkateswara* v. *Luis* ('64) A. Kerala 125 (F.B.). Also see *Controller of Estate Duty* v. *Anari Devi* ('72) A.A. 179 which affords a useful illustration: See Illustration (*n*1) *infra*.

(*m*4) *Neelayya* v. *Ramaswami* ('73) A.A.P. 58.

The quantum of the share to be allotted to the heirs of the deceased coparcener will be on the footing of the coparcenery property existing at the date of his death when the notional partition is to be deemed to have taken place and not of the property as may exist at the date of the actual allotment and delivery of that share to the heirs. The fluctuations in the fortunes of the family between the two dates would be irrelevant to the purpose (*m*5).

*Illustrations*

(m) *A* governed by the Mitakshara school inherits certain property from his father. *A* dies intestate leaving his widow A1 and son *B*. *Since A has died leaving him surviving a female relative specified in Class I of the Schedule, the case will be governed by the proviso.* *A*'s undivided interest in the coparcenary property will not devolve by survivorship upon *B* but will devolve by succession upon *A*1 and *B* and their shares in it will be equal in accordance with the rules laid down in sections 8, 9 and 10. *A*'s separate property will devolve by succession upon *A*1 and *B* in equal shares in accordance with the rules laid down in sections 8, 9 and 10.

Also see illus. (2) at p. 853 *infra*.

(n) *A* and his sons, *B* and *C*, are members of a Mitakshara coparcenary. *A* dies intestate leaving him surviving his widow *A*1 and his two sons. *B* and *C* continue to be members of the joint family. *A*'s undivided interest in the coparcenary property will not devolve by survivorship upon *B* and *C* but will devolve by succession upon *A*1, *B* and *C* and their shares in it will be equal in accordance with the rules laid down in sections 8, 9 and 10. The position will be similar if in addition to *B* and *C* the deceased has left him surviving a daughter or a predeceased daughter's son or any other female relative specified in Class I of the Schedule of heirs. Such other relatives for instance may be mother, daughter of a predeceased daughter and daughter of a predeceased son (*n*).

Also see illus. (1) at p. 853, *infra*.

(*n*1) *A* and his son *B* are members of a Mitakshara coparcenary. *A* dies intestate leaving him surviving his son *B*, his two widows *W*1 and *W*2 and three daughters. *A*'s undivided interest devolved by succession upon the son, the widows and the daughters. *W*1 died sometime thereafter. According to R. 1 of section 10 which has to be read with section 8 *W*1 and *W*2 together had taken one share in the interest of *A*. The son and the three daughters would have been entitled to a one fifth share each. *W*1's share in the interest of *A* in the coparcenary property will be one tenth of one fourth since in the notional partition *A*'s share was one-fourth of the entire coparcenary property (*n*1).

(o) *A* inherits considerable property from his father and he and his son *B* are members of a Mitakshara coparcenary. *A* dies intestate leaving him surviving his widow *A*1, son *B*, two daughters *D*1 and *D*2 and *DS* the son of a predeceased daughter. *A*'s undivided interest in the coparcenary property will not devolve upon *B* by survivorship but will devolve by succession upon *A*1, *B*, *D*1, *D*2 and *DS* in equal shares in accordance with the rules laid down in sections 8, 9 and 10.

(p) *A* and his sons, *B* and *C*, were members of a Mitakshara coparcenary. *C* took his share of the joint property and separated himself from the family and *A* and *B* continued to be joint. *A* dies intestate leaving him surviving a daughter *D* and his two sons. *A*'s undivided interest in the coparcenary property will not devolve upon *B* by survivorship but will devolve by succession upon *B* and *D*. Although *B*, *C* and *D* are the heirs of *A* according to section 8 read with Class I of the Schedule, *C* having separated from the coparcenary is not entitled to a share in the interest of *A* in the coparcenary of which *A* and *B* had continued to be members. If, however, *A* has left any separate or self-acquired property it will devolve by succession upon *B*, *C* and *D* in equal shares notwithstanding *C*'s separation from the joint family (see "divided son" p. 867 *infra*). Under the old law *C* would not have been entitled to claim any share even in the separate or self-acquired property of *A*. See § 43—"Divided and undivided sons" at p. 108 *supra* and § 341 *supra*.

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(*m*5) *Karuppa Karuppa Gounder* v. *Palaniammai* ('63) A.M. 245; (1963) 1 Mad. L.J. 86.

(*n*) In *Ananda* v. *Haribandhu* ('67) A. Orissa 194 there was a partition suit in respect of the entire property. The shares were correctly determined but there are observations correctness of which must be doubted.

(*n*1) *Controller of Estate Duty* v. *Anari Devi* ('72) A.A. 179.

**Computation of the interest of the deceased coparcener.**—The undivided share of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such persons would have to be ascertained according to the law of joint family and partition. The Act regulates succession and does not contain the law of joint family and partition. The rules of Hindu law on the subject in force on the date of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition.

*Illustrations*

1. In illustration (n) above, it is stated that *A*'s undivided interest will devolve by succession upon his widow *A*1 and his two sons *B* and *C*. That share of *A* will have to be computed according to the law of partition applicable to the parties on the date of *A*'s death. If a partition had in fact taken place immediately before his death *A*, in all States except Madras, would have been entitled to ¼ of the property since *A*1 the wife would have become entitled to receive a share equal to that of a son and the property would have been divided in four parts. That ¼ interest of *A* will therefore devolve by succession upon *A*1, *B* and *C* and in all States other than Madras. *A*1 will become entitled to 1/12 of the entire coparcenary property as one of the heirs of *A*. In Madras the share of *A* on such notional partition will be computed at 1/3 and *A*1 will become entitled to 1/9 of the property.

If *A* has not left a widow but a daughter or any other female relative specified in Class I of the Schedule of heirs or a predeceased daughter's son *A*'s interest will be computed as 1/3 and it will in all States devolve by succession upon such relative or relatives and the two sons *B* and *C*. The division of this 1/3 interest will be in accordance with the rules laid down in sections 8, 9 and 10.

2. In illustrations (m) above, *A*1 as the wife of *A* would have, at the time of the notional partition, been entitled in all States other than Madras to receive a share equal to that of a son and therefore *A* would have received 1/3 of the coparcenary property and not ½ of the same. That 1/3 share of *A* will devolve by succession upon *A*1 and *B* in equal parts. The result will be that *A*1 will get only 1/6 of the entire property. In Madras *A*1 will be entitled to ¼ of the property because on the notional partition *A*'s share would have been ½ and not 1/3 of the property.

Under the old law as modified by the Hindu Women's Rights to Property Act, 1937, the case would have been governed by s. 3(2) of that Act and *A*1 as the widow of *A* would have become entitled to a larger share viz. "the same interest as he himself had," that is one-half. That interest of *A*1 would however have been the limited interest known as a Hindu Woman's estate. The Act of 1937 is repealed by the present Act and the share of *A*1 will be 1/6 or ¼ as stated above but as absolute owner.

2A. See illustration (*n*1) above.

3. *A* and his sons *B* and *C* were members of a Mitakshara coparcenary. *C* died prior to the coming into operation of this Act (and therefore before the repeal of the Hindu Women's Rights to Property Act, 1937) leaving him surviving his widow *C*1. *A* dies (after the coming into operation of this Act) leaving him surviving *B*, *C*1 and his daughter *D*. *A*'s interest will be computed as 1/3 since by virtue of s. 3(2) and s. 3(3) of the Hindu Women's Rights to Property Act, on the death of *C*, *C*1 had obtained in the coparcenary the same interest which *C* himself had and the same right of claiming partition which *C* had. That interest and right having accrued and acquired by *C*1 under the Hindu Women's Rights to Property Act, is not affected by the repeal of that enactment [s. 6(c) General Clauses Act]. The 1/3 interest of *A* will devolve by succession upon *B*, *C*1 and *D* in equal shares in accordance with the rules laid down in sections 8, 9 and 10 of the Act.

**Subsequent Partition between surviving coparceners.**—The effect of the proviso is that any of the female heirs and a daughter's son specified in the proviso read with Class I of the Schedule can claim to succeed not only to the separate or self-acquired property but also to the interest of the deceased in coparcenary property. Their shares would be ascertained in accordance with the relevant rules in sections 8, 9 and 10 and the other general provisions of the Act relating to succession. This would be regardless of the fact that the deceased coparcener had left any son, grandson or great grandson. It is only by a fiction of law that a partition is to be deemed to have taken place as regards the interest of the deceased coparcener in any such case and the existence or constitution of the coparcenary *quoad* the surviving coparceners is not otherwise affected. Where the surviving coparceners continue as before to be members of the coparcenary after paying out the share of the deceased coparcener and a partition subsequently takes place between them and the joint family property is to be divided, it would become necessary to have regard to the quantum of the share of the deceased coparcener distributed amongst his heirs under the proviso. The division, it is submitted, would be on equitable principles [See Illustration below].

*Illustrations*

A Mitakshara coparcenary consisted of two brothers *A* and *B; A*1, *A*2 and *A*3 the sons of *A;* and *B*1 the son of *B*. The brothers had inherited ancestral property. *A* died leaving him surviving his sons *A*1, *A*2 and *A*3, daughter *D* and a predeceased daughter's son *DS*. Thereupon *D* and *DS* claimed their shares as heirs out of the undivided coparcenary interest of *A* in the joint family property. *A*'s share would have been 1/8th if there had been a partition between him and other members of the coparcenary immediately before his death. *D* and *DS* became entitled to 1/5th each of *A*'s 1/8th share in the joint family property and they were paid off their aliquot shares. *A*1, *A*2 and *A*3 continued to be joint with *B* and *B*1. Some time thereafter partition takes place between *A*1, *A*2, *A*3, *B* and *B*1. The division will be *per stirpe* and not *per capita*, that is, *B* and *B*1 as between them will be entitled to half the joint family property in existence at the time of the subsequent partition and *A*1, *A*2 and *A*3 between them will be entitled to half the property. But on equitable principles, the amount paid out to *D* and *DS*, it is submitted, will be taken into account as having gone out of the coparcenary property and for which the branch of *B* was not liable.

**Debts of a deceased coparcener.**—The question—"Undivided coparcenary interest, when liable for coparcener's debt" has been dealt with in § 289. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary, his undivided interest will not devolve by survivorship upon the other coparceners in cases falling under the proviso, that is, if he dies leaving him surviving any of the male or female relatives specified there but will devolve by succession. If, however, he dies without leaving any such male or female relatives his undivided interest will devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. The law relating to 'Debts' stated in Chapter XIV of this work has not been amended or codified by the new legislation. The present section, however, has some bearing on the subject. Where the undivided interest of a person governed by the Mitakshara law is attached in his lifetime in execution of a decree against him for his personal debt, it may be sold after his death whether the order for sale was made in his lifetime or after his death. But it cannot be attached after his death (except where the coparcener is the father), for it then ceases to be his

interest and passes to the other coparceners by survivorship. It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship (*n*2). The effect of the proviso to the present section is that there will be no devolution of the interest of the deceased coparcener by survivorship in cases falling under it with the result that when his interest devolves by succession by operation of the proviso the rights of the creditor will not be affected and will be governed by the rule stated in § 288 which deals with the question of liability of "heirs" for debts. The position will be different where there is devolution of such interest by survivorship and the rules stated in § 289 will apply. The pious obligation of a son, grandson and great grandson remains the same as stated in Chapter XIV of this work. The Dayabhaga law of debts is very simple as pointed out in Chapter XV.

**Parties to suit relating to any property affected by the proviso.**—Where the death of a coparcener takes place in a family falling under the proviso the female heirs and a predeceased daughter's son (along with other heirs of the deceased coparcener) inherit an interest in the joint family property and that interest becomes vested in them. In such a case all the persons interested in the property will be necessary parties to any suit affecting any property or asset of the family. The eldest male member of the family cannot represent all of them as Karta of the family (*n*3).

**Explanation II: Separated member.**—When partition takes place between members of a joint family every coparcener is entitled to a share. But a partition between coparceners may be partial as for instance when one coparcener separates from the others and the others do not separate but continue to remain joint or become reunited (§ 328). In such a case on the death of any such coparcener the proviso will come into operation but the separated member or his heirs cannot claim any share in the interest of the deceased in the coparcenary he having already gone out of the coparcenary. Explanation II is intended to make the position clear. The rule stated in the Explanation will apply even where at the time of the separation of a member the coparcenary consisted of only two members, for instance a father and a son and the son became separated from the father and obtained his share of the ancestral property. In such a case if there is a son begotten and born to the father after the partition the share of the ancestral property acquired by the father will immediately become property of a coparcenary consisting of the father and the son or sons begotten and born after such partition (*o*). And in case the father thereafter dies intestate the separated son or his heirs cannot claim a share out of the interest of the father in such coparcenary by relying on the rule laid down in the proviso. As regards the separate or self-acquired property of the father the position will be different because now under section 8 in a

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(*n*2) See § 289 ante.

(*n*3) *P. Govinda Reddy* v. *Golla Obulamma* ('71) A.A.P. 363 (F.B.). [Suit on mortgage in favour of joint family]; *Govindram* v. *Chotumal* ('70) A.B. 251 [suit in respect of monies advanced by deceased Karta of joint family]. *Narayan Prasad* v. *Mutuni Kohain* ('69) A.C. 69; *Venkateswara* v. *Luis* ('64) A. Kerala 125 [Karta cannot represent family where one of the coparceners dies and the Explanation applies]. Also see *Kashinath Prasad* v. *Dharamnath* ('73) A.P. 110. And see *Neelayya* v. *Ramaswami* ('73) A.A.P. 58.

(*o*) Reference may be made to §§ 309 and 310, *ante*.

case of this nature a separated son is entitled to a share in such property left by the father (*p*).

*Illustrations*

(1) *A* and his sons *B* and *C* constitute a Mitakshara coparcenary. *B* separates himself from the family and takes his one-third share of the coparcenary property. *A* and *C* continue to be joint as before. *A* dies intestate thereafter leaving him surviving his daughter *D* and his two sons. On *A*'s death *A*'s interest in the coparcenary will not devolve upon *C* by survivorship, but by operation of the proviso it will devolve by succession upon *C* and *D* in equal shares (section 8). *B* will have no claim for any share in the same. He will, however, be entitled to a share in the separate or self-acquired property left by *A*.

(2) *A* and his son *B* constitute a Mitakshara coparcenary. *B*'s mother had died leaving her husband *A*, son *B* and daughter *D*. *B* separates from his father and takes his one-half share in the coparcenary property. *A* marries again and a son *C* is born to him by his wife *W* with the result that *A* and *C* become members in a coparcenary consisting of the two of them. On *A* dying intestate thereafter his share in the coparcenary will not devolve by survivorship upon *C* but by operation of the proviso it will devolve by succession upon his son *C*, widow *W* and daughter *D* in equal shares (section 8). *B* will have no claim for any share in the same. He will, however, be entitled to a share in the separate or self-acquired property of *A*.

(3) *A* and his son *B* (by his first wife) constitute a Mitakshara coparcenary. *B* separates from his father and takes his one-half share in the coparcenary property. *A* dies intestate thereafter leaving him surviving his second wife *W*, two daughters *C* and *D* by his first and second wife respectively and his divided son *B*. There being no coparcenary in existence at the death of *A* this section will have no application and the property left by *A* will devolve by succession under section 8 on *W*, *C*, *D* and the divided son *B* in equal shares (*p*1).

**7.** (1) When a Hindu to whom the *marumakkattayam* or *nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad*, *tavazhi* or *illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *marumakkattayam* or *nambudri* law.

Devolution of interest in the property of a *tarwad tavazhi, kutumba, kavaru* or *illom*.

*Explanation*.—For the purposes of this sub-section, the interest of a Hindu in the property of a *tarwad*, *tavazhi* or *illom* shall be deemed to be the share in the property of the *tarwad*, *tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad*, *tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *marumakkattayam* or *nambudri* law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *aliyasantana* law would have applied if this Act had not been passed dies after the commencement

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(*p*) See "Divided son" at p. 867, *infra*. Also see Notes under "divided son" under section 8 *post*.

(*p*1) *Appalanaidu* v. *Narayana* ('72) A.A.P. 258.

of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *aliyasantana* law.

*Explanation.*—For the purposes of this sub-section, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or *kavaru*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *aliyasantana* law, and such share shall be deemed to have been alloted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

*Explanation.*—For the purposes of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

**Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru, or illom.**—The definitions in clauses (b), (h) and (i) of section 3 are, as already mentioned, inserted to facilitate the application of the rules of succession laid down in this Act to persons governed by the Aliyasantana, Marumakkattayam and Nambudri laws. The effect of this section and section 17 is to regulate succession to property of persons hitherto governed by those systems prevalent in certain parts of the South by the simple rules of inheritance laid down in the Act and which keep in view certain features of those systems. As the Joint Committee has observed this clause regulates succession to the interest of an intestate in any property belonging to any of the various kinds of joint families specified therein which are peculiar to the South and West Coast of India. In the case of *sthanam* properties which are specially assigned to a senior member of a joint family for the purpose of preserving his dignity, sub-clause (2) provides for a notional partition immediately before the death of the *sthanamdar* so that his interest will pass, not by any special rule of descent to a single heir, but in accordance with this law.

Mr. Justice Sundara Ayyar of the Madras High Court has written an excellent treatise on the customary laws of Malabar and South Kanara. His 'Malabar and Aliyasanthana law' is recognised as an authoritative work and was referred to by the Privy Council in the undermentioned case (*q*). In view of the fundamental and radical changes brought about in the law by the present enactment it is not deemed necessary to state the previous law on the subject and the reader is referred to the above treatise. The Supreme Court had occasion to refer to some broad aspects of this law in some recent decisions (*q*1).

Marumakkattayam law is a body of customs and usages which have received judicial sanction. It prevails among a considerable section of the people inhabiting the west coast of South India. The essential difference between Marumakkattayam and the other schools of Hindu law is that the former is founded on the matriarchate while the latter is founded upon the agnetic family. In the Mitakshara joint family the members claim there descent from a common ancestor but in a Marumakkattayam family which is known as the tarwad the descent is from a common ancestress. Mayne compares a tarwad to a family corporation. Every member of a tarwad has equal rights in the property by reason of his birth or her birth in the tarwad. It was laid down in a course of judicial decisions in the nineteenth century that one or more members of a tarwad cannot claim partition and separate possession of his or her share of the tarwad property without the consent or concurrence of all the members of the tarwad. The Madras Legisiature enacted certain statutes giving a right of partition to the members of a tarwad to enforce partition of a tarwad property. The shares on partition were to be on *per capita* basis (*q*2).

Under the customary Marumakkattayam law no partition of the family estate may be made, but items of the family property may by agreement be separately enjoyed by the members. On death the interest of a member devolved by survivorship. Management of the family property remained in the hands of the eldest male member, and in the absence of a male member a female member. A tarwad may consist of two or more branches known as thavazhies, each tawazhi or branch consisting of one of the female members of the tarwad and her children and all her descendents in the female line. Every tarwad consisted of a mother and her children—male and female—living in commensality, with joint rights in property. The customary law was modified in certain respects from time to time by the Madras Legislature. There were several legislative measures also in the States of Travancore and Cochin before they merged with the Indian Union. Those statutes also made significant changes in the customary law governing the family and property relations between the members governed by the Marumakkattayam law (*q*3). In the undermentioned case the Supreme Court (*qq*3) had to examine the question of property acquired in the name of a junior member of a tarwad and the application or otherwise of the rules of presumption in respect of self-acquisition of property by a member.

**Sub-section (1):**—This sub-section relates only to the Marumakkattayam and Nambudri laws. It gives an enactment parallel to that in section 6 and Explanation I to the same. The expressions *tarwad, tawazhi* and *illom* were defined in the relevant enactments mentioned in the definition clauses in section 3 and which enactments are now over-ridden by operation of section 4 of this Act.

This sub-section does not affect the rights of parties before a partition. Section 43 of the Travancore Kshatriya Act, in unambiguous terms, confers a right of partition upon all the members of a Kshatriya Tarwad since the date of that Act coming into force. The right to partition without the concurrence of others is a valuable right in property which must be available for

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(*q*) *Kochunni* v. *Kuttanunni* ('48) P.C. 47, 53.
(*q*1) See f.n. (*q*2) and f.n. (*q*3) below.
(*q*2) *Balakrishna Menon* v. *Asst. Controller of Estate Duty* ('71) A.S.C. 2392.
(*q*3) *Venugopala Ravi Varma Raja* v. *Union of India* ('69) A.S.C. 1094.
(*qq*3) *Achuthan Nair* v. *C. Amma* ('66) A.S.C. 411.

attachment and sale by the person to whom a debt was due by the deceased member of the Tarwad (*q*4).

**Sub-section (2).**—This sub-section relates to the Aliyasantana law. It gives an enactment parallel to that in section 6 and Explanation I to the same. The expression *kutumba* and *kavaru* were defined in the relevant enactment mentioned in the definition clause in section 3 of this Act and which enactment is now overriden by operation of section 4 of this Act. The undermentioned decision illustrates the application of this sub-section read with the Explanation to the same (*qq*4).

A brief survey of the customary Aliyasantana law regarding succession, partition and devolution of shares will be found in the undermentioned Full Bench decisions of the High Court of Mysore and other decisions there stated (*q*5). The present Act has brought about some important changes in the customary Aliyasantana law as modified by Madras Act 9 of 1949 as pointed out in the undermentioned decision of the High Court of Mysore (*q*6). Also see Madras Aliyasantana (Mysore Amendment) Act 1 of 1962.

Neither under the customary law nor under the Aliyasantana Act, 1949, the interest of a coparcener in an Aliyasantana Kutumba could have been disposed of by a will. In that regard a definite change in the law is made by the Explanation to section 30 of the present Act with the result that now a member of an individual Aliyasantana Kutumba can dispose of his interest in the Kutumba properties by a will. But this does not mean that otherwise the rights of a divided member have been enlarged. In a case decided by a Full Bench of the Mysore High Court Kutumba properties were partitioned and under the preliminary decree, A, a nissanthathi Kavaru, obtained a share in the same. Under section 36(3) of the Madras Aliyasanthana Act, 1949, A got a life interest in the properties allotted to him. By a will executed by A, he purported to bequeath the same. It was held that the contention that the interest obtained by A under the preliminary decree stood enlarged by the operation of section 30(1) of the present Act must fail (*q*7).

**Sub-section (3): Devolution of sthanam property.**—This sub-section relates to *sthanam* property and devolution of such property on the death of a *sthanamdar*. The Act does not define the expression *sthanam* which means (*r*) the status and attendant property of senior rajas. In Moore's *Malabar Law and Custom* it is defined as a station, rank or dignity. The holder of a *sthanam* is referred to as a *sthani* or *sthanamdar*. The ancient rulers of the Malabar coast possessed *stanoms* and it may be taken that the lands which they held as rulers were regarded as being *stanom* in character. Rulers granted *stanoms* to their subsidiary chieftains and public officers. The grant of a *stanom* to a subsidiary ruler or public officer was usually accompanied by a grant of land for the maintenance of the dignity. In Mr. Sundara Ayyar's

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(*q*4) *Bank of New India* v. *S. Ponnamma* ('61) A Kerala 105 (F.B.). Also see Notes under section 30 *post*.

(*qq*4) *Laxmi* v. *Parameshwari* ('69) A. Mys. 175.

(*q*5) *Sundara* v. *Girija* ('62) A. Mys. 72 (F.B.); *Bhagirathi* v. *Darakke* (1965) 2 Mys. L.J. 796 (F.B.).

(*q*6) *Ratnamala* v. *State of Mysore* ('68) A. Mys. 216. In *Gummanna* v. *Nagaveniamma* ('67) A.S.C. 159 the Supreme Court had to examine the Madras Act 9 of 1949 and on construction of a document of 1900 held that it was not a deed of partition but only a family settlement.

(*q*7) *Sundara* v. *Girija* ('62) A. Mys. 72 (F.B.).

(*r*) *Malabar and Aliyasanthanam Law.*

work a chapter is devoted to this subject and it is there pointed out that in addition to the families of princes and chieftains there were other families possessing *stanoms* without any particular dignity attaching to them. In ancient days when a family became opulent and influential the members of the tarwad sometimes agreed to set aside for the *karnavan* certain property in order that he might keep up his social position and influence and this property descended to the next head of the family (*s*). Reference may also be made to the decision of the Privy Council (*t*) and to the decision of the Supreme Court in the undermentioned cases (*u*).

The incidents of the *sthanam* were that the senior most member of the family became the sthanamdar who was usually the male member; but there were instances where the senior most female member became the *sthanamdar*. Separate properties belonged to each sthanam and they vested in the holder of the office for the time being and descended to the successors in office. One important feature was that a sthanamdar ceased to have any interest in the property on his death and the members of his tarwad had in their turn only reversionary rights to the sthanam property. The sthanamdar had a limited interest in the sense that he could encumber or alienate the sthanam property only for a legal necessity like any limited owner but otherwise he was absolutely entitled to the income accruing during his tenure of office. His position was analogous to that of a holder of an impartible estate. His successor had no interest in it and the right of the successor was nothing more than a *spes successionis* (*u*1).

Now all the sthanams will gradually get liquidated by operation of this Act. The present sub-section regulates the devolution of the sthanam property held by a sthanamdar who dies after the commencement of this Act. The effect of it is that sthanams continue till the death of the sthanamdar and thereafter the sthanam property devolves upon the members of the family to which he belonged and his personal heirs. The division is to be *per capita* on the basis of a notional partition having taken place immediately before his death. This result, as pointed out by the Supreme Court in *Balakrishna Menon* v. *Asst. Controller of Estate Duty* (*u*1), is brought about by the legal fiction enacted in this sub-section. The legal fiction, however, has to be confined for the purpose for which it is enacted and not to be extended further so as to include an actual division or partition having been effected in the lifetime of the sthanamdar with the result that there was a division or partition for all purposes.

General rules of succession in the case of males.

**8.** The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

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(*s*) *Kuttan Unni* v. *Kochunni* ('44) A.M. 378.
(*t*) *Kochunni* v. *Kuttanunni* ('48) A.P.C. 47.
(*u*) *Kochuni* v. *States of Madras & Kerala* ('60) A.S.C. 1080; *Balakrishna Menon* v. *Asst. Controller of Estate Duty* ('71) A.S.C. 2392.
(*u*1) *Balakrishna Menon* v. *Asst. Controller of Estate Duty* ('71) A.S.C. 2392 confirming *Asstt. Controller of Estate Duty* v. *Balakrishna Menon* ('67) A. Kerala 210 (F.B.). Also see *Balakrishna Menon* v. *Inspecting Asst. Commissioner* ('69) A. Kerala 1 (F.B.) for nature of estate of a sthanamdar.

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

**Succession to property of a male dying intestate.**—This section propounds a new and definite scheme of succession and lays down certain rules of succession to the property of a male Hindu who dies intestate after the commencement of the Act. The rules are pivotal and have to be read along with the Schedule. They have also to be read with certain other sections (particularly sections 9 to 13) in the Chapter which contain supplementary provisions which are not merely explanatory but lay down substantive rules involving legal principles. *Sections 8 to 13 contain a fasciculus of rules which must be read together.* Notes on sections 9 to 13 are given under those sections. The Schedule referred to in section 8 above and sections 9 to 13 are repeated here only to facilitate reference:

*THE SCHEDULE*

(*See* section 8)

HEIRS IN CLASS I AND CLASS II

*Class I*

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

*Class II*

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

*Explanation.*—In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

9. *Order of succession among heirs in the Schedule.*—Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be pre-

ferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

10. *Distribution of property among heirs in class I of the Schedule.*—The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:—

*Rule 1.*—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

*Rule 2.*—The surviving sons and daughters and the mother of the intestate shall each take one share.

*Rule 3.*—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

*Rule 4.*—The distribution of the share referred to in Rule 3—

(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. *Distribution of property among heirs in class II of the Schedule.*—The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

12. *Order of succession among agnates and cognates.*—The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:—

*Rule 1.*—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

*Rule 2.*—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

*Rule 3.*—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. *Computation of degrees.*—(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

**Four categories of heirs.**—This section groups the heirs of a male intestate into four categories and lays down that his heritable property devolves firstly upon the heirs specified in Class I of the Schedule. They are the son; daugh-

ter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. Under the old law in force before 1937 the "simultaneous heirs" of a male intestate consisted only of the son, the son of a predeceased son and the son of a predeceased son of a predeceased son. This was enlarged by the Hindu Women's Rights to Property Act, 1937, by adding three more heirs, viz. the widow of the intestate and the widows of the predeceased son and of the predeceased son of a predeceased son. All the six heirs succeeded simultaneously and the doctrine of representation applied to their case.

In Class I of the Schedule the Act enumerates twelve heirs so as to include in the new scheme of heirs the mother and the daughter of the intestate and some more descendants, the latter by reference to the principle of representation. All these heirs inherit simultaneously. On failure of any such heir specified in Class I the property devolves upon the enumerated heirs specified in Class II, a heir in the first entry in Class II being preferred to one in the second entry and so on in succession. If there is no heir belonging to Class I or even Class II the property devolves upon the agnates of the deceased. A person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males. Lastly if there is no agnate of the deceased in existence at the time of his death the property devolves upon his cognates. A person is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males.

**Property.**—The expression 'property' in this section means all property (*u*2) of the deceased intestate heritable under the Act. It includes not only his separate or self-acquired property but his interest in a Mitakshara coparcenary property in case he has left him surviving any of the female heirs or a daughter's son mentioned in Class I of the Schedule. It also includes agricultural land (*u*3) subject to this that legislation relating to prevention of fragmentation of agricultural holdings or fixation of ceilings or the devolution of tenancy rights in respect of such holdings is not to be affected by anything contained in this Act. But the rules of succession laid down in the Act do not apply to the property expressly excluded from the operation of the Act by section 5.

**". . . property of a male Hindu . . . shall devolve".**—The language of the section and particularly the words "shall devolve" plainly indicate that the section is prospective in its operation. It applies where on death of a male intestate devolution of his property takes place after the commencement of the Act and does not govern succession to the property of a male Hindu whose death took place before the commencement of the Act (*v*). In the latter case

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(*u*2) As to succession to *upasara* property on death of a Jain Yati see *Sumer Chand* v. *State of Rajasthan* ('65) A. Raj. 2.

(*u*3) See f.n. (k) at p. 845 *supra*.

(*v*) *Eramma* v. *Veerupana* ('66) A.S.C. 1879; *Jandebi* v. *Upendra* ('68) A. Orissa 187; *Satyanarayana* v. *Seethamma* ('72) A. Mys. 247; *Kempiah* v. *Girigamma* ('66) A. Mys. 189; *Sampathkumari* v. *Lakshmi Ammal* ('63) A.M. 50; *Nathuni Missir* v. *Ratna Kuer* ('63) A.P. 337. *Renukha Bala* v. *Aswini Kumar* ('61) A.P. 498. *Sheoraj Singh* v. *Munia* ('63) A.M.P. 360. *Gopi Chand* v. *Bedamo Kuer* ('66) A.P. 231 [no divesting of property already vested].

all questions of inheritance would be determined according to the previous law.

**". . . according to the provisions of this Chapter".**—Chapter II contains a number of provisions which are supplementary to the primary and pivotal rules laid down in this section. The following are the important provisions. The order of succession among the heirs enumerated in Class I and Class II of the Schedule is governed by s. 9. The order of succession in case of agnates and cognates, ascertaining the nearest in relationship among them to the deceased, is to be in accordance with the rules of preference and computation of degrees stated in sections 12 and 13. The computation of the shares of the various heirs in the four classes is regulated by the rules laid down in sections 9 to 13. Section 17 contains some special provisions respecting persons governed by Marumakkattayam and Aliyasantana laws. Section 18 lays down that an heir related by full blood is to be preferred to one related by half blood when both stand in the same relationship with the deceased. As a general rule two or more heirs who succeed together take the property as tenants-in-common as laid down in s. 19. Section 20 rules that a child *en ventre sa mere* has the same rights to inherit as if he or she had been born before the death of the intestate.

**Relative by adoption.**—The words ". . . upon the heirs, being the relatives specified in Class . . . of the Schedule" which appear in clauses (a) and (b) of the section and Classes I and II of the Schedule mentioned in those clauses do not expressly refer to relationship by adoption; nor does any relevant definition expressly refer to such relationship. The expression "heir" is defined to mean any person, male or female, who is entitled to succeed to the property of an intestate under the Act [s. 3(f)] and the expression "related" is defined to mean "related by legitimate kinship" [s. 3(j)]. It is a rudimentary rule of Hindu law that the adopted son must be deemed to have been begotten by the adoptive father on his own wife and that adoption operates as birth of the adoptee in the family of adoption thus creating legitimate kinship between him and the members of the adoptive family.

The question whether a person who is a relative by adoption is or is not an heir under Class I or Class II of the Schedule must be determined by reference to the rules of Hindu law relating to adoption and where the Hindu Adoptions and Maintenance Act, 1956, applies the determination must be in accordance with the provisions of that enactment. Under the Hindu law of adoption, which was operative at the time of the passing of the Hindu Succession Act and continued to be in operation till the coming into force of the Hindu Adoptions and Maintenance Act, 1956, adoption had the effect of transferring the adopted boy from his natural family into the adoptive family. It also had the effect of conferring upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son except in a few cases which related *inter alia* to the share on a partition between an adopted and the atterborn son (see § 494 *ante*). It followed as a necessary corollary to the rule that children born to the adoptee after his adoption acquired rights and privileges in the adoptive family of their father as if the father had been a natural born son in that family. Adoptions are now regulated by the Hindu

Adoptions and Maintenance Act, 1956, which came into operation on 21st December 1956, that is some months after the Hindu Succession Act. That Act modifies and alters the prior law of adoption to a considerable extent. It confers wide powers of adoption both on the male and the female Hindu. A male Hindu, under the new Act, has the capacity to adopt a son to himself and has also the capacity to take a daughter in adoption (s. 7.) So also a female Hindu, under the new Act, has now the capacity to adopt a son to herself and she has also the right to take a daughter in adoption (s. 8). In all such cases of adoption regulated by the new Act, the effect of adoption is that the adopted child is from the date of adoption to be deemed to be the child of his or her adoptive father or mother for all purposes (s. 12).

Having regard, therefore, to the legal consequences and incidents of adoption both under the old Hindu law and the Hindu Adoptions and Maintenance Act, the heirs referred to in clauses (a) and (b) of the present section and specified in Classes I and II of the Schedule, mean not only persons related to the intestate by blood but also those related to him by adoption. The definitions of "agnate" and "cognate" in s. 3 (a) and s. 3 (c) expressly state that the expressions include persons by adoption. Presumably this was done to dispel any doubt on the question because the expressions "agnate" and "cognate" were not used in Hindu law in any strict legal sense.

# ORDER OF SUCCESSION

## I—Clause (a): Class I of the Schedule

Firstly, the heirs of a male Hindu who dies intestate after the commencement of this Act are:—

| | |
|---|---|
| Son<br>Daughter<br>Widow<br>Mother<br>Son of a predeceased son<br>Daughter of a predeceased son<br>Son of a predeceased daughter<br>Daughter of a predeceased daughter<br>Widow of a predeceased son<br>Son of a predeceased son of a predeceased son<br>Daughter of a predeceased son of a predeceased son<br>Widow of a predeceased son of a predeceased son | These are heirs in Class I of the Schedule. They take *simultaneously** and to the exclusion of all other heirs (s. 9). |

### SON

(i) *Adopted son.*—The expression 'son' used in Class I of the Schedule has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. A son given in adoption loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or any share in the coparcenary property of his natural family.

Where a son is born after adoption to the adoptive father the adopted son is entitled to inherit just as if he were a natural-born son and is now entitled to the same share as a natural-born son.

Also see "Relative by adoption" at p. 864 *supra* and sections 5, 7 and 12 of the Hindu Adoptions and Maintenance Act, 1956, which Act came in force on 21st December 1956.

For computation of the share of a son, see sec. 10 and illustrations in the notes under that section, *post*.

*Old law.*—See §§ 494 and 495.

(ii) *Posthumous son.*—A son of the intestate who was in the womb at the time of the death of the intestate though subsequently born is to be deemed for the purpose of succession as if born before the death of the intestate (s. 20).

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* But in accordance with the four Rules in Section 10.

*Old law.*—The position of a posthumous son under the old law was the same.

(iii) *Son born after partition.*—When there has been a partition of joint family property between a father and his sons and thereafter a son is born to the father, the son will take an interest by birth in the property obtained on partition by the father and the property will be their coparcenary property. In case of death of the father after the commencement of this Act devolution of the father's interest in such coparcenary property will be governed by s. 6 of the Act and succession to the father's separate and self-acquired property will be in accordance with the rules laid down in s. 8.

Reference may be made to Notes under s. 6.

*Old law.*—The old law on the question of after-born sons was considerably different. See §§ 309, 310, 340 and 341.

(iv) *Divided son.*—In matters of succession the Act does not differentiate between a divided son and a son who had remained joint with his father or his father and other coparceners except in cases falling under s. 6 which relates *inter alia* to the undivided interest of a father in a Mitakshara coparcenary. The separate or self-acquired property of the father will, therefore, devolve by succession upon his heirs specified in Class I of the Schedule including a son who had separated from the father as well as one who had continued to remain joint with the father. See Illus. (p) at p. 852 *supra*. Under the old law the divided son was not entitled to claim any share in separate or self-acquired property of the father where the father after partition had continued to remain joint with his other sons or where he had a son born to him after partition and who was joint with him.

*Old law.*—See § 43—"divided and undivided sons" at p. 108 *supra* and § 341.

(v) *Illegitimate son.*—The illegitimate son of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a Shudra dying intestate after the commencement of the Act. The illegitimate son of a male Hindu of any caste is, however, entitled to claim maintenance from the father and in case of death of the father, from his heirs out of his estate inherited by them so long as the illegitimate son remains a minor and does not cease to be a Hindu [See sections 20(2), 21(viii), 22 and 24 of the Hindu Adoptions and Maintenance Act, 1956, which came into force on 21st December 1956].

Reference may also be made to Note (vi) below.

*Old law.*—See § 43—"illegitimate sons" at pp. 108-111 *supra*.

(vi) *Son born of a void or voidable marriage.*—Section 16 of the Hindu Marriage Act, 1955, is as under:

> "Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity *shall be deemed to be their legitimate child notwithstanding the decree of nullity*:
>
> Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

One effect of the abovementioned section is that sons and daughters of parents whose marriage was declared null and void by a decree of nullity under section 11 of that Act or annulled on the ground that it was voidable under section 12 of that Act are to be deemed to be the legitimate children of their parents and notwithstanding any such decree *entitled to succeed to the property of such parents* as if they were born in lawful wedlock. Reference may be made to Notes under section 16 at pp. 760-765.

*Illustration*

*A* and *B* are the father and mother of *S*. After *S* was born *B* obtains from the court a decree of nullity of marriage on one of the grounds mentioned in clause (i), (iv) or (v) of section 5 of the Hindu Marriage Act, 1955. Notwithstanding the decree of nullity of the marriage of his parents, *S* is entitled to succeed as an heir to the property of his father *A* and his mother *B* as if he was a child born in lawful wedlock. The same will be the status and right in the above case of a daughter to succeed as an heir to the property of *A* and *B* as if she were a child born in lawful wedlock:

*Step son.*—A step-son, that is a son of a previous marriage of the wife of the intestate, is not entitled to succeed to the property of the step-father. In his case there is no relationship with the step-father by full blood, half-blood or uterine blood.

Where a widow or an unmarried woman adopts a child any husband whom she marries subsequently is deemed to be the step-father of the adopted child (*w*). Such child is entitled to succeed to the property of the mother but not that of the step-father.

(vii) *Son having physical or mental defects.*—Under the old Hindu Law certain defects, deformities and diseases excluded an heir, as for instance a son, from inheritance. The Hindu Inheritance (Removal of Disabilities) Act, 1928, declared that no person shall be excluded from inheritance on any of those grounds unless he was from birth a lunatic or an idiot. That restricted disqualification also is now removed by s. 28 of this Act with the result that no person is now disqualified from succeeding to any property on any ground whatever save as provided in this Act.

*Old law.*—§ 98 *ante.*

**SON OF A PREDECEASED SON.**—He inherits simultaneously with a son and the other heirs specified in Class I of Schedule. The rules relating to the right of a son to succeed (pp. 866-868 *supra*) apply *mutatis mutandis* to the son of a predeceased son.

**SON OF A PREDECEASED SON OF A PREDECEASED SON.**—He inherits simultaneously with a son and the other heirs specified in Class I of the Schedule. The rules relating to the right of a son to succeed (pp. 866-868 *supra*) apply *mutatis mutandis* to the predeceased son of a predeceased son.

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(*w*) S. 14(4), Hindu Adoptions and Maintenance Act, 1956.

**WIDOW.**—The widow of a male Hindu inherits simultaneously with a son, daughter and the other heirs specified in Class I of the Schedule (s. 9). She takes her share absolutely and not as widow's estate (s. 14). If there are more widows than one, all the widows together, take one share (s. 10, r. 1.)

*Old law.*—See § 43 at pp. 111-113 and § 88 at p. 157 *supra.*

*Unchastity* of a widow is not now under the Act a ground for disqualifying her from succeeding to the estate of her husband (s. 28).

*Old law.*—See § 96 at p. 161 *supra* and § 43—"Unchastity" at p. 111 *supra.*

*Remarriage* of a widow, is not now under the Act a ground for divesting the estate inherited by her from her husband. The Hindu Widow's Remarriage Act, 1856, though it legalized the remarriage of a Hindu widow, had the effect of divesting the estate inherited by her as a widow. By her second marriage she forfeited the interest taken by her in her husband's estate, and it passed to the next heirs of her husband as if she were dead (s. 2 of that Act). The rule laid down in that enactment cannot apply to a case covered by the present Act and a widow becomes full owner of the share or interest in her husband's property that may devolve on her by succession under the present section. Her remarriage, which would evidently be after the vesting in her of her share or interest on the death of the husband, would not operate to divest such share or interest. The Hindu Widow's Remarriage Act, 1856, is not repealed but section 4 of the present Act in effect abrogates the operation of that Act in the case of a widow who succeeds to the property of her husband under the present section and section 14 has the effect of vesting in her that interest or share in her husband's property as full owner of the same (*w*1). Reference may be made to Notes under section 14 *infra.*

*Old law.*—See § 43—"Re-marriage" at pp. 111-112 *supra* which deal with both Mitakshara and Dayabhaga.

*Conversion* of a Hindu widow to another religion is not a ground for divesting her of property inherited by her from her husband. Section 26 of the Act which in terms deals with certain disqualifications ensuing upon change of religion does not affect the right of a widow who has succeeded to her husband. The effect of conversion of a wife to another religion during the lifetime of the husband is not *per se* to dissolve the marriage but is under section 13 (1) (ii) of the Hindu Marriage Act, 1955, only a ground for seeking from the court dissolution of the marriage. The mere fact, therefore, that the widow had ceased to be a Hindu by change of religion before the death of her husband does not exclude her from inheriting her husband's property.

*Old law.*—Change of religion and loss of caste which at one time were grounds of forfeiture of property and exclusion from inheritance had ceased to be so since the passing of the Caste Disabilities Removal Act, 1850.

**WIDOW OF A PREDECEASED SON.**—She inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. The rules relating to the right of a widow to succeed (see *supra*) apply *mutatis*

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(*w*1) See *Bhuri Bai* v. *Champi Bai* ('68) A. Raj. 139, 144.

*mutandis* to the widow of a predeceased son. She is, however, not entitled to succeed if, on the date the succession opens, she has remarried (s. 24).

*Old law.*—See § 35 at p. 92 and § 43 at p. 113 *supra.*

**WIDOW OF A PREDECEASED SON OF A PREDECEASED SON.**—She inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. The rules relating to the right of a widow to succeed (p. 869 *supra*) apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son. She is, however, not entitled to succeed if, on the date the succession opens, she has remarried (s. 24).

*Old law.*—See § 35 at p. 92 and § 43 at p. 113 *supra.*

**DAUGHTER.**—(i) The daughter, whether married or unmarried, inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Each daughter takes one share (*x*) that is equal to that of a son. She takes her share absolutely and not as woman's estate (*y*). There is no priority among married and unmarried daughters. Unchastity of a daughter is no ground for exclusion (*z*).

*Old law.*—See § 43 at pp. 113-115 *supra.*

(ii) *Intestate having interest in coparcenary.*—See section 6 and Notes thereunder.

(iii) *Adopted daughter.*—'Daughter' would include an adopted daughter. A male Hindu has now the capacity, under s. 7 of the Hindu Adoptions and Maintenance Act, 1956, to take a daughter in adoption. An adopted daughter is, therefore, one of the heirs under Class I of the Schedule. Also see 'Relative by adoption' at pp. 864-865 *supra.*

*Old law.*—See § 43 at pp. 113-115 *supra* and § 88 at p. 157 *supra.*

*Adopted son and adopted daughter.*—Under the provisions of the Hindu Adoptions and Maintenance Act, 1956, it is competent to a male Hindu to have both an adopted son and an adopted daughter. Therefore under Class I of the Schedule an adopted son and an adopted daughter can both be his heirs and take simultaneously.

(iv) *Posthumous daughter.*—See 'Posthumous son' at p. 866 *supra.* Also see s. 20 *post.*

(v) *Illegitimate daughter.*—The illegitimate daughter of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a Shudra. But she is entitled to inherit to her mother (See Notes under s. 15 post). The illegitimate daughter of a male Hindu is, however, entitled to claim maintenance from the father and in case of death of the father, from his heirs out of his estate inherited by them so long as she remains a minor and does not cease to be a Hindu (See sections 20-22 of the Hindu Adoptions and Maintenance Act, 1956, which came into force on 21st December 1956).

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(*x*) Section 10, Rule 2.
(*y*) Section 14.
(*z*) See S. 28 and Notes thereunder.

Reference may also be made to Note (vi) below and section 16 of the Hindu Marriage Act, 1955, and Notes thereunder.

*Old law.*—See § 43—"Illegitimate daughter" at p. 114 *supra.*

(vi) *Daughter born of a void or voidable marriage.*—See 'Son born of a void or voidable marriage' at pp. 867-868 *supra.*

(vii) *Daughter having physical or mental defects.*—See Notes under 'Sons having physical or mental defects' at p. 868 *supra.* Also see s. 28 *post.*

**MOTHER.**—The mother inherits simultaneously with a son, widow, daughter and other heirs specified in Class I of the Schedule. She takes her share absolutely (s. 14). Unchastity of a mother is no bar to her succeeding as heir to her son (*z*1); nor does divorce or remarriage constitute any such bar. The Hindu Widow's Remarriage Act, 1856, is not repealed but section 4 of the present Act in effect abrogates the operation of that Act in respect of matters dealt with by it and even if that Act could apply to the case of a mother (*a*) before this Act came into operation there can be no doubt that the present section and sections 4 and 14 of this Act have the effect of laying down that her remarriage is no bar to her succeeding as heir to her son and that there can be no divesting of the interest that she acquires in his property by reason of a remarriage (*a*1).

Mother includes *adoptive mother* because under the old Hindu Law (*b*) and now under the Hindu Adoptions and Maintenance Act, 1956, an adopted son is deemed to be the child of the adoptive parent or parents for all purposes with effect from the date of the adoption (*c*). On the death of a son adopted in dwyamushyayana form, the adoptive mother and natural mother inherited equally as co-heiresses (*d*). But that form of adoption is not recognised in case of adoptions made after the Hindu Adoptions and Maintenance Act, 1956, came into force (*e*).

Adoption has the effect of severing all the ties of the son with the natural parents and their family and therefore the natural mother is not entitled to succeed to the property of her son given in adoption (*f*).

A mother is entitled to succeed to the property of her *illegitimate son* as an heir in Class I of the Schedule [See Proviso to s. 3 (1) (j) and *supra*].

A mother of a son born of a void or voidable marriage is entitled to succeed as his heir in cases falling within the purview of section 16 of the Hindu Marriage Act, 1955. See pp. 867-868 *supra* and Notes under the section at pp. 760-765 *supra.* In cases covered by that section the son is to be deemed to be the legitimate son of the parents and the proviso to that section does not create any bar to the right of the mother to succeed to such son.

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(*z*1) *Jayalakshmi* v. *Ganesh Iyer* ('72) A.M. 357.

(*a*) See Notes at p. 869, *ante.*

(*a*1) Reference may be made to *Mantorabai* v. *Parotanbai* ('72) A.M.P. 145 where agreement has been expressed with this view.

(*b*) See § 43 under "adoptive mother" at p. 116.

(*c*) See Ss. 7, 8, 12 and 14 of that Act.

(*d*) See p. 553, *supra.*

(*e*) See S. 5 of that Act.

(*f*) See § 494 *ante.* Also see S. 12 of the Hindu Adoptions and Maintenance Act, 1956.

A *step-mother* is not entitled as mother to inherit to her step-son as one of the heirs in Class I but she can be an heir as father's widow under Entry VI of Class II of the Schedule.

*Old law.*—See § 43 at p. 116 *supra*.

**SON OF A PREDECEASED DAUGHTER.**—The son of a predeceased daughter inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Daughter's son would include the adopted son of a predeceased daughter; that is if the latter was in the position of the adoptive mother (*g*). A female Hindu, who is not married or if married whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or has been declared by a court to be of unsound mind, has now the capacity, under s. 8 of the Hindu Adoptions and Maintenance Act, 1956, to take a son or daughter *in adoption to herself*. Therefore, a son adopted by her would, in case of her death during the life-time of her father who subsequently dies intestate, be in the position of a daughter's son and entitled to succeed as such under the present section.

Also see 'Relative by adoption' at pp. 864-865 *supra*. For computation of the share of a daughter's son see s. 10 and illustrations in notes under that section *infra*.

*Old law.*—See § 43 at p. 115 *supra*.

**DAUGHTER OF A PREDECEASED SON.**—The daughter of a predeceased son inherits simultaneously with a son, daughter, widow, son of a predeceased son and the other heirs specified in Class I of the Schedule. Son's daughter would include the adopted daughter of a predeceased son. Reference may be made to Notes under 'Daughter' at pp. 870-871 *supra*. For computation of her share see s. 10 at p. 884 *infra*.

*Old law.*—See § 43 at p. 117 *supra*.

**DAUGHTER OF A PREDECEASED DAUGHTER.**—The daughter of a predeceased daughter inherits simultaneously with a son, daughter, widow, son of a predeceased daughter and the other heirs specified in Class I of the Schedule. Also see 'Relative by adoption' at pp. 864-865 *supra*. Reference may be made to Notes under 'Daughter' at pp. 870-871 *supra*. For computation of her share see s. 10 at p. 884 *infra*.

*Old law.*—See § 43 at p. 117 *supra*..

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(*g*) See S. 14 of the Hindu Adoptions and Maintenance Act, 1956.

**DAUGHTER OF A PREDECEASED SON OF A PREDECEASED SON.**—The daughter of a predeceased son of a predeceased son inherits simultaneously with a son, daughter, widow and the other heirs specified in Class I of the Schedule. Also see 'Relative by adoption' at pp. 864-865 *supra*. Reference may be made to the Notes under 'Daughter' at pp. 870-871 *supra*. For computation of her share see s. 10 at p. 884 *infra*.

## ORDER OF SUCCESSION (*contd.*)

### II.—Clause (b): Class II of the Schedule

*Secondly*, that is failing all heirs of the intestate male specified in Class I of the Schedule, but not until then, his property devolves upon the heirs specified in the nine entries in Class II of the Schedule. The heir in the first entry in this class is preferred to those in the second entry; the heirs in the second entry are preferred to those in the third entry and so on in case of succeeding entries.

### *Entry I (Class II of the Schedule)*

**FATHER.**—He is the only heir specified in Entry I of Class II and failing any heir in Class I he takes the whole property of the intestate. Under the old law mother ranked as an heir before the father except in cases governed by Mayukha Law.

If the intestate had been an adopted son, the *adoptive father* and his relations would stand in the same relationship to the deceased as if he were a son born in the adoptive family. The adoptive father, therefore, would be the heir of the intestate under Entry I of Class II (*h*). Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. While the adopted son acquires the rights of a son in the adoptive family, he loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. And conversely the natural father is not entitled to succeed to the property of his natural son given in adoption. Also see 'Relative by adoption' at pp. 864-865 *supra*.

A mother is entitled to succeed to the property of her illegitimate son (*i*) but a father is not entitled to any interest by succession in the property of an illegitimate son. The proviso to s. 3(1)(j) does not apply to his case.

A father of a son born of a void or voidable marriage is entitled to succeed as his heir in cases falling within the purview of section 16 of the Hindu Marriage Act, 1955. See sec. 16 *supra* and Notes under that section at pp. 760-765 *ante*. In cases covered by that section the son is to be deemed

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(*h*) Also see, S. 12, Hindu Adoptions and Maintenance Act, 1956.

(*i*) p. 867, *supra*.

to be the legitimate son of the parents and the proviso to that section does not create any bar to the right of the father to succeed to such son.

A step-father is not entitled to succeed to the property of his step-son.

## *Entry II (Class II of the Schedule)*

| | |
|---|---|
| Son's daughter's son<br>Son's daughter's daughter<br>Brother<br>Sister. | These heirs specified in Entry II of Class II of the Schedule share the property simultaneously and equally (s. 11) and to the exclusion of those specified in the subsequent entries. |

**SON'S DAUGHTER'S SON.**—The son of a predeceased daughter of a predeceased son mentioned in this Entry would include the adopted son of the son's daughter. The rules relating to the right of the adopted son and adopted daughter of a predeceased daughter to succeed apply *mutatis mutandis* to such adopted son. Also see 'Relative by adoption' at pp. 864-865 *supra*.

For computation of the share of a son's daughter's son see s. 11 at pp. 886-887 *infra*.

**SON'S DAUGHTER'S DAUGHTER.**—The daughter of a predeceased daughter of a predeceased son mentioned in this Entry would include the adopted daughter of a son's daughter. The rules relating to the right of the adopted daughter of a predeceased son to succeed apply *mutatis mutandis* to the adopted daughter of a predeceased daughter of a predeceased son. Also see 'Relative by adoption' at pp. 864-865 *supra*.

For computation of the share of a son's daughter's daughter see s. 11 of pp. 886-887 *infra*.

**BROTHER.**—Brother specified in this Entry as an heir inherits simultaneously with the sister and other heirs mentioned in the Entry (*j*). He may be a brother of the full blood or of the half-blood. But where there is a full brother and a half-brother of the intestate the full brother is preferred to the half-brother (s. 18). The half-brothers referred to here are sons of the same father by a different mother. Uterine brothers, that is sons of the same mother by different fathers are not entitled to succeed to one another as 'brothers' under this Entry although related by legitimate kinship. This

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(*j*) As to full brother and half-sister and full sister and half-brother of the intestate see Notes under S. 18, *post*.

necessarily follows from the *Explanation* to the Schedule (*k*). But where the intestate and his brother are the illegitimate sons of their mother they are deemed to be related to one another as 'brothers' under this Entry. Although the expressions 'relatives' and 'related' mean persons related by legitimate kinship, the proviso to the definition of 'related' in s. 3(1) (j) states an express rule having the effect *inter alia* of giving recognition to the rights of such illegitimate offspring to succeed to one another (See p. 840 *ante*).

Where a son is born to a male Hindu after he has taken a son in adoption, the adopted son stands in the same relationship to the natural-born son as if he were himself a natural-born son. Such adopted son and natural-born son are 'brothers' within the meaning of this Entry and entitled as such to succeed to one another. Also see 'Relative by adoption' at pp. 864-865 *supra* and sections 5, 7, 11 and 12 of the Hindu Adoptions and Maintenance Act, 1956.

For computation of the share of a brother see s. 11 at pp. 886-887 *infra*.

*Old law.*—See § 43 at p. 116 *supra*.

**SISTER.**—Sister specified in this Entry as an heir inherits simultaneously with the brother and other heirs mentioned in the Entry (*l*). She takes her share absolutely and not a limited estate (s. 14). She may be a sister of the full blood or of the half-blood. But where there is a full sister and a half-sister of the intestate the full sister is preferred to the half-sister. The intestate and the half-sister referred to here are children of the same father by a different mother. As between a full-brother and a half-sister or a full-sister and a half-brother the former would be preferred on the ground that full blood is preferred to half blood (section 18). Where the intestate male and the sister are son and daughter of the same mother by different fathers, the uterine sister is not entitled to succeed as a 'sister' under this Entry although related to the intestate by legitimate kinship. This necessarily follows from the *Explanation* to the Schedule (*m*). But where the intestate and his sister are the illegitimate children of their mother they are deemed to be related to one another as 'brother' and 'sister' within the meaning of this Entry. Although the expressions 'relatives' and 'related' mean persons related by legitimate kinship the proviso to the definition of 'related' in s. 3(1) (j) states an express rule having the effect *inter alia* of giving recognition to the rights of such illegitimate offspring to succeed to one another (See p. 840 *ante*).

Where a son is born to a male Hindu after he has taken a daughter in adoption in accordance with the law in force at the time of adoption or where a male Hindu having a son adopts a daughter in accordance with the law in force at the time of adoption, the adopted daughter stands in the same relationship to the son as if she were a natural-born daughter. Such adopted daughter is a 'sister' within the meaning of this Entry and entitled to suc-

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(*k*) A uterine brother can, however, succeed as a cognate under clause (*d*) of Section 8 when there are no heirs of the deceased under clauses (*a*) to (*c*) of the section.

(*l*) As to full-sister and half-brother and full-brother and half-sister of the intestate see Notes under S. 18, *post*.

(*m*) A uterine sister can, however, succeed as a cognate under clause (*d*) of Section 8 when there are no heirs of the deceased under clauses (*a*) to (*c*) of the section.

ceed to the son as such. Also see 'Relative by adoption' at pp. 864-865 *supra* and sections 5, 7, 11 and 12 of the Hindu Adoptions and Maintenance Act, 1956.

For computation of share of a sister see s. 11 at pp. 886-887 *infra*.

*Old law*.—See § 43 at p. 118 *supra*.

## *Entry III (Class II of the Schedule)*

| | |
|---|---|
| Daughter's son's son<br>Daughter's son's daughter<br>Daughter's daughter's son<br>Daughter's daughter's daughter | These heirs specified in Entry III of Class II of the Schedule share the property simultaneously and equally (s. 11) and to the exclusion of those specified in the subsequent entries. |

See 'Son of a predeceased daughter' and 'daughter of a predeceased daughter' at p. 872 *supra*.

Also see 'Relative by adoption' at pp. 864-865 *supra*.

## *Entry IV (Class II of the Schedule)*

| | |
|---|---|
| Brother's son<br>Sister's son<br>Brother's daughter<br>Sister's daughter | These heirs specified in Entry IV of Class II of the Schedule share the property simultaneously and equally (s. 11) and to the exclusion of those specified in the subsequent entries. |

The heirs specified in this Entry are the son and daughter of a predeceased brother and of a predeceased sister. It has already been pointed out that the full brother is preferred to the half-brother and the full sister is preferred to the half-sister (Entry II). Similarly under the present Entry, where there is a son of a full brother and also a son of a half-brother the former is preferred to the latter. The position is similar in case of the other heirs specified in this Entry. Also see s. 18 and Notes thereunder.

The intestate and the half-brother or the intestate and the half-sister referred to above must be children of the same father by a different mother. Where the intestate male and the brother or sister were children of the same mother by different fathers, the relationship will be by uterine blood and the son or daughter of such uterine brother or uterine sister are not entitled to succeed under this Entry although related to the intestate by legitimate kinship. This necessarily follows from the Explanation to the Schedule (*n*). But where the intestate and his brother or sister were illegitimate children of their mother they will be deemed to be related to one another as brothers or as brother and sister within the ambit of this section. Although the expressions 'relatives' and 'related' mean persons related by legitimate kinship the

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*n*) A uterine brother's son or daughter and a uterine sister's son or daughter can, however, succeed as cognates under clause (*d*) of Section 8 when there are no heirs of the deceased under clauses (*a*) to (*c*) of the section.

proviso to the definition of 'related' in s. 3 (1) (j) states an express rule having the effect *inter alia* of giving recognition to the rights of the legitimate descendants of such illegitimate offspring and the words 'brother' and 'sister' in this Entry must be construed accordingly.

Also see 'Relative by adoption' at pp. 864-865 *supra*.

*Old law.*—See § 43 at pp. 117-119 *supra*.

## *Entry V (Class II of the Schedule)*

| | |
|---|---|
| Father's father<br>Father's mother | These heirs specified in Entry V of Class II of the Schedule share the property simultaneously and equally (s. 11) and to the exclusion of those specified in the subsequent entries. |

See 'Father' at pp. 873-874 *supra* and 'Mother' at pp. 871-872 *supra*. Also see 'Relative by adoption' at pp. 864-865 *supra*.

Father's step-mother is not entitled as father's mother to inherit to her step-son's son as one of the heirs in this Entry. Nor is she entitled to inherit under clause (c) or (d) of the section there being no relationship by blood (*o*).

*Old law.*—See § 43 at p. 117 *supra*.

## *Entry VI (Class II of the Schedule)*

| | |
|---|---|
| Father's widow<br>Brother's widow | These heirs specified in Entry VI of Class II of the Schedule share the property simultaneously and equally (s. 11) and to the exclusion of those specified in the subsequent entries. |

Father's widow that is a step-mother is now recognised as one of the heirs of the male intestate but not as a very near relation (*p*). The step-mother of the intestate is entitled to succeed under this entry.

Reference may be made to Notes under 'Father' *supra*.

Remarriage of the father's widow does not constitute any bar to her right to succeed under this Entry. She is not one of the persons disqualified under s. 24 of the Act. Unchastity of the father's widow (step-mother) does not disqualify her from succeeding under this entry (*p*1).

Brother's widow is not entitled to succeed as an heir under this entry if on the date the succession opens she had remarried (s. 24).

Reference may be made to Notes under 'Brother' at pp. 874-875 *supra*.

Reference may be made to Notes under s. 18 for relationship by full blood and half-blood.

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(*o*) See pp. 879-882 *infra*.

(*p*) See 'Step-mother' and 'Mother' at pp. 871-872.

(*p*1) *Jayalakshmi* v. *Ganesa Iyer* ('72) A.M. 357.

Also see 'Relative by adoption' at pp. 864-865 *supra*.

## *Entry VII (Class II of the Schedule)*

| | |
|---|---|
| Father's brother<br>Father's sister | These heirs specified in Entry VII of Class II of the Schedule share the property simultaneously and equally and to the exclusion of those specified in the subsequent entries. |

The father's brother may be a brother of the full blood or of the half-blood. But a father's brother of the full blood will be preferred to a father's brother of the half-blood (s. 18). The father's uterine brother is not entitled to succeed as father's brother (*q*). Also see 'Relative by adoption' at pp. 864-865 *supra*.

The father's sister may be a sister of the full-blood or of the half-blood. But a father's sister of the full blood will be preferred to a father's sister of the half-blood (s. 18). The father's uterine sister is not entitled to succeed as father's sister (*r*). Also see 'Relative by adoption' at pp. 864-865 *supra*.

Reference may also be made to Notes under s. 18 for relationship by full blood and half-blood.

For computation of shares of the father's brother and father's sister see s. 11 at pp. 886-887 *supra*.

*Old law.*—See § 43 at p. 119 *supra*.

## *Entry VIII (Class II of the Schedule)*

| | |
|---|---|
| Mother's father<br>Mother's mother | These heirs specified in Entry VIII of Class II of the Schedule share the property simultaneously and equally and to the exclusion of those specified in the subsequent entry. |

See Notes under 'Father' at pp. 873-874 *supra* and 'Father's mother' at p. 877 *supra*.

Also see 'Relative by adoption' at pp. 864-865 *supra*.

## *Entry IX (Class II of the Schedule)*

| | |
|---|---|
| Mother's brother<br>Mother's sister | These heirs specified in Entry IX of Class I of the Schedule share the property simultaneously and equally and to the exclusion only of the agnates and cognates of the intestate. |

(*q*) See Explanation to the Schedule. But he can succeed as a cognate: See f.n. (*k*) at p. 875 *supra*.

(*r*) See Explanation to the Schedule. But she can succeed as a cognate: See f.n. (*m*) at p. 875 *supra*.

See Notes under 'Father's brother' and 'Father's sister' above.

Also see Notes under 'Brother' at pp. 874-875 *supra* and 'Sister' at pp. 875-876 *supra*. Reference may also be made to Notes under s. 18 for relationship by full blood and half-blood.

## ORDER OF SUCCESSION (*contd.*)

### III.—Clause (c): Agnates

Failing all heirs of the intestate male specified in Classes I and II of the Schedule, but not until then, his property devolves upon his agnates.

A person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males [s. 3 (1) (a)]. The expression 'related' has been defined in s. 3 (1) (j) to mean related by legitimate kinship. It follows from clause (c) of section 8 read with the relevant definitions that:

(1) Both male and female relatives by blood or adoption having legitimate kinship with the intestate are included among his agnates provided the relationship is wholly through males. Thus a father's brother's daughter is an agnate. But a father's sister's son is not an agnate because he is not related to the intestate wholly through males. Not being related to the intestate wholly through males he is only a cognate of the intestate.

Agnates do not include the widows of the lineal descendants of the intestate or widows of those who may be related to him as lineal male descendants of his lineal ascendants because the definition of agnates does not extend to relatives by marriage but is confined to relatives by blood or adoption. Some of the female heirs specified in Classes I and II of the Schedule are widows of agnatic relations of the intestate but they succeed as heirs expressly recognised by clauses (a) and (b) of section 8. Widow of a predeceased son and widow of a predeceased son of a predeceased son are not relatives by blood but by marriage. But they succeed as heirs expressly recognised in Class I. Father's widow (step-mother) and brother's widow also are not relatives by blood but by marriage. But they succeed as heirs expressly recognised in Class II. Mother and Father's mother are relatives by blood and not marriage. They are not agnates but relatives specified as heirs respectively in Class I and Class II of the Schedule and succeed as such. Father's father's mother is not a relative by marriage but by blood. She is not specified as an heir in the Schedule and is entitled to succeed only as an agnate.

(2) There are no degrees of relationship beyond which kinship is not recognised so that an agnate howsoever remotely related to the intestate is entitled to succeed as an heir.

(3) Excluding heirs already specified in the two classes of the Schedule, all lineal male descendants of the intestate however remote are his agnates. So also all his female descendants however remote are his agnates if they are related to him wholly through males. Similarly all his lineal male ascendants

as also the lineal descendants male or female of his lineal ascendants however remote are among his agnates provided the female descendants are related to him wholly through males. Thus a father's father's father's son's son's daughter is an agnate but a father's sister's son is not an agnate as he is not related to the intestate wholly through males.

Clause (c) applies to agnates other than those heirs who are already specified in Classes I and II of the Schedule and are related to the intestate wholly through males. The definition of agnates in s. 3(1) (a) applies 'unless the context otherwise requires' and the context requires that the heirs specified in clauses (a) and (b) of the present section are not to be included in the category of agnates recognised as heirs under sub-section (c).

(4) Relationship by blood includes relationship by full-blood, half-blood and uterine blood. Relationship by uterine blood cannot, however, create agnatic kinship because relatives by uterine blood cannot be related to the intestate male wholly through males. But agnates include persons related to one another by full blood as well as half-blood. Heirs of full blood are, however, preferred to heirs of the half-blood (s. 18)). Reference may be made to Notes under s. 18 for competing heirs related by full blood and half-blood.

Agnates also include relatives by adoption. See 'Relative by adoption' at pp. 864-865 *supra*.

**Order of succession among agnates.**—Clause (c) of section 8 does not give a list of agnates or state the order in which they are entitled to succeed under it. But section 12 lays down certain rules of preference which are determinative of the order of succession among agnates and section 13 lays down certain rules for the purpose of determining that order by computation of degrees both of ascent and descent. Another rule of preference contained in s. 18 is the general provision that heirs related to an intestate by full blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect.

## ORDER OF SUCCESSION (*contd.*)

### IV.—Clause (d): Cognates

Failing all heirs of the intestate specified in Classes I and II of the Schedule and also all agnates, but not until then, his property devolves upon his cognates.

A person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males [s. 3(1) (c)]. They may be related through one or more females. Thus a mother's brother's son and a brother's daughter's daughter are cognates. The expression 'related' has been defined in s. 3(1) (j) to mean related by legitimate kinship. It follows from clause (d) of section 8 read with the relevant definitions that:

(1) Excluding heirs specified in the two Classes of the schedule, all male and female relatives by blood or adoption having legitimate kinship with the

intestate are his cognates where the relationship is through one or more females.

Cognates do not include the widows of any persons related to the intestate by blood or adoption. The definition of cognates does not extend to relatives by marriage but is confined to relatives by blood or adoption.

Clause (d) applies to those heirs who are related to the intestate through one or more females. The definition of cognates in s. 3(1) (c) applies 'unless the context otherwise requires' and the context requires that the heirs specified in clauses (a) and (b) of the present section are not to be included in the category of cognates recognised as heirs under clause (d).

(2) There are no degrees of relationship beyond which kinship is not recognised so that a cognate howsoever remote to the intestate is entitled to succeed as an heir.

(3) Relationship by blood includes relationship by full blood, half-blood and uterine blood. Heirs of full blood are, however, preferred to heirs related by half-blood. Reference may be made to Notes under s. 18 for competing heirs related to the intestate by full blood and half-blood. Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands [s. 3(1)(e) (ii)]. Relations by uterine blood have legitimate kinship and can therefore claim relationship by blood with the intestate. The relationship would necessarily be through one or more females and those who satisfy the above requirements would be included among the cognates of the intestate. Thus the uterine brother or uterine sister of the intestate is entitled to succeed as a cognate under clause (d); and similarly others related to the intestate by uterine blood are included in the category of cognates. It is only in case of heirs expressly specified in Classes I and II of the Schedule that reference to a brother or sister does not include a brother or sister by uterine blood. That rule laid down in the Explanation to the Schedule has no application to the category of cognates recognised as heirs under clause (d).

Cognates also include relatives by adoption. See 'Relative by adoption' at pp. 864-865 *supra*.

**Order of succession among cognates.**—Clause (d) of section 8 does not give a list of cognates or state the order in which they are entitled to succeed under it. But section 12 lays down certain rules of preference which are determinative of the order of succession among cognates and section 13 lays down certain rules for the purpose of determining that order by computation of degress both of ascent and descent. Another rule of preference contained in s. 18 is the general provision that heirs related to an intestate by full blood shall be preferred to heirs related by half-blood if the nature of the relationship is the same in every other respect.

See Illustrations at pp. 935-936.

**Death of a male Hindu who was member of a Mitakshara coparcenary.**—Section 6 of the Act contains a vital provision and deals with the question of devolution of interest in coparcenary property in case of a male Hindu gov-

erned by the Mitakshara where he has left him surviving a female relative specified in class I of the Schedule to this Act. Reference may be made to the Notes under that section.

**9.** Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

Order of succession among heirs in the Schedule.

This section states some important rules which are supplementary to the primary and pivotal rules laid down in s. 8 and the explicit declaration of the law in this section governs the order of succession among the heirs enumerated in Class I and II of the Schedule.

The heirs specified in Class I of the Schedule may for convenience be described as the preferential heirs of the intestate. They succeed simultaneously and there is, therefore, no question of any precedence or priority among them. As heirs specified in Class I of the Schedule they constitute a distinct and exclusive category and succeed in preference to all other heirs.

Failing all heirs of the intestate in the category of the preferential heirs enumerated in Class I of the Schedule, but not until then, his property devolves upon the heirs specified in the second category of heirs enumerated in the nine entries in Class II of the Schedule. It is important to note that the nine entries constitute distinct and separate groups of heirs one in a prior entry being preferred to one in the next entry and so on in order of the entries. But there is no precedence or priority among the different heirs mentioned in any particular entry. They stand *in aequali jura* with this qualification that full blood is to be preferred to half-blood.

Having regard to this section and section 11 there is little scope for the contention that the different heirs mentioned in what may be described as sub-divisions of any particular Entry in Class II of the Schedule do not inherit simultaneously. Such a contention was raised in the undermentioned case and was negatived (*r*1). See Illustration 7 below and also see Notes under section 11 *post*.

*Illustrations*

1. *A* dies leaving him surviving among others his widow, two sons, son of a predeceased son, widow of another predeceased son, two daughters and a son of a predeceased daughter. All these are among the preferential heirs specified in Class I. They take *A*'s property simultaneously and to the exclusion of all other heirs such as father, brother and son's daughter's son who are heirs specified in Class II.

2. *A* dies leaving him surviving *SSW*, the widow of a predeceased son of a predeceased son, son's daughter's son and his brother. *SSW* being the only heir specified in Class I will take the whole of *A*'s property to the exclusion of all the other heirs. But if *SSW* had remarried during the lifetime of *A* she will not be entitled to succeed to *A*'s property (S. 24) which will devolve equally upon *A*'s son's daughter's son and brother who are both heirs specified in Entry II of Class II.

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(*r*1) *Arunachalathammal* v. *Ramachandran* ('63) A.S.C. 1714. A.M. 255. Also see *Satya Charan* v. *Urmila* ('70)

3. *A* dies leaving him surviving his father and son's daughter's son. The father being an heir specified in Entry I of Class II will take *A*'s property in preference to and to the exclusion of the son's daughter's son who is an heir specified in Entry II of Class II.

4. *A* dies leaving him surviving two brothers, a son's daughter's son and a daughter's son's son. The brothers and the son's daughter's son being heirs specified in Entry II of Class II will take A's property to the exclusion of the daughter's son's son who is an heir specified in Entry III of Class II.

5. *A* dies leaving him surviving a brother, a step-brother and the son of a pre-deceased brother. Full blood is preferred to half-blood (s. 18), and therefore the brother who is an heir specified in Entry II of Class II will have preference over the step-brother and will take the whole of *A*'s property to the exclusion of the step-brother and of the brother's son who is an heir in Entry IV of Class II. If *A* dies leaving only his step-brother and the son of a predeceased full-brother the step-brother will take the property to the exclusion of the brother's son (*s*).

6. *A* dies leaving him surviving a step-sister, a uterine brother, and a uterine sister. The step-sister will take the whole of *A*'s property as she is within the meaning of 'sister' specified as an heir in Entry II of Class II of the Schedule. Reference to 'brother' or 'sister' in the Schedule does not include reference to uterine brother or uterine sister (*t*).

7. *A* dies leaving him surviving a brother's son and sons and daughters of his sister. They are all heirs in Entry IV of Class II and will take *A*'s property simultaneously and in equal shares (*t*1). See Notes under section 11 *post*.

8. *A* dies leaving him surviving his sister *C* and his brother's son *BS*. The sister *C* being an heir in Entry II of Class II is a preferential heir to *BS* who is an heir in Entry IV of Class II (*t*2).

**10.** The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:—

Distribution of property among heirs in class I of the Schedule.

*Rule 1*.—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

*Rule 2*.—The surviving sons and daughters and the mother of the intestate shall each take one share.

*Rule 3*.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

*Rule 4*.—The distribution of the share referred to in Rule 3—

(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

**Distribution among heirs in Class I of the Schedule.**—Sections 8 and 9, so far as they relate to heirs specified in Class I of the Schedule, contain the

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(*s*) See "Brother" at pp. 874-875 *supra*.
(*t*) See Explanation to the Schedule.
(*t*1) See case cited in f.n. (*r*1) above.
(*t*2) *Aparti Beua* v. *Suna Stree* ('63) A. Orissa 166. Also see this case under Section 15 *post*.

explicit declaration of the law that the preferential heirs there enumerated take simultaneously and to the exclusion of all other heirs. There is no precedence or priority among them but it does not follow that every individual who succeeds as an heir listed in Class I of the Schedule is entitled to an equal share of the property along with every other individual heir in that class. The computation of the shares or portions of the heirs so listed is to be in accordance with the rules laid down in this section which may be said to constitute the Statute of Distribution applicable to heirs in Class I. It must have been noticed from the preceding sections and the Schedule that the Legislature does not lay down any rule of discrimination between a male heir and a female heir. The general scheme of the Act is to put sons and daughters as far as possible on the same footing and allot shares to them *pari passu*. Section 19 states the broad general rule that if two or more heirs succeed together to the property of an intestate, they shall take the property,—

(a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and

(b) as tenants-in-common and not as joint tenants. This is subject to any express provision to the contrary.

Rule 2 of the present section gives effect to the general rule wherein each claimant has a share in his or her own right as in equal degree of kinship to the deceased and not as representing another person, that is, distribution *per stirpes*. The general rule is based on the broad principle of equalization.

Rule 3 expressly provides for the exception that heirs of the deceased in the branches of predeceased sons and predeceased daughters take not *per capita* but *per stirpes*.

Rule 4 is of the nature of a corollary to Rule 3. Distribution *per capita* wherein each claimant has a share in his own right as in equal degree of kindred to the intestate is not recognised in case of heirs (widow, sons or daughters) in the branches of predeceased sons and predeceased daughters enumerated in Class I. In their case distribution is *per stirpes* wherein division is according to stocks, i.e. taking into consideration the share which the predeceased sons or daughters would themselves have taken if they had survived the propositus. It will be noticed that Rule 4 describes the distributive shares of such widow (or widows), sons and daughters in the branch of a predeceased son or a predeceased daughter as *portion* or portions which they get when distribution in their case is *per stirpes*.

Rule 1 lays down that the widow of the intestate is entitled to take one share, that is the same share that a son, daughter or mother takes under Rule 2. But if there are more widows than one, each widow does not take one share, but the widows together take one share.

The section deals with distribution of property among heirs of the intestate enumerated in Class I. The expressions "heirs in the branch of the predeceased son" and "heirs in the branch of the predeceased daughter" in the Rules mean heirs of the intestate enumerated in Class I constituting the branch of the predeceased son or predeceased daughter and not heirs of such predeceased son or predeceased daughter. The heirs of the intestate in the

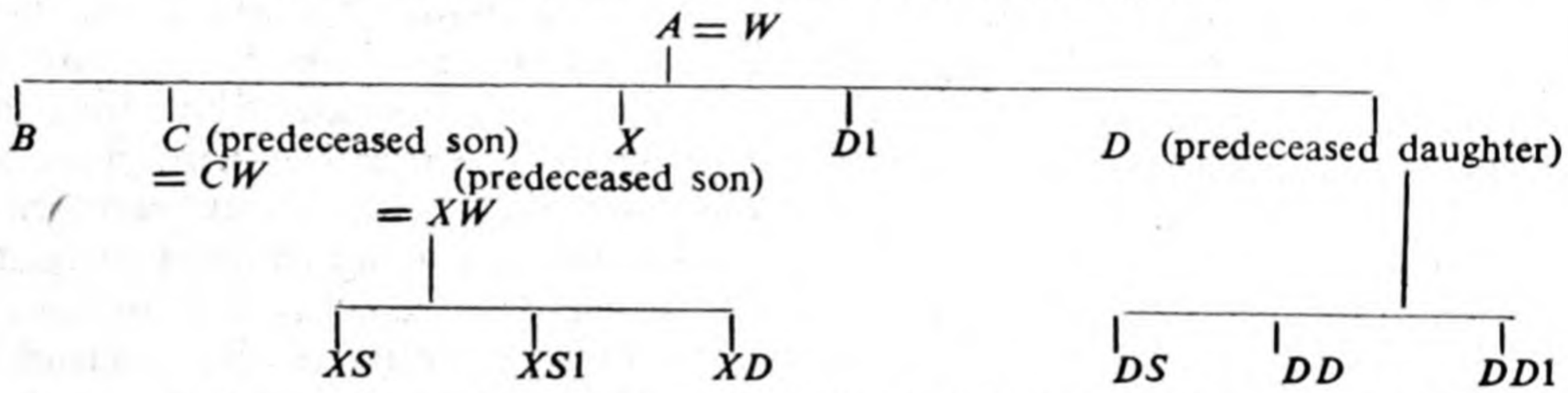
branch of a predeceased son are son of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son; and widow of a predeceased son of a predeceased son. The heirs of the intestate in the branch of a predeceased daughter are son of a predeceased daughter and daughter of a predeceased daughter.

*Illustrations*

1. *A* dies leaving him surviving his widows *W* and *W*1, his mother *M* and two sons *S* and *S*1 and two daughters *D* and *D*1. *S*, *S*1, *D*, *D*1 and *M* will each take one share, that is one-sixth share; and *W* and *W*1 will together take one-sixth share. Therefore, each widow will take one-twelfth of the property left by *A*.

2. *A* dies leaving him surviving his widow *W;* a daughter *D;* a son *S*1; and *SS*1, *SS*2 and *SD*, the two sons and daughter respectively of a predeceased son *S*. *W*, *D* and *S*1 will each take one share that is one-fourth; and *SS*1, *SS*2 and *SD* will together take one-fourth. The portion of each of them will be one-twelfth of the property left by *A*.

3. *A* dies leaving him surviving his widow *W;* a son *B; CW* widow of a predeceased son *C; XW*, *XS*, *XS*1 and *XD* the widow, two sons and daughter respectively of a predeceased son *X;* a daughter *D*1 and *DS*, *DD* and *DD*1 the son and two daughters of a predeceased daughter *D* as appears from the following diagram:




These are among heirs enumerated in Class I of the Schedule and therefore entitled to take the property of *A* simultaneously as his preferential heirs. *W* takes one share in accordance with Rule 1. *B* and *D*1 as surviving son and surviving daughter take one share each in accordance with Rule 2. The branches of *C*, *X* and *D* get one share each in accordance with Rule 3. *CW* takes one share as the only heir of *A* in the branch of the predeceased son *C* in accordance with Rule 3. *XW*, *XS*, *XS*1 and *XD* between them take only one share as heirs of *A* in the branch of *X* the predeceased son. *XW*, *XS*, *XS*1 and *XD* will each take an equal portion of that one share in accordance with Rule 4(i).

*DS*, *DD* and *DD*1 between them take only one share as heirs of *A* in the branch of the predeceased daughter *D*. *DS*, *DD* and *DD*1 will each take an equal portion of that one share in accordance with Rule 4(ii). In distribution *W* will take one-sixth; *B* and *D*1 will each take one-sixth, *CW* will take one-sixth as constituting the branch of *C; XW*, *XS*, *XS*1 and *XD* will take a one-sixth share between them as constituting the branch of *X*, that is the portion of each of them will be one-twenty-fourth of *A*'s property; and *DS*, *DD* and *DD*1 will take a one-sixth share between them as constituting the branch of *D*, that is the portion of each of them will be one-eighteenth of *A*'s property.

4. In illustration 3 above if *XS* one of the sons of *X* had died during the life-time of *A* leaving him surviving his widow, sons and daughters or any of them such persons would (as heirs of *A* enumerated in Class I) have got between them in accordance with Rule 4(i) the same portion that *XS* would have got if he had been alive when *A* died (one-twenty-fourth). So if *XS* had left him surviving a widow, a son and a daughter the portion of each of them would have been one-seventy-second of the property left by *A*. This is in accordance with the last part of Rule 4(i). The effect of Rules 3 and 4(i) read together is that the principle of distribution *per stirpes* also applies to the heirs of the deceased in the sub-branch of a predeceased son of a predeceased son.

5. In illustration 3 above if *DS* the son of *D* had died during the lifetime of *A* leaving him surviving his widow, sons and daughters, none of such persons would have got any portion because a daughter's son's widow or a daughter's son's son or a daughter's son's daughter is not an heir (of *A*) enumerated in Class I. The position would have

been similar if *XD* the daughter of *A*'s predeceased son *X* had died during the lifetime of *A* because a son's daughter's son or a son's daughter's daughter is not an heir enumerated in Class I.

Distribution of property among heirs in class II of the Schedule.

**11.** The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

**Distribution among heirs in Class II of the Schedule.**—Sections 8 and 9, so far as they relate to heirs specified in Class II of the Schedule, contain the explicit declaration of the law that failing all heirs of the intestate specified in Class I of the Schedule, but not until then, his property devolves upon the heirs specified in the nine entries in Class II of the Schedule. The heir in the first entry in this class is preferred to those in the second entry; the heirs in the second entry are preferred to those in the third entry and so on in order of the entries. No question of computation of the shares of the heirs so listed can arise when there is only one heir who is entitled to take the property as belonging to prior entry in competition with any heir or heirs specified in any subsequent entry. But where there are more heirs than one of the intestate entitled to take the property on the ground that they are all listed in the same prior entry in Class II and are therefore entitled to be preferred in competition with other heirs of the intestate in any subsequent entry in Class II under the rule laid down in section 8 and latter part of section 9, the computation of their shares is to be in accordance with the simple rule of equal distribution of the property among them enacted in this section which may be said to constitute the Statute of Distribution applicable to heirs in Class II. The Legislature does not lay down any rule of discrimination between a male heir and a female heir. Thus, for instance a brother and sister mentioned in Entry II in class II succeed simultaneously (*t*3). The heirs in any particular entry in class II succeed together. Section 19 states the broad general rule (subject to any express provision to the contrary) that if two or more heirs succeed together to the property of an intestate, they shall take the property,—

(a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and

(b) as tenants-in-common and not as joint tenants.

The present section enacts that the heirs specified in any one entry in Class II of the Schedule share simultaneously and equally. There is no precedence or priority among the different heirs specified in any one entry. They all stand *in aequali jura* and take *per capita* with this qualification that full-blood is to be preferred to half-blood. There is little scope for the contention that the different heirs mentioned in what may be described as sub-divisions of any particular Entry in Class II of the Schedule do not inherit simultaneously. Such a contention was raised in the undermentioned case (*t*4) and was negatived. See Illustration 2 below. Also see Notes under section 9. The section does

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(*t*3) *Satya Charan* v. *Urmila* ('70) A.S.C. 1714. A.M. 255.
(*t*4) *Arunachalathammal* v. *Ramachandran* ('63)

not state under what may be described as heirs in a sub-division of any one entry take one share and heirs in another sub-division of that entry take one share. The equality, therefore, is between every individual heir of the intestate and not between the sub-divisions (really there are no sub-divisions) in any particular entry. Thus for instance if the intestate dies leaving him surviving as his heirs only one brother and four sisters who are among the heirs enumerated in Entry II the distribution will be that all the five heirs will share equally (*t*5).

*Illustrations*

1. In illustration (4) under s. 9 the two brothers and the son's daughter's son who are heirs specified in Entry II will share equally, that is each of them will take one-third of the property of the intestate.

2. *A* dies leaving him surviving a brother's son and sons and daughters of his sister. They are all heirs in Entry IV of Class II and will take *A*'s property simultaneously and in equal shares (*t*6).

3. *A* dies leaving him surviving three daughter's daughter's daughters and a daughter's son's son, the former being the grandchildren of his predeceased daughter *D* and the latter being the grandson of another predeceased daughter *D*1. The distribution will not be according to the branches of the daughters *D* and *D*1 but all the four heirs will share equally, that is, each of them will take one-fourth of the property of the intestate.

4. *A* dies leaving him surviving his father's full brother, his father's step-brother and three full sisters of his father. Full blood is to be preferred to half-blood in this case as the nature of relationship is the same in every other respect. The distribution between the full brother and the full sisters of the father, though they belong to what may be described as sub-divisions, will be that they share equally. The brother and the three sisters of the father will each of them take one-fourth of the property of the intestate.

Order of succession among agnates and cognates.

**12.** The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder: —

*Rule 1.*—Of two heirs, the one who has fewer or no degrees of ascent is prefered.

*Rule 2.*—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

*Rule 3.*—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

Computation of degrees.

**13.** (1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

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(*t*5) Cited with approval in *Kumara Pillai* v. *Kunjulakshmi Amma* ('72) A. Kerala 66.

(*t*6) See f.n. (*t*2) above.

(3) Every generation constitutes a degree either ascending or descending.

**Succession among agnates and cognates.**—The rules of preference determinative of the order of succession and those relating to the mode or method of reckoning degrees of ascent or descent or both are, under the Act common to both the categories of agnates and cognates and are stated in these two sections which may conveniently be read together.

Section 8(c) contains the explicit declaration of the law that failing all heirs of the intestate specified in Classes I and II of the Schedule, but not until then, his property devolves upon his agnates; and section 8(d) declares that failing all heirs of the intestate specified in Classes I and II of the Schedule, and also all agnates, but not until then, his property devolves upon his cognates. Sections 8(c) and 8(d) do not give any authoritative lists of agnates and cognates of the intestate or state the order of succession among them. The order of succession is left to be worked out in accordance with the rules laid down in sections 12 and 13.

Section 12 lays down three rules of preference which govern the order of succession among agnates and cognates. Section 13 states the rules in accordance with which degrees of relationship between the intestate and his agnates or his cognates are to be computed. The degree of relationship may be of ascent or descent; or of both ascent and descent as for instance in case of a father's brother's son who is related to the intestate as father's father's son's son.

In accordance with the rules laid down in section 12 agnates and cognates may conveniently be divided into the following sub-categories or grades:

**(A)**

(i) Agnates who are descendants: they are related to the intestate by no degree of ascent. Such for instance are son's son's son's son and son's son's son's daughter.

(ii) Agnates who are ascendants: they are related to the intestate only by degrees of ascent and no degree of descent. Such, for instance, are father's father's father and father's father's mother.

(iii) Agnates who are *collaterals*: they are related to the intestate by degrees both of ascent and descent. Such for instance are father's brother's son and father's brother's daughter.

**(B)**

(i) Cognates who are descendants: they are related to the intestate by no degrees of ascent. Such for instance are son's daughter's son's son and daughter's son's son's son.

(ii) Cognates who are ascendants: they are related to the intestate only by degrees of ascent and no degree of descent. Such for instance are father's mother's father and mother's father's father.

(iii) Cognates who are *collaterals*: they are related to the intestate by degrees both of ascent and descent. Such for instance are father's sister's son and mother's brother's son.

It will be noticed that none of the heirs in any of the instances given above are enumerated in Classes I and II of the Schedule.

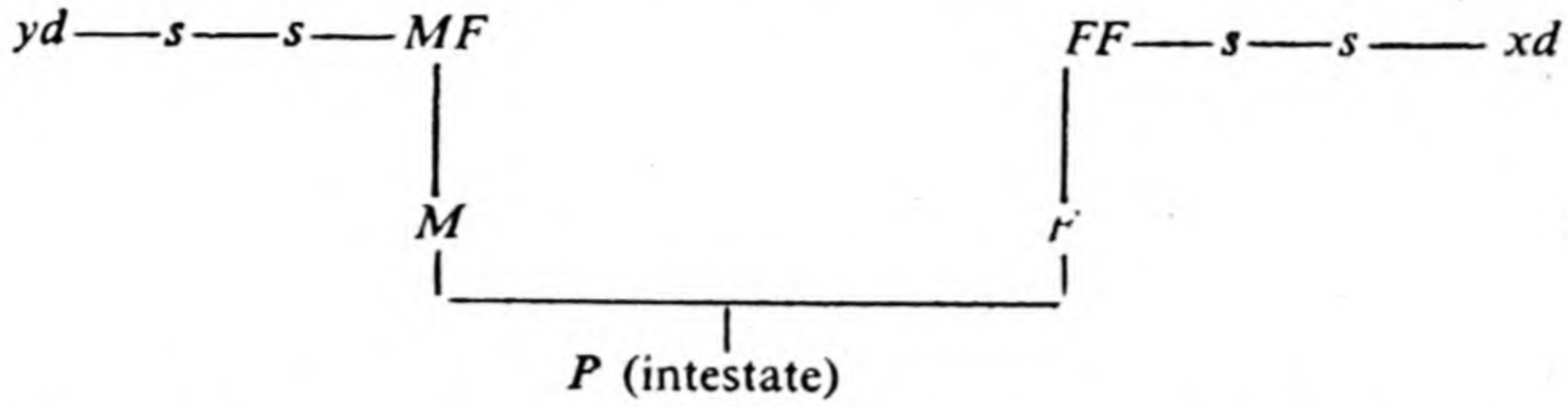
The effect of the rules laid down in section 12 in the first instance is that agnates in the first grade above are to be preferred to those in the second grade and agnates in the second grade are to be preferred to those in the third grade; and similarly in case of cognates. It is obvious that most of the heirs in the categories of agnates and cognates would be collaterals related to the intestate in degrees both of ascent and descent. *Collaterals* are persons of common descent but by different line.

**Computation of degrees (section 13).**—Application of the rules of preference governing order of succession laid down in s. 12 (pp. 891-895 *infra*) involves computation of the degrees of relationship between the intestate and his agnates or cognates. That relationship is to be reckoned from the intestate to the heir in terms of degrees with the (intestate) propositus as the starting point. There is no rule of discrimination or preference between male and female heirs and both male and female relatives by blood or adoption having legitimate kinship with the intestate wholly through males are included among his agnates and all relatives male and female are his cognates where the relationship is not wholly through males but through one or more females. It follows that in case of agnates every intervening person featuring in the reckoning must be a male relative and in the case of cognates at least one female relative must feature and intervene in the reckoning. The computations of degrees of ascent and of descent is to be so made that it is inclusive of the intestate. The relationship must be reckoned from the propositus to the heir in terms of degrees with the propositus as the *terminus a quo*, that is the first degree [s. 13 (2)]. The other rule is that every generation constitutes a degree either ascending or descending [s. 13 (3)]. But it should be noted that the *order of succession among agnates or cognates is not determined merely by the total of the number of degrees of ascent and descent. It is regulated by the rules of preference laid down in section 12.*

The Hindu mode of computation of degrees is retained by the Legislature in section 13. It is the same as the adopted by the Canonists and differs from that adopted in Civil law and followed in sections 25 to 28 of the Indian Succession Act. In the latter system of computation the propositus is excluded and the first degree begins with an ascendant or a descendant.

The rules of computation are simple but error in reckoning the degrees of relationship between the propositus and his collaterals may arise if they are not properly applied. The degrees of relationship with a father's father's father are four in ascent inclusive of the intestate and on similar reckoning the degrees of relationship with a daughter's daughter's daughter are four in

descent. In case of a collateral there are degrees both of ascent and descent. In the following diagram the propositus is the grandson of *FF* and *xd* is his paternal uncle's son's daughter. She is a collateral and an agnate.




*xd* is related to the propositus by three degrees of ascent (since the intestate must be included) and three degrees of descent. Similarly *yd* who is the maternal uncle's son's daughter (collateral and a cognate) is related to the propositus by three degrees of ascent and three degrees of descent.

The following are further illustrations of the rules of computation of degrees (*u*):

(i) The heir to be considered is the father's mother's father of the intestate. He has no degrees of descent but has four degrees of ascent represented in order by (1) the intestate, (2) the intestate's father, (3) that father's mother, and (4) her father (the heir).

(ii) The heir to be considered is the son's daughter's son's daughter of the intestate. She has no degrees of ascent, but has five degrees of descent represented in order by (1) the intestate, (2) the intestate's son, (3) that son's daughter, (4) her son, and (5) his daughter (the heir).

(iii) The heir to be considered is the mother's father's sister's son (that is mother's father's father's daughter's son) of the intestate. He has four degrees of ascent represented in order by (1) the intestate, (2) the intestate's mother, (3) her father, and (4) that father's father and two degrees of descent represented in order by (1) the daughter of the common ancestor (viz. the mother's father's father) and (2) her son (the heir).

It will be seen that in every case in computing the degrees of ascent or descent the intestate is included as constituting one degree of ascent or descent. It will also be seen that when degrees both of ascent and descent are to be computed in case of a collateral the degrees of ascent computed from the intestate are inclusive of him but in counting the degrees of descent from the ancestor (or ancestress) only generations of descent are computed, that is, the ancestor (or ancestress) does not constitute a degree of descent. In such a case it is only every generation of descent from the ancestor (or ancestress) that is taken in the computation.

**Rules of Preference determinative of Order of Succession among agnates and cognates (section 12).**—Order of succession among agnates and cognates is governed by the three Rules of Preference laid down in section 12 which are common to both the categories of heirs. In order to determine which of two or more claimants in the category of agnates or of cognates, as the case may be, must be preferred recourse must be had to Rules I and II laid down in section 12 and initially to Rule I. Where one competing heir is not entitled to be preferred to the other competing heir under Rule I or Rule II they take simultaneously (Rule III).

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(*u*) These three illustrations are adopted from the illustrations to clause 105 of the Hindu Code Bill as amended by the Select Committee.

**RULE I.**—This Rule is pivotal and enacts that of two heirs, the one who has fewer or no degrees of ascent is preferred. It applies to all agnates and cognates and means that of two competing heirs in the category of agnates or of cognates—

(i) The one who has no degrees of ascent, that is, one who is only related to the propositus by degrees of descent, is to be preferred to one who has any degrees of ascent;

(ii) where both are related to the propositus by degrees of ascent, the one who has fewer degrees of ascent is to be preferred to the other.

In case of descendants of the propositus there can be no degree of ascent and therefore all such descendants form a grade by themselves from whom and excluding all others the nearest agnate or the nearest cognate, as the case may be, has to be ascertained. As among the descendants the order of succession will be in accordance with Rule II and that heir is preferred who has fewer degrees of descent. Thus for instance among descendants who are cognates the daughter's daughter's daughter's son is to be preferred to a son's son's son's daughter's son because the former has fewer degrees of descent than the latter. The application of the Rule in case of ascendants of the propositus either agnates or cognates is equally simple. They may be said to belong to the second grade or sub-category as already stated (*v*) and become entitled to succeed only when there are no descendants of the propositus but having no degree of descent they exclude all collaterals. As regards the ascendants the order of succession will be in accordance with the initial part of Rule I that of two heirs the one who has fewer degrees of ascent is preferred. Thus for instance among agnates the father's father's mother will be preferred to the father's father's father's father the degrees being only of ascent and four and five respectively. The position of ascendants who are cognates is similar.

The Rule is of considerable importance in determining the order of succession among collaterals either agnates or cognates. Among collaterals who may be competing agnates or competing cognates preference is to be given to one who has fewer degrees of ascent than the other and this rule of preference is to be applied regardless of the degrees of descent. It is an obvious corollary of Rule I that the order of succession among collateral agnates or collateral cognates is not determined merely by the total of the degrees of ascent and of descent, because of two such heirs preference is given to one who has the fewer degrees of ascent. So among two competing collateral agnates one who is descended from the nearer ancestor of the intestate is to be preferred to one who claims descent from a remoter ancestor; and among two competing collateral cognates one who is descended from the nearer ancestor or ancestress of the intestate is to be preferred to one who claims from a remoter ancestor or ancestress. Rule I which is primary lays absolute stress on the degrees of ascent; the fewer the degrees of ascent the nearer is the heir and *one with no degree of ascent at all, that is a descendant is preferred to another having degrees of ascent however few.*

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(*v*) See p. 889 *supra.*

*Illustrations*

1. The competing heirs are two collateral agnates (1) brother's son's daughter (father's son's son's daughter) and (2) paternal uncle's son (father's father's son's son). The former who has only two degrees of ascent is to be preferred to the latter who has three degrees of ascent. It will be noticed that the order of succession among collateral agnates or congnates is not determined by the total of degrees of ascent and of descent because of two such heirs preference is primarily given to one who has fewer degrees of ascent. In this illustration if the degrees both of ascent and descent had to be totalled up both the heirs would have been related to the propositus by the same aggregate number of degrees, viz. five. But that is not the Rule.

2. The competing heirs are two cognates (1) son's daughter's son's son and (2) sister's daughter's son (father's daughter's daughter's son). The former who has no degree of ascent is preferred to a collateral.

3. The competing heirs are two collateral cognates (1) brother's daughter's daughter (father's son's daughter's daughter) and (2) mother's sister's son (mother's father's daughter's son). The former who has only two degrees of ascent is preferred to the latter who has three degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred although she is a female.

4. The competing heirs are two collateral cognates (1) sister's daughter's son's daughter (father's daughter's daughter's son's daughter) and (2) maternal uncle's son (mother's father's son's son). The former who has only two degrees of ascent is preferred to the latter who has three such degrees.

5. The competing heirs are two collateral cognates (1) mother's sister's son's son (mother's father's daughter's son's son) and (2) father's father's sister's son (father's father's father's daughter's son). The former who has three degrees of ascent is preferred to the latter who has four degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred. It will be noticed that it makes no difference that one heir (the heir preferred) is a cognate *ex parte materna* and the other heir is a cognate *ex parte paterna*.

6. The competing heirs are *uterine brother* and father's sister's son (father's father's daughter's son). The uterine brother has two degrees of ascent (of the intestate and of his mother) and the father's sister's son has three degrees of ascent. The uterine brother is, therefore, preferred. The position would have been the same if instead of the uterine brother the competing heir had been an *uterine sister*.

**RULE II.**—This Rule enacts that where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. It applies to all agnates and cognates and means that:

(i) of two heirs who have no degrees of ascent, that is, are descendants, being related to the propositus only by degrees of descent, the one who has fewer degrees of descent is to be preferred to the other;

(ii) of two heirs who have the same degrees of ascent, the one who has fewer degrees of descent is to be preferred to the other.

This rule though not subordinate to Rule I in practice comes into operation only after Rule I has been applied. In case of competing descendants the order of succession will be regulated by this Rule and the one who has fewer degrees of descent will be preferred. The case of competing ascendants not of the same degrees is governed by Rule I. The case of competing ascendants of the same degree such for instance as a father's father's father and a father's father's mother will not fall under this Rule but Rule III because both heirs are agnates who are in the same degrees of ascent and there is no question of degrees of descent in their case. The more practical importance of Rule II is that read with Rule I it settles the order of precedence and priority among collateral agnates as also among collateral cognates.

*Illustrations*

1. The competing heirs are two collateral agnates (1) brother's son's daughter (father's son's son's daughter) and (2) brother's son's son's daughter (father's son's son's son's daughter). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent with the result that the former is to be preferred to the latter. The result would have been the same if the claimants had been the brother's son's daughter and brother's son's son's son. A male heir it will be noticed is not preferred to a female heir. It will not make any difference whether the grandchildren and great-grandchildren under consideration are of the same brother of the propositus or of different brothers. Succession here is not governed by any doctrine of representation.

In the undermentioned case (*v*1) the heirs were competing collateral agnates. The degrees of ascent were the same and collateral with five degrees of descent were preferred to those with six or more degrees of descent.

2. The competing heirs are two collateral cognates (1) sister's daughter's daughter (father's daughter's daughter's daughter) and (2) brother's son's daughter's son (father's son's son's daughter's son). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent with the result that the former is to be preferred to the latter. If however the competing heirs had been the sister's daughter's daughter and the brother's daughter's son, the case would have been governed not by Rule II but by Rule III.

3. *The competing heirs are (1) mother's father's mother and (2) father's father's sister's son (father's father's father's daughter's son). The number of degrees of ascent in both cases is the same, viz. three, but the former has no degrees of descent while the latter has two such degrees. The former is, therefore, preferred. Here an ascendant cognate (on the mother's side) is preferred to a collateral cognate (on the father's side).

4. *The competing heirs are two collateral cognates (1) sister's son's son (father's daughter's son's son) and (2) brother's son's daughter's son (father's son's son's daughter's son). The number of degrees of ascent in both cases is the same viz. two, but the former has only three degrees of descent while the latter has four degrees of descent. The former is, therefore, preferred.

5. The competing heirs are *uterine brother* and full brother's daughter's son. Both the claimants have two degrees of ascent (counting the intestate and of the intestate's mother in one case and the intestate and the intestate's father in the other), but the uterine brother has only one degree of descent and the other heir has three degrees of descent. The uterine brother is, therefore, preferred. The position would have been the same if instead of uterine brother the competing heir had been the intestate's *uterine sister*. If, however, the competing heirs had been on the one hand the uterine brother or uterine sister and on the other a full-brother's (or a step-brother's) son or daughter or a full-sister's (or a step-sister's) son or daughter the position would have been totally different because the uterine brother or uterine sister is only a cognate whereas the others are heirs enumerated in Class II of the Schedule and therefore entitled to priority.

**RULE III.**—This rule enacts that where neither heir is entitled to be preferred to the other under Rule I or Rule II they take simultaneously. In case of descendants of the propositus either agnates or cognates the order of succession will be governed by this rule when the competing descendants are so related to the prospositus that none of them is entitled to claim greater proximity to the propositus in terms of degrees of descent. In case of ascendants of the propositus either agnates or cognates the application of this Rule is equally simple. Thus for instance among agnates a father's father's father and a father's father's mother both stand in the same degree of ascent, viz. four and no degree of descent. There being no rule of discrimination between male and female heirs, neither is entitled to be preferred to the other under Rule I or Rule II and must therefore take simultaneously. The same is the

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(*v*1) *Kuldip Singh* v. *Karnail Singh* ('61) A. Punj. 573.

* Illustrations 3 and 4 have been adopted from illustration to clause 104 of the Hindu Code Bill as amended by the Select Committee.

position among cognates, for instance, of a father's mother's father and a mother's mother's mother.

The rule is of considerable importance in fixing the order of succession among competing heirs who are collateral agnates or collateral cognates. Among two competing collateral agnates where both are in the same degrees of descent from the same male ascendant of the intestate they will take simultaneously; and among two competing collateral cognates where both are in the same degrees of descent from the same ascendant male or female of the intestate or of different ascendants of the intestate in same degrees of ascent to the intestate, they will take simultaneously as none of them can claim greater proximity to the intestate in terms of degrees of ascent or descent under Rule I or Rule II.

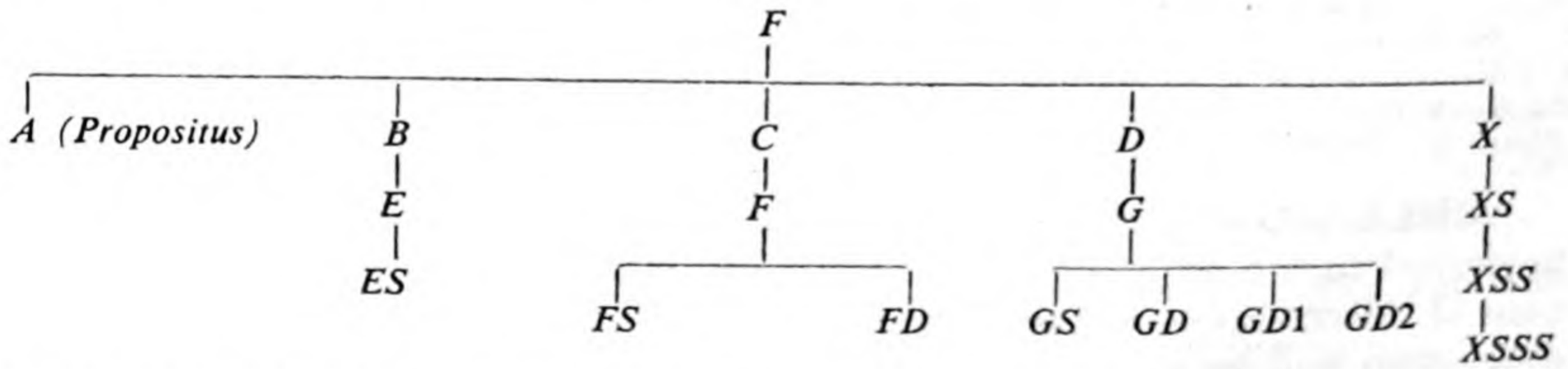
*Illustrations*

1. The competing heirs are two agnates (1) son's son's son's son and (2) son's son's son's daughter. There are no degrees of ascent and the number of degrees of descent is the same in case of both. Therefore, neither heir is entitled to be preferred under Rule I or Rule II and the result is that they take simultaneously. Here both heirs are descendants and stand in the same degrees of descent.

2. The competing heirs are two cognates (1) daughter's son's son's son and (2) son's son's daughter's son. The position is similar to that in illustration I above and they take simultaneously.

3. The competing heirs are two cognates (1) father's mother's father and (2) mother's mother's mother. There are the same degrees of ascent, viz. four, and no degree of descent in case of both. Therefore, neither heir is entitled to be preferred under Rule I or Rule II and the result is that they take simultaneously. Here both heirs are ascendants and stand in the same degrees of ascent.

4. The competing heirs are all collateral agnates as appears from the following diagram. *A* the propositus had four brothers *B, C, D* and *X*. *E, F, G* and *XS* were sons respectively of *B, C, D* and *X*. All of them died during the lifetime of the propositus; *E* leaving a son *ES; F* leaving a son *FS* and a daughter *FD; G* leaving a son *GS* and three daughters *GD, GD*1 and *GD*2; and *XS* leaving *XSSS* a son of a predeceased son *XSS*. *A* dies intestate leaving him surviving *ES, FS, FD, GS, GD, GD*1, *GD*2 and *XSSS*.




*ES, FS, FD GS, GD GD*1 and *GD*2 are all grand-children of *A*'s brothers and have the same degrees of ascent, viz. two, and also the same degrees of descent, viz. three. Among themselves none is, therefore, entitled to any preference under Rule I or Rule II and they must all take simultaneously. They will take *per capita* and each of them will get one-seventh share in the property of *A* (*w*). *XSSS* has the same degrees of ascent, viz. two, but four degrees of descent with the result that *ES, FS, FD, GS, GD, GD*1 and *GD*2 having fewer degrees of descent are all entitled to be preferred to him under Rule II. *XSSS*, therefore, is not entitled to succeed to *A* although his father *XSS* if he had been alive at the time of *A*'s death would have ranked with the others.

5. Similar position will arise if in the above diagram *ES, FS, FD, GS, GD, GD*1, *GD*2, and *XSSS* are all collateral cognates. Such will be the case if *B* or *E* or both had been females; and *C* or *F* or both had been females; and *D* or *G* or both had been

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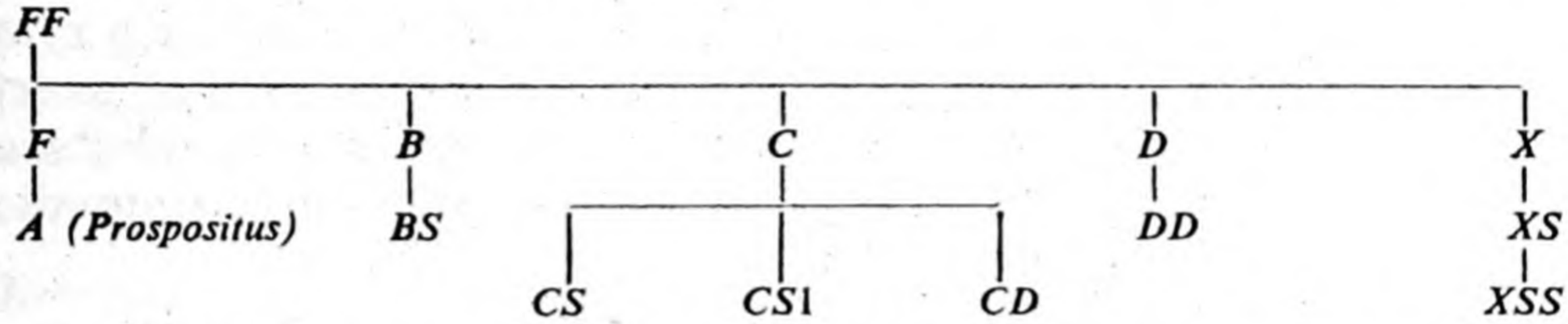
(*w*) See Section 19.

females; and *X*, *XS* and *XSS* had all or any one or more of them been females. None of the seven heirs *ES*, *FS*, *FD*, *GS*, *GD*, *GD*1 and *GD*2 is among themselves entitled to any preference under Rule I or Rule II and will therefore take simultaneously, each getting one-seventh share in the property of *A*. *XSSS* is not entitled to succeed to *A* as he has one more degree of descent than the others.

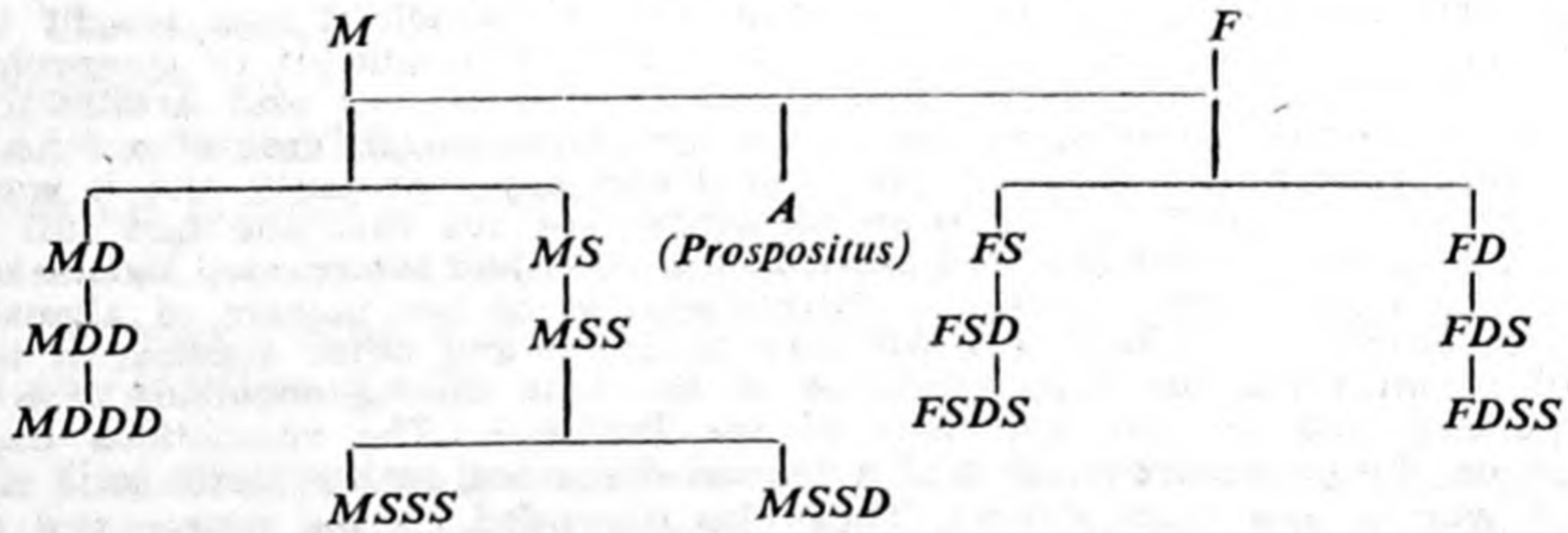
6. The competing heirs are all collateral agnates as appears from the following diagram. *A* the propositus had four uncles *B*, *C*, *D* and *X* (brothers of his father). *B*, *C*, *D*, *X* and *XS* (son of *X*) all died during the lifetime of *A*. *A* dies leaving him surviving *BS*, son of *B*; *CS*, *CS*1 and *CD*, two sons and a daughter respectively of *C*; *DD*, daughter of *D*; and *XSS* the son of *XS*.




*BS*, *CS*, *CS*1, *CD* and *DD* are all children of *A*'s father's brothers and have the same degrees of ascent, viz. three, and also the same degrees of descent, viz. two. Among themselves none is, therefore, entitled to any preference under Rule I or Rule II and they must take simultaneously. They will take *per capita* and each of them will get one-fifth share in the property of *A*. *XSS* has the same degrees of ascent viz three but three degrees of descent with the result that *BS*, *CS*, *CS*1, *CD* and *DD* having fewer degrees of descent are all entitled to be preferred to him under Rule II. *XSS*, therefore, is not entitled to succeed to *A* although if *XS* had been alive at the time of *A*'s death he would have ranked with the others.

7. The competing heirs are collateral cognates (1) mother's brother's son (2) mother's sister's daughter and (3) father's sister's son. All three are in the same degree of ascent, viz. three, and the number of degrees of descent is the same in case of all of them, viz. two. Therefore, none of them is entitled to be preferred under Rule I or Rule II and the result is that they take simultaneously.

8. The competing heirs are all collateral cognates and some of them are related to the intestate by *uterine* blood as appears from the following diagram:




*FS* was full brother of *A* and *FD* was full sister of *A*. *A*'s mother had remarried after the death of *A*'s father and *MS* was the *uterine brother* of *A* and *MD* was the *uterine sister* of *A*. *FSD* was the daughter of *FS*; *FDS* was the son of *FD*; *MSS* was the son of the uterine brother *MS*; and *MDD* was the daughter of *MD* the uterine sister. All of them died during the lifetime of *A*. *A* dies leaving: *FSDS* the daughter's son of the full brother; *FDSS*, the son's son of the full sister; *MSSS* and *MSSD* the son's son and son's daughter respectively of *MS* the uterine brother; and *MDDD*, the daughter's daughter of *MD* the uterine sister. Here *MSSS*, *MSSD* and *MDDD* are related to *A* by uterine blood and *FSDS* and *FDSS* are related to *A* by full blood and they are *all collateral* cognates. Here both the father and mother of *A* constitute an ascending degree. *FSDS*, *FDSS*, *MSSS*, *MSSD* and *MDDD* are all related to the propositus by the same degrees of ascent, viz. two, and are related to him by the same degrees of descent, viz. three. Relationship by uterine blood does not create any exclusion in case of cognates (See p. 881). None of the five heirs is entitled to preference under Rule I or Rule II with the result that they will all take simultaneously. They take *per capita* and each of them will get one-fifth share in the property of *A*.

Property of a female Hindu to be her absolute property.

**14.** (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

*Explanation.*—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Under the Hindu law in operation prior to the coming into force of this Act a woman's ownership of property was hedged in by certain delimitations on her right of disposal by acts *inter vivos* and also on her testamentary power in respect of that property and there was great diversity of doctrine on the subject.

The ancient texts purported to enumerate heads of stridhan but without comprehensive signification. Some of the expressions used in those texts were merely suppletory and there was no logical classification. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it was sought to give a technical significance and the result was that a term not difficult of comprehension in its etymological sense came to be understood in a narrower and arbitrarily limited connotation. Absolute power of alienation was not regarded, in case of a female owner, as a necessary concomitant of the right to hold and enjoy property and it was only in case of property acquired by her from particular sources that she had full dominion over it. Even so the ancient law laid down in the texts and interpreted by the nibandhakars was considerably more liberal in its recognition of her powers of alienation than the rules of Roman law affecting a woman's *peculiam* and other systems of law under which till recent times the legal existence of the wife during coverture was regarded as incorporated and merged into that of the husband. The restrictions imposed by Hindu law on the proprietory rights of a woman depended on her status as a maiden, as a married woman and as a widow. They also depended on the source and nature of the property. The order of succession to stridhan was different from that in case of property of a male owner and it varied under the different schools. All this gave rise to a branch of law the most complicated of its kind and one which till the passing of the present Act continued to be regarded as a complex and very difficult subject. As already pointed out in the Introductory Note to the Act, there was some fragmentary legislation (*x*) which only added to the number of anomalies already existing and gave rise to no end of conundrums.

The present Act over-rides *inter alia* the old law on the subject of Stridhan in respect of all property possessed by a female, whether acquired by her before or after the commencement of the Act and this section declares that all such property shall be held by her as full owner. The Act confers

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(*x*) Hindu Women's Rights to Property Act, 1937.

full heritable capacity on the female heir and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property. The effect of the rule laid down in this section is to abrogate the stringent provisions against the proprietory rights of a female which were often regarded as evidence of her perpetual tutelage and to recognise her status as independent and absolute owner of property. A qualification to the rule is laid down in sub-section (2) but it does not relate to the incidents of women's property.

In *Punithavalli* v. *Ramalingam* (*x*1) the Supreme Court pointed out that the estate taken by a female Hindu under sub-section (1) is an absolute one and is not defeasible and its ambit cannot be cut down by any text or rule of Hindu law or by any presumption or any fiction under that law.

In *Eramma* v. *Veerupana* (*x*2) the Supreme Court examined the ambit and object of this section and observed: "The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the Explanation to s. 14(1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner" as given in the last portion of sub-section (1) of the section clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words Section 14(1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. . . . It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title".

The rule that the section is applicable where the female Hindu has acquired some kind of title, however restricted the nature of her interest may be, was applied in a Full Bench decision of the High Court of Delhi. A Hindu widow made a gift of property which she held as a limited owner, to her daughter prior to the Act. At the date of the Act coming into force the daughter was in possession of the property and it was held that she became full owner of the property (*x*3).

The section does not infringe Article 14 of the Constitution (*x*4). It applies to all 'property' including agricultural lands and is valid legislation.

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(*x*1) ('70) A.S.C. 1730.
(*x*2) ('66) A.S.C. 1879.
(*x*3) *Chinti* v. *Daultu* ('68) A. Delhi 264 (F.B.).
(*x*4) *Amar Singh* v. *Baldev Singh* ('60) A. Punj. 666 (F.B.).

This section should be read with section 4 which gives overriding effect to the provisions of this Act with respect to all matters dealt with in the Act and also enumerates matters which are not affected by this Act. Reference may also be made to section 5.

A Full Bench of the Punjab High Court (*x*5) has held that this section provides enlarged rights over 'land' to Hindu females on the ground that it enacts law on a matter of special property of females.

A Division Bench of the Allahabad High Court (*x*6), overruling its earlier decisions has now held that the provisions in the present section are inapplicable to land tenures under the U.P. Zamindari Abolition and Land Reforms Act.

Reference may be made to decisions noted under section 4 *supra*.

The section applies to all "property" including agricultural lands and is valid legislation (*x*4).

**Property of female to be her absolute property.**—This section gives the explicit declaration of the law that a female holds all property in her possession whether acquired by her before or after the commencement of the Act as absolute owner and not as a limited owner. The rule applies to all property movable and immovable howsoever and whenever acquired by her but subject to the qualification mentioned in sub-section (2).

*Illustrations*

1. *A* governed by the Mitakshara school died after the Hindu Women's Rights to Property Act, 1937, came into force but before the commencement of the present Act, leaving him surviving *W* his widow, *B* and *C* his two sons and *SSW* the widow of *SS* a predeceased son of his predeceased son *S*. At the time of his death *A* was joint with his sons *B* and *C* and the family owned property. Both *S* and *SS* had been members of the joint family at the time of their death and *S* had predeceased *SS* leaving him surviving as his only son. *A* also left separate property. Both *W* and *SSW* had acquired the same interest in the joint family property which *A* and *SS* respectively had [S. 3(2) of the Act of 1937]: but the interest which devolved on them was the limited interest known as Hindu woman's estate [s. 3(3) of the Act of 1937]. In the separate property which *A* left *W* and *SSW* had acquired equal shares with the two sons *B* and *C* by right of inheritance [s. 3(1) of the Act of 1937] but the interest which devolved on them by inheritance was the limited interest known as Hindu woman's estate. There was partition of the joint family property and division of *A*'s separate property between *B*, *C*, *W* and *SSW* soon after *A*'s death and before the commencement of the present Act. It was stated in the deed of partition that *W* and *SSW* took only limited interest in all the property allotted to them. The effect of the present section is to enlarge that limited interest of *W* and *SSW* into full ownership.

The result will be similar if *A* had been governed by the Dayabhaga school although the case would have been affected only by s. 3(1) and s. 3(3) of the Act of 1937.

2. A Hindu governed by the Benares school died leaving a widow, a daughter and a paternal uncle's son. Prior to the commencement of this Act the widow surrendered her interest in the property inherited by her and handed over possession of it to her daughter. The surrender was valid but according to the Benares school the daughter though in possession took a limited estate, in other words, she did not take the property absolutely. Under the old law on the death of the daughter the property would have passed to the uncle's son. The effect of the present section is that from the date of the commencement of the Act the daughter holds the property as full owner and if she does not dispose of it during her lifetime it will devolve on her heirs.

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(*x*5) *Joginder Singh* v. *Kehar Singh* ('65) A. Punj. 407 (F.B.).

(*x*6) *Prema Devi* v. *Joint Director Consolidation* ('70) A.A. 238.

**"Acquired"—meaning of.**—The word "acquired" in sub-section (1) has to be given the widest possible meaning. This is amply borne out by the very comprehensive language used in the Explanation to the sub-section (*xx*).

**". . . possessed by a female Hindu, whether acquired before or after the commencement of this Act".**—The expression "possessed" in the initial part of the section appears to have been deliberately used by the Legislature. The radical change intended to be made in the limited connotation of woman's property and the distinct departure from the old law has speaking generally the effect of converting limited ownership where it existed into absolute ownership. The necessary consequence of the altered law was immediately to affect the incidents of woman's property not merely in respect of property that might be acquired and held by a female after the coming into force of the Act but also in respect of property already acquired by her in the past and possessed by her. In that sense the operation of the new law has been carried back and the section can be said to have been given retrospective effect (*x*7). In *Harish Chandra* v. *Triloki Singh* (*y*) the Supreme Court pointed out that by reason of the expression "whether acquired before or after the commencement of this Act" the section is retrospective in effect.

The interpretation of the expression "possessed" in the present context has considerable bearing on the question of alienations of property made by a female before the commencement of the Act when such alienations were liable to be set aside at the instance of persons other than the alienor. In case of any alienation of property or surrender of her interest made by a female having only the limited estate of a Hindu woman the alienation or surrender could be challenged on certain grounds and by certain persons (reversioners). Question arose whether after the coming into operation of the Act it was open to the reversioners to challenge the validity of any alienation made by a widow when the alienation was liable to be set aside under the old law. The answer to this would seem to be in the affirmative because the present section, so far as it deals with property acquired before the commencement of the Act, declares the law only in respect of property *possessed* by a female Hindu and does not refer to property of which a female holder was the limited owner and which property had ceased to be her property or possessed by her.

There was, however, considerable diversity of judicial opinion on the meaning and effect of the expression 'possessed' in the phrase "possessed by a female Hindu, whether acquired before or after the commencement of this Act. . . ." No difficulty could be likely to arise in respect of property acquired by a female after the commencement of the Act as it is clear that any such property would be held and possessed by her as full owner except where a restricted estate is prescribed as provided for in sub-section (2). But controversy arose in respect of property acquired by her before the commencement of the Act when such property was not in her possession and had already been

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(*xx*) *Badri Pershad* v. *Kanso Devi* ('70) A.S.C. 1963; *Munnalal* v. *Rajkumar* ('62) A.S.C. 1493.

(*x*7) This passage was quoted with approval in *Mohari* v. *Chukli* ('60) A. Raj. 82, 85; 10 Raj. 238.

(*y*) (57) S.C. 444.

alienated by her or her interest in it had otherwise ceased to exist at the date when the Act came into force.

In some earlier decisions of the Patna High Court (*z*)—subsequently reversed by a Full Bench of the same High Court (*z*1)—and a decision of the Allahabad High Court (*a*) the view was taken that this section has been made expressly retrospective and declares that any property acquired by a Hindu female at any time whether before or after the commencement of the Act is to be her absolute property with the result that a reversioner recognised as such under the Hindu Law is no more a reversioner as to any property possessed by her at any time and that after the coming into force of the Act a reversioner has no right of reversioner or *spes successionis*. In a case decided by that Court a Hindu female had executed a sale deed in favour of certain persons and those persons had subsequently mortgaged the property in favour of another person and the plaintiff as reversioner brought a suit for declaration that the sale deed executed by her was without consideration and without any legal necessity and not binding upon him. The lower courts decreed the plaintiff's claim and the present Act came into force during the pendency of the appeal before the High Court. It was held that the plaintiff had lost his right as a reversioner and his suit was dismissed. The view was expressed that the reversioner has in any such case no *locus standi* to bring or continue, a suit challenging the alienation on any ground. According to the Allahabad High Court even where a reversioner in any such case obtained a declaratory decree before the Act came into force the decree could not be maintained after the commencement of the Act on the ground that any such declaration was rendered futile by the Act and that the effect of the Act was that there were no reversioners at all and there could be no question of the alienation, howsoever illegal it may be, not being binding on the reversioners. The widow would continue to be estopped from challenging the validity of the alienation and the reversioners would have completely disappeared by virtue of the provisions of the Act. The customary law of succession had been completely abrogated by the Act and the next reversioner, it was observed, was a creation of the customary law and was no longer in the picture. The opinion was also expressed that the heirs of the widow who replaced the reversioners cannot challenge the alienation (*b*).

The contrary view taken by the High Courts of Andhra Pradesh (*c*), Madras (*d*), Calcutta (*e*), Bombay (*f*), Madhya Pradesh (*g*), Punjab (*h*), Orissa (*i*), Kerala (*j*), Gujarat (*j*1) and Mysore (*j*2) is to the effect that the section does not purport to enlarge an estate determined before the commencement of the Act or to enlarge an estate conveyed to alienees by the limited owner before the date of the coming into operation of the Act in 1956 and that the court would not be justified in holding that even in such cases the 'reversioner' has no *locus standi* or that the rights of the 'reversioner' were wholly abrogated.

In *Kotturuswami* v. *Veeravva* (*k*) the Supreme Court expressed its approval of and agreement with the view taken by the High Court of Calcutta (*e*), that "the opening words of the section 14, i.e. 'property possessed by a female Hindu,' obviously mean that to come within the purview of the section the *property must be in possession of the female concerned at the date of the commencement of the Act.* They clearly contemplate the female's possession when the Act came into force. The possession might have been either actual or constructive or in any form recognized by law, but unless the female

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(*z*) *R. A. Missir* v. *Raghunath* ('57) A.P. 480; *Janki Kuer* v. *Chharthu Prasad* ('57) A.P. 674; 37 Pat. 1; *Julam Missir* v. *Pradip Missir* ('58) A.P. 115; *Baijnath* v. *Ramautar* ('58) A.P. 227. *Ramsaroop* v. *Hiralall* ('58) A.P. 319; 37 Pat. 496.

(*z*1) *Harak Singh* v. *Kailash Singh* (58) A.P. 581 (F.B.). *Sheopujan* v. *Ramsewak* ('63) A.P. 330.

(*a*) *Hanuman Prasad* v. *Indrawati* ('58) A.A. 304; dissented from in *Rameshwar* v. *Hardas* ('64) A.A. 308.

(*b*) See f.n. (*a*) above.

(*c*) *Venkayamma* v. *Veerayya* ('57) A.A.P. 280.

(*d*) *Marudakkal* v. *Arumugha* ('58) A.M. 255; I.L.R. (1958) Mad. 354; (1958) 1 Mad. L.J. 101.

(*e*) *Gostha Behari* v. *Haridas*, ('57) A.C. 557; *Krishna Dassi* v. *Akhil Chandra* ('58) A.C. 671.

(*f*) *Ramchandra* v. *Sakharam* ('58) A.B. 244.

(*g*) *Lukai* v. *Niranjan* ('58) A.M.P. 160 (F.B.) *Janku* v. *Kisan* ('59) A.M.P. 1.

(*h*) *Amar Singh* v. *Sewa Ram* ('60) A. Punj. 530 (F.B.). I.L.R. (1960) 2 Punj. 343; *Mukhtiar Kaur* v. *Kartar Kaur* ('66) A. Punj. 31.

(*i*) *Sansir Patelin* v. *Satyabati Naikani* ('58) A. Orissa 75; I.L.R. (1957) Cutt. 700.

(*j*) *Chandrasekhara* v. *Sivaramakrishna* ('58) A. Kerala 142.

(*j*1) *Kamla* v. *Ochhavlal* ('65) A. Guj. 84.

(*j*2) *Damodar Rao* v. *Bhima Rao* ('65) Mys. 290.

(*k*) (1959) Suppl. (1) S.C.R. 968, (1959) S.C. 577 (1959) S.C.J. 437. Also see *Radha Rani* v. *Hanuman Prasad* ('66) A.S.C. 216.

Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word 'possession' in its widest connotation, when the Act came into force, the section would not apply." The Supreme Court also observed that in its later Full Bench decision (*z*1) the Patna High Court had "rightly pointed out that the object of the Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided they were in possession of the property when the Act came into force and, therefore, in a position to take advantage of its beneficial provisions; but the Act was not intended to benefit alienees who with their eyes open purchased the property from the owners without justifying necessity before the Act came into force and at a time when the vendors had only a limited interest of Hindu women."

**"Possessed"—Meaning of.**—The word "possessed is used in this section in a broad sense and in its widest connotation and as pointed out by the Supreme Court in *Kotturuswami* v. *Veeravva* (*k*) means "the state of owning or having in one's hand or power." It need not be actual physical possession or personal occupation of the property by the female but may be possession in law. It may either be actual or constructive or in any form recognised by law. Thus for instance the possession of a licensee, lessee or a mortgagee from the female owner would be her possession for the purpose of this section. Such also would be the case where a person is in possession as agent of the female owner and is accountable to her. It will be seen from the undermentioned cases (*k*1) that the Courts have given the widest connotation to the expression 'possessed'. In *Mangal Singh* v. *Rattno* (*k*2) the Supreme Court pointed out that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of that property, provided of course that she has not parted with her rights and is capable of obtaining possession of the property. In that case a Hindu widow came into possession of land on the death of her husband in 1917 and continued in possession until 1954 when she was wrongfully dispossessed and filed a suit on 12th March 1956 and died in 1958. It was held that on coming into force of the Act in 1956 after institution of the suit she must be regarded as a female Hindu who possessed the property for the purpose of this section and as one who became full owner of it. In any such case the female owner would be regarded as being 'possessed' of the property if the trespasser has not perfected his title by adverse possession before the Act came into force (*k*3).

The right which was conferred on the widow by Section 3 of the Hindu Women's Right to Property Act, 1937, as has already been pointed out, was

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(*k*1) *Sampathakumari* v. *Lakshmi Ammal* ('63) A.M. 50. *Arumuga* v. *Nachemuthu* ('58) A.M. 459 [widow was mortgagor: became absolute owner]. *Jai Ram* v. *Tota Ram* ('61) A Punj. 395. [Constructive possession through mortgagee]. *Thakur Ram Janki* v. *Jago Singh* ('62) A.P. 131. *Krishna Dassi* v. *Akhil Chandra* ('58) A.C. 671. [Receiver in mortgage suit]; *Annapurna* v. *Kalpana Debi* ('72) A. Gauhati 107; *Baswant Gouda* v. *Channabasawwa* ('71) A. Mys. 151 [invalid adoption before Act: widow held to be in possession]; *Ladhi Bai* v. *Thakur Shiriji* ('68) A. Raj. 41 [will by widow before Act came into force]; *Rangaswami* v. *Chinnammal* ('64) A.M. 387.

(*k*2) ('67) A.S.C. 1786.

(*k*3) *Gopalakrishnan* v. *Ramulu Reddi* (1965) 1 Mad. L.J. 579; *Sivaiah* v. *Tekchand* ('66) A.A.P. 305 [title in widow by inheritance but possession of trespasser]; *Anandibai* v. *Sundarabai* ('65) A.M.P. 85 [co-widows: possession of trespassers]; *Gulabchand* v. *Sheokaran Lal* ('64) A.P. 45 [widow in adverse possession]. Also see *Harmal Kaur* v. *Kartar Kaur* ('68) A.P.&H. 295; *Rajendra Nath* v. *Shiv Nath* ('71) A.A. 448.

not a right which was inchoate or imperfect till a claim for partition was made. The undivided interest of the husband in the joint family property devolved upon the widow immediately on the death of the husband and in the eye of law she would be in possession of her interest in that property. The effect of the present section is to transform that statutory interest of the widow of which she was a limited owner into that of a full owner. The fact that she had not sought any partition before the present Act came into force in 1956 makes no difference (*k*4). Similarly where at the time of her death the widow was in possession of her share of the property to which she became entitled under the Hindu Women's Right to Property Act, 1937, that share or that property would devolve upon her heirs and the latter would be entitled to prosecute a suit for partition filed by the widow (*k*5). On the same principle it was held by the Supreme Court that the share of a widow declared by a preliminary decree in a partition suit before the commencement of the present Act, is a share "possessed" by her and if she dies before actual division of the estate, the interest declared in her favour will devolve upon her heir as property of which she was possessed at the time of her death and within the contemplation of the present section (*kk*5). The same principle has been applied to analogous cases where she had acquired interest in any property by virtue of the operation of the Act of 1937 and this irrespective of any actual partition having been effected or not. The mere superimposition of a partition deed or consent decree or an award in any such case would not take the matter out of the purview of sub-section (1) simply because her interest was there described as limited interest (*k*6). In any such case she becomes full owner in respect of that interest and as such she acquires by virtue of this section, a right unlimited in point of user and duration and uninhibited in point of disposition (*k*7). In *Sukhram* v. *Gauri Shankar* decided by the Supreme Court H and S, two brothers and C the son of S constituted a joint Hindu family governed by the Mitakshara law of the Benaras School. H died in 1952 leaving him surviving his widow K. In December 1956, after this Act came into force, K sold a half share in a house and a shop belonging to the joint family. In a suit by S and C challenging the sale it was held that K having become full owner of her husband's interest was competent to effect the sale (*k*7). Compensation awarded in respect of property in the possession of a widow, who had not at the date of the acquisition, absolute interest therein, and kept under the provisions of the Land Acquisition Act with the Land Acquisition Court on the date when the

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(*k*4) *Sankara Rao* v. *Rayyalakshamma* ('61) A.A.P. 241. *Sukh Ram* v. *Gori Shankar* ('62) A.A. 8, *Billabasini* v. *Dulal* ('58) A.C. 472. Also see *Bhawar Singh* v. *Pilabai* ('72) A.M.P. 204 [wife's right to share on a partition although not impleaded in partition suit].

(*k*5) *Subbalakshmi* v. *Ramalakshmi* ('64) A.M. 76; (1963) 2 Mad. L.J. 467; *Banarsi* v. *Marcchia* ('67) A.P. 340; *Ranganayakamma* v. *Rajeshwaramma* ('64) A.P. 380 [widow in possession under a compromise with husband who died after the 1937 Act]. In *Shib Dai* v. *Ghauri Lal* ('65) A.J. & K. 11 it was held that if in law the property had not vested in any other person the widow could be deemed to be in possession.

(*kk*5) *Munnalal* v. *Rajkumar* ('62) A.S.C. 1493.

(*k*6) *Badri Pershad* v. *Kanso Devi* ('70) A.S.C. 1963. [Partition by award: widow given shares as widow's estate: husband died in 1947]; *Munnalal* v. *Rajkumar* (1962) S.C. 1493. *Dulei Bewa* v. *Bimali Bewa* ('64) A. Orissa 33. Reference may also be made to *Lalchand* v. *Sushila* ('62) A.C. 623; *Satyanarayana* v. *Seethamma* ('72) A. Mys. 247; *Saraswathi* v. *Anantha* ('66) A. Kerala 66; *Saraswathi Ammal* v. *Krishna Iyer* ('65) A. Kerala 226 [property given to brother's widow under a partition]; *Kaliammal* v. *Andiammal* ('65) A.M. 451; *Indubai* v. *Vyankati* ('66) A.B. 64; *Udhav Shankar* v. *Tarabai* ('68) A.B. 308 [consent decree in partition suit]; *Jagannathpuri Guru* v. *Godabai* ('68) A.B. 25; *Raghunath* v. *Bhimsen* ('65) A. Orissa 59; *Purna Chandra* v. *Nimai Charan* ('68) A. Orissa 196 [partition deed].

(*k*7) *Sukh Ram* v. *Gauri Shankar* ('68) A.S.C. 365.

present Act came into operation in 1956, is property "possessed" by her within the meaning of this section (*k*8).

The section, however, is not intended to validate illegal possession of a female Hindu and does not confer any right on a trespasser (*l*) or on a female who had no right to hold or possess the property (*l*1). The female owner must be in possession of the property in her right as a limited owner. If she had already divested her interest as a limited owner (*l*2) or had been divested of her interest as a widow on account of remarriage before the Act came into force she would not become full owner of the property simply because she had not been deprived of the possession of the property when the Act came into force (*l*3). She would not, however, forfeit her right to the property if she remarried after this Act came into operation and the property vested in her as full owner (*l*4).

The section can have no application where a female Hindu never acquired any property at all or where having acquired it she happens to have lost her title thereto by alienation, surrender or otherwise and of which she was not or could not be in juridical possession at the commencement of the Act (*l*5). As explained by the Supreme Court, in order that the female Hindu can he said to be 'possessed' of the property two things are necessary: (a) she must have had a right to the possession of the property and (b) she must have been in possession of that property either actually or constructively. It necessarily follows that if her possession was that of a trespasser when the Act came into force and even thereafter till her death she cannot be said to have acquired any right under this section. In that case *G* died in 1920 and on his death his widow *L* took possession of his property as his heir. In 1936 she gifted the property to *N* and on the death of *N* the plaintiffs came into possession of the same. In 1951 *L* took wrongful possession of the property. In a suit by the plaintiffs it was held that *L* could not be said to be 'possessed' of the property when the Act came into force because she had no right to be in possession of the property and she did not acquire any right under this section (*l*6). The position, however, would be different in case of property acquired by a female Hindu by prescription (*l*7).

**Reversioners.**—It is true that a reversion gets abolished as a consequence of the woman's estate being enlarged to full ownership where the limited owner "possessed" the property at the commencement of the Act. In respect, however, of property other than property to which this section applies by reason of its being "possessed" by her the position is different. As already pointed out the section has no application where a Hindu female having

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(*k*8) *Saila Bala Dasi* v. *Saila Bala* ('61) A.C. 26.

(*l*) *Bakhtawari* v. *Sadhu Singh* ('59) A. Punj. 558. *Gurdas* v. *Prito* ('61) A. Punj. 203.

(*l*1) *Giano* v. *Moti Ram* ('61) A. Punj. 274; *Andal Ammal* v. *Sivaprakasa* ('63) A.M. 452.

(*l*2) *Chandradip Rai* v. *Mahip Rai* ('60) A.P. 112.

(*l*3) *Bisarti* v. *Sukarti* ('60) A.M.P. 156.

(*l*4) *Pandurang* v. *Sindhu* ('71) A.B. 413; *Chimappvu* v. *Meenakshi* ('71) A.M. 453; *Annapurna* v. *Kalpana Debi* ('72) A. Gauhati 107; *Bhuri Bai* v. *Champa Bai* ('68) A. Raj. 139.

(*l*5) *Eramma* v. *Veeruppana* ('66) A.S.C. 1879; *Mohari* v. *Chukli* ('60) A. Raj. 82; 10 Raj. 238. *Pathumma Beebi* v. *Krishnan Asari* ('61) A. Kerala 247. *Vishwapathi* v. *Venkata Krishna* ('63) A.A.P. 9. *Ram Ghulam Singh* v. *Palakdhari Singh* ('61) A.P. 60. *Gangadhar Charan* v. *Saraswati* ('62) A. Orissa 190. *Bapurao* v. *Netaji* ('61) A.B. 300; *Damodhar Rao* v. *Bhima Rao* ('65) A. Mys. 290; *Mukhtiar Kaur* v. *Kartar Kaur* ('60) A. Punj. 31; *Nathuni Prasad* v. *Kachnar* ('65) A.P. 160 [wrongful alienation by widow].

(*l*6) *Dindayal* v. *Rajaram* ('70) A.S.C. 1019.

(*l*7) *Harmal Kaur* v. *Kartar Kaur* ('68) A.P.&H. 295.

acquired property as a limited owner happens to have lost her title thereto by alienation, surrender or otherwise and of which she was not or could not be in juridical possession at the commencement of the Act. The right of a reversioner to repudiate the alienation made without legal necessity or other transaction in any such case effected before the Act came into operation and his claim to possession thereof from the transferee on the death of the female Hindu, or on the extinction of the limited estate otherwise has not been adversely affected or taken away by this section (*l*8). Reference may also be made to the Notes at pp. 900-901 *supra* where mention has been made of the decision of the Supreme Court in *Kotturuswami* v. *Veeravva* and other decisions on the subject. The question of maintainability of such a suit was again examined by the Supreme Court and the same view was taken (*l*9). The maintainability of a suit by a reversioner in any such case is not affected by this section or section 15 (*l*10).

There is a difference of opinion among some of the High Courts as to who would be the reversioners entitled to challenge any alienation of the nature mentioned above and made before the Act came into operation. In a case decided by the High Court of Mysore (*l*11) the last male holder died in 1918 and the widow who inherited his property died in 1958 after the Act came into force. The widow having parted with possession of the property in favour of a donee before she could have become owner of the property by operation of this section, question arose as to who would be the reversioners entitled to challenge the alienation by the widow beyond her life time. It was held that the reversioners were to be ascertained according to the Hindu law operative at the time of the death of the last male holder and not as of the date when the widow died in 1958. A similar view has been taken by the High Courts of Orissa (*l*12) and Patna (*l*13). A contrary view has been taken in the undermentioned decisions of the High Court of Punjab (*l*14) according to which in any such case the succession would open on the death of the widow and the reversioners would be those who would have been the heirs of the last male holder if he had died in 1958, that is by reference to section 8 of this Act. In the latest decision of the High Court of Mysore, however, the view has been expressed that the question falls to be settled as of the date when succession opens, that is on the death of the female life estate holder (*l*15). The High Courts of Andhra Pradesh (*l*16) and Calcutta ( *l*17) have taken the same view.

**Surrender of estate by widow or other limited heir.**—Where a valid surrender of her estate was made by a widow or other limited heir in favour of a female reversioner it did not, under the previous law, confer on the female reversioner any larger estate but merely accelerated the estate of such reversioner. The estate vested in her as a limited owner and on her death it passed to the next reversioner and did not revert to the widow or other limited heir who had by surrender completely effaced herself (§ 197). Any such case of the female reversioner in whose favour the surrender was made would invite the operation of the rule laid down in this section and her

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(*l*8) *Harak Singh* v. *Kailash Singh* ('58) A.P. 581; (F.B.). *Amar Singh* v. *Sewa Ram* ('60) A. Punj. 530 (F.B.). [gift by widow]. *Nathuni Missir* v. *Ratna Kuer* ('63) A.P. 337 (surrender); *Tulsi Ahir* v. *Sonia* ('62) A.P. 296. *Marudakkal* v. *Arugugha* ('58) A.M. 255; I.L.R. (1958) Mad. 354; (1958) 1 Mad. L.J. 101. *Kanthimathinatha* v. *Vayyapuri* ('63) A.M. 37; *Somiah* v. *Rattamma* ('59) A.A.P. 244.

(*l*9) *Radha Rani* v. *Hanuman Prasad* ('66) A.S.C. 216.

(*l*10) *Janku* v. *Kisan* ('59) A.M.P. 1; *Bakurao* v. *Neroji* ('61) A.B. 300; *Mangla Balmukund* v. *Nathiya* ('71) A.P.&H. 365. Also see f.n. (*l*8) and (*l*9) above.

(*l*11) *Kempiah* v. *Girigamma* ('66) A. Mys. 189.

(*l*12) *Jandebi* v. *Upendra* ('68) A. Orissa 187.

(*l*13) *Chaturbhuj* v. *Sarbeshwar* ('67) A.P. 138.

(*l*14) *Kuldip Singh* v. *Karnail Singh* ('61) A. Punj. 573; *Banso* v. *Charan Singh* ('61) A. Punj. 45; *Gurmit Singh* v. *Tara Singh* ('60) A. Punj. 6; *Harbhaj Taro* v. *Darshan Singh* ('60) A. Punj. 145; *Harbhaj* v. *Mohar Singh* ('67) A. Punj. 184.

(*l*15) *Satyanarayana* v. *Seethamma* ('72) A. Mys. 247.

(*l*16) *Ramulu* v. *Narayana* ('65) A.A.P. 466.

(*l*17) *Bepin Behary* v. *Lakshasona* ('59) A.C. 27; *Hira Lal* v. *Kunud Behari* ('57) A.C. 571.

interest in property possessed by her at the commencement of the Act would be treated as enlarged into full ownership.

**Reconveyance to the limited owner by the alienee of property alienated by her before the Act came into force.**—A rather unusual situation arises where an alienee from a limited owner, for instance a widow, reconveys the property to the widow in consequence of a challenge by the reversioners or after the reversioners obtain a decree declaring that the alienation would not bind the reversioners after the death of the widow. The view has been taken in the undermentioned cases (*l*18) that the widow would become an absolute owner of the property by operation of this section even though the reconveyance might have taken place after this Act came into operation. A similar view has been taken in a recent decision in a somewhat similar situation (*l*19).

**". . . as full owner . .".**—The expression 'full owner' has been used in the sense of absolute ownership and in contradistinction to the term 'limited owner' which had received special signification under the old law. The impossibility of exactly defining or circumscribing the right of absolute ownership, it is well understood, arises from various difficulties. The expression full ownership is used in this section in the context of property and denotes a right indefinite in point of user, unrestricted in point of disposition, unlimited in point of duration and heritable as such right by the heirs of the owner. In any such case covered by this section the disposition of such property by the female Hindu by a will executed by her after or even before she became full owner will be valid and operative since in either case the will can speak from the date of her death that is after she became full owner of the property (*l*20). The ambit of this right cannot be cut down by any text rule or interpretation of Hindu law. Therefore, the right of disposition of any such property by the female Hindu will not be affected or controlled by any adoption by her after the Act came into operation (*m*).

**Explanation.**—The explanation is too plain to need any comment. It deals elaborately with the various sources and the sundry modes or manners of acquisition of property by a female Hindu and ends up with the words 'in any other manner whatsoever' and also refers to property held as stridhan. It may suffer from excessive caution but the object of the Legislature obviously is to define the term 'property' as comprehensively as possible.

In *Munnalal* v. *Rajkumar* (*m*1) the Supreme Court pointed out that this Explanation gives the expression "property" the widest connotation.

**Sub-section (2): Restricted estate.**—The object of this sub-section is to confine the language of sub-section (1) to its own subject and to stress its co-existence with sets of provisions in other enactments such for instance as the Transfer of Property Act and the Indian Succession Act which may be applic-

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(*l*18) *Jagat Singh* v. *Teja Singh* ('70) A.P.&H. 309 (F.B.); *Chinnakolandi* v. *Thanji* ('65) A.M. 497. *Contra Ganesh Mahanta* v. *Sukriya Bewa* ('63) A. Orissa 167.

(*l*19) *Jagannatham* v. *Kunjithapatham* ('72) A.M. 390.

(*l*20) *Ladhi Bai* v. *Thakur Singh* ('68) A. Punj. 41.

(*m*) *Punithavelli Ammal* v. *Ramalingam* ('70) A.S.C. 1730.

(*m*1) (1962) S.C. 1493. Also see f.n. (*k*1) *supra*, and pp. 901-902 where this case is noted.

able to Hindus. The object of this sub-section is also to make it abundantly clear that a restricted estate can even after the commencement of the Act come into existence in case of interest in property given to a female Hindu, by operation of transactions *inter vivos*, by testamentary disposition, by decree or order of a civil court or under an award (*m*2). It is also intended to make it clear that any such restricted estate created prior to the commencement of the Act will not be enlarged into full ownership by operation of sub-section (1) if the gift, will, other instrument, decree, order or award had prescribed a restricted estate. Also see Notes on 'restricted estate' *infra*.

In *Badri Pershad* v. *Kanso Devi* the Supreme Court pointed out that it would depend on the facts of each case whether the same is covered by the first or the second sub-section. It was observed that sub-section (2) is more in the nature of a proviso or an exception to sub-section (1). It can come into operation only if acquisition in any of the methods indicated in it is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property. The court also expressed agreement with the view that the object of the section was to remove the disability on women imposed by law and not to interfere with contracts, grants or decrees etc., by virtue of which a woman's right was restricted (*m*3).

**". . . acquired by way of . . ."** —The expression acquired means that the female Hindu did not have any interest in the property prior to its acquisition by her (*m*4). The operation of the sub-section is confined to property acquired by a female Hindu in any manner stated in it and does not cover the case of a decree or any other instrument which merely declares her right in property in question when the title itself in the property was not really in dispute. Thus for instance if the female Hindu had prior to the date of the decree title to the property and what the decree really does is to declare that title she cannot be said to have acquired the property under that decree (*m*5). In order to invoke the application of this sub-section it is necessary to satisfy the essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title to the property. If she had an existing interest in the property, the interposition of any instrument will not affect the operation of sub-section (1). The instrument, for instance, may be a decree or order or deed of partition but if the pre-existing right was there, sub-section (2) cannot have the effect of taking the property out of the coverage of sub-section (1). In any such case the mere fact that the instrument provides that the female Hindu is to have a limited estate or there is a restriction on her power of alienation or that the property will on her death revert to the next reversioner will not take the case out of the purview of sub-section (1). Such terms are merely reiteration of the incidents of Hindu law applicable to limited estate (*m*6). In the Supreme Court case referred to above one *G* died in 1947 leaving him

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(*m*2) quoted with approval in *Jagannatham* v. *Kunjithakatham* ('72) A.M. 390.

(*m*3) ('70) A.S.C. 1963.

(*m*4) *Sampathkumari* v. *Lakshmi Ammal* ('63) A.M. 50. *Subbarreddi* v. *Cenchalamma* ('62) A.A.P. 368.

(*m*5) *Sasadhar* v. *Tara Sundari* ('62) A.C. 438. *Janak Dulari* v. *Dist. Judge Kanpur*, ('61) A.A. 294.

(*m*6) *Gurunath Chetty* v. *Navaneethamma* ('67) A.M. 429; *Pattabiraman* v. *Parijatham Ammal* ('70) A.M. 257; *Kaliammal* v. *Andiammal* ('65) A.M. 451; *Bapusaheb* v. *Gangabai* ('72) A.B. 16.

surviving four sons by his predeceased wife and one son by his second wife *K* who also survived him. *G* left considerable self acquired property. Some differences arose between these heirs in respect of partitioning of the property among them and the arbitrator who was appointed made his award which was made an order of the court. The award stated that *K* would have a widow's estate in the share allotted to her. It was held that she had acquired an interest in the property left by *G* by virtue of the Hindu Women's Right to Property Act, 1937 and became absolute owner of the property allotted to her as the case was covered by sub-section (1) and the Explanation to it and sub-section (2) was not attracted simply because there was a partition and an award (*m*3). On the same principle, for instance in case of two female Hindus who inherited property from their husband and then divided the same between them by an instrument of partition, it cannot be said that they acquired their property under such instrument. The partition merely caused adjustment of the proprietory right which had already arisen. In the context of the present section they must be said to have acquired their interest in the property as heirs of the husband and not under the instrument (*m*7).

The question in these cases will be mostly one of construction of the instrument and ascertainment of the intention therein expressed. As pointed out by the Supreme Court (*m*3) it will depend on the facts of each case whether the same is covered by the first sub-section or sub-section (2). The facts have to be examined in the light of the principles stated above. Where there is a dispute about property between rival claimants and it is settled by a compromise the title of the female Hindu flows from the compromise since each party gives up its respective claim and accepts the compromise as the basis of its title (*m*8). Where there were *bona fide* disputes as to title itself and in a compromise decree passed in 1924 between an adopted son and his widow mothers, the son got half share in the property in dispute and the widows got the remaining half share with certain other stipulations, it was held that only a restricted right was given to the widows and the case fell under the present sub-section (*mm*8).

A restricted estate may be created by a will (*m*9). Where *A* executed a will under which he bequeathed his property to *B* but gave her only a limited estate and prohibited her from making any alienations and the property was after *B*'s death to go to certain male heirs of the testator the case was held to be governed by the rule enacted in the present sub-section (*m*10).

A deed of partition between members of a joint Hindu family would not ordinarily fall under the description of "any other instrument" prescribing a "restricted estate" within the meaning of this sub-section because no fresh title is created by a partition deed among the members of a joint Hindu family (*m*11). As a general rule a partition deed of this nature declares the

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(*m*7) *Sampathikumari* v. *Lakshmi Ammal supra.*

(*m*8) *Kirpo* v. *Bakhtawar Singh* ('64) A. Punj. 474.

(*mm*8) *Mali Bewa* v. *Dodhi Das* ('60) A. Orissa 81; *Seetharamayya* v. *Peraiah* ('64) A.A.P. 545.

(*m*9) *Karni* v. *Amru* ('71) A.S.C. 745.

(*m*10) *Ajab Singh* v. *Ram Singh* ('39) A.J.&K. 92 (F.B.); *Raj Kumar* v. *Prem Prakash Kaur* ('72) A.P.&H. 459.

(*m*11) *Jagannathpuri* v. *Godebai* ('68) A.B. 25: Also see *Udhav Shankar* v. *Tarabai* ('68) A.B. 308; *Purna Chandra* v. *Nimei Charan* ('68) A. Orissa 196.

existing rights of the parties and even when it declares and allots a share in favour of a female Hindu member of the family and defines the property allotted to her it does not of itself become the source or foundation of the female's title to such property. The instrument only crystalises, declares or recognizes her pre-existing rights and the case does not come under the coverage of this sub-section. On the other hand, a partition deed may go beyond this and in fact record a *bona fide* compromise of disputed claims between the female member and the other members. It may also embody a *bona fide* family settlement or family arrangement and if on a proper interpretation of the instrument the court comes to the conclusion that the intention of the parties was to create a 'restricted estate' of the nature visualised by this sub-section the case would fall within its purview regard being had to the principles discussed above (*m*12).

**Property given in lieu of maintenance.**—There is no difficulty as to the effect of any instrument giving specified property for maintenance to a Hindu widow where the instrument is executed after the death of her husband after the Hindu Women's Right to Property Act 1937 came into operation. The pre-existing right of the widow being there the instrument though it speaks of limited interest or restriction on alienation would not fall under this sub-section and the case would be covered by sub-section (1) with the result that she would become absolute owner of such property. In such cases where the husband died after the 1937 Act came into operation the widow acquired her right under that Act and the subsequent instrument would be regarded as merely declaring the pre-existing title in the widow. The instrument would not be the source or foundation of her title. There is, however diversity of judicial opinion as to the application of this sub-section where a coparcener had died before the coming into operation of that Act and the widow did not acquire any interest in the joint family property but was only entitled to maintenance out of the same. In cases falling under this category there were instances where the widow was assured of this right of maintenance by allotting property to her for life under instruments, for instance, of agreements, compromises, awards or decrees of court. There are decisions which proceed on the footing that her right to be maintained from the family property though crystalised, declared or recognized in any such instrument was a right in existence prior to such instrument and hence not covered by sub-section (2) and the widow has been held to have become absolute owner of the property by regarding the case as within the purview of sub-section (1) read with the Explanation to it which is *inter alia* to the effect that 'property' in sub-section (1) includes property acquired "in lieu of maintenance or arrears of maintenance" (*n*). The decisions to the contrary

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(*m*12) For instance see *Jaria Devi* v. *Shyam Sunder* ('59) A.C. 338. Also see *Kirpo* v. *Bakhtawar Singh* ('64) A. Punj. 474: But every family arrangement or settlement need not fall under sub-section (2), *Lachhia* v. *Ram Shankar* ('66) A.P. 191. Nor need every compromise, *Ude Chand* v. *Rajo* ('66) A. Punj. 329; *Mahadeo* v. *Bensraji* ('71) A.P. 515; *Raghunath* v. *Bhimsen* ('65) A. Orissa 59.

(*n*) *Bapusaheb* v. *Gangabai* ('72) A.B. 16; *Gadam* v. *Venkatarajalu* ('65) A.A.P. 66; *Someshwar* v. *Swami Nath* ('70) A.P. 348. [In such a case though the female Hindu cannot be said to be limited owner of the property still the inclusive definition of the word property in the Explanation, according to this decision, makes her a limited owner for the purpose of sub-section 1]; *Sharbati Devi* v. *Hiralal* ('64) A. Punj. 114; *Suhagwanti* v. *Sodhan* ('68) A. Punj. 24; *Ram Jag* v. *Director of Consolidation* ('68) A.A. 419; *Bindbashini* v. *Sheorati* ('71) A.P. 104; *Sheoji* v. *Prema Kuer* ('64) A.P. 187; *Hanamangouda* v. *Hanamangouda* ('72) A. Mys. 286. Also see *Kunji Thomman* v. *Meenakshi* ('70) A. Kerala 284. And see *Saraswathi Ammal* v. *Anantha* ('66) A. Kerala 66; *Chanamma* v. *Lingamma* ('72) A. Mys. 333.

rest on the basis that her right to be maintained out of the family property in any such case was not a "right to property" and she acquired right to property for the first time under the instrument, award or decree and therefore according to these decisions the case would fall under the purview of sub-section (2) and the widow has been held to be entitled only to the "restricted estate" prescribed under the instrument, award or decree (*n*1). Most of the decisions which take the former view lay stress on the language of the Explanation whereby the expression "property" includes property acquired by the female Hindu in lieu of maintenance.

While the relevance of the Explanation cannot be overlooked, it has to be emphasised that an essential condition of the application of sub-section (1) read with the Explanation is that the property must have been "acquired" by the female Hindu. It would not be sufficient in order to invite the operation of sub-section (1) that she had been put in possession of the property in lieu of maintenance. It would not be correct to say that the mere fact that she was put in possession of the property in lieu of maintenance created in her any title in the property. The right of maintenance even of a Hindu widow is an indefinite right which falls short of a charge; and even when it is made a charge, as is well-established, it does not create any interest in the property like a mortgage. In examining the ambit and operation of this section the Supreme Court has observed that possession alone is not sufficient to attract the operation of the section and that the property contemplated in the section is clearly property to which the female Hindu has acquired some kind of title however restricted the nature of her interest may be (*n*2). It is submitted that it is not possible to expect any general rule applicable to all cases of property given for maintenance. It cannot be said that because of the Explanation all such cases must fall under the coverage of sub-section (1). The decision in each case must depend on the construction of the instrument, award or decree and the facts of the particular case which would be examined in the light of the principles which emerge from the decisions of the Supreme Court to which reference has already been made and without undue emphasis on the Explanation to sub-section (1).

*Decree.*—This sub-section contemplates only those cases where the decree in question had become final and was not under appeal when the Act came into force (*n*3). The decree must be the source of title (*n*4).

*Restricted estate.*—The sub-section does not require that the restricted estate must be prescribed in express terms. Normally any acquisition of property covered by this sub-section would be by an instrument in writing or by a decree or award (*n*5). Whether any restricted estate has been created

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(n1) *Pattabhiraman* v. *Parijatam Ammal* ('70) A.M. 257; *Gurunadhan* v. *Navaneethamma* ('67) A.M. 429; *Thayammal* v. *Salammal* ('72) A.M. 83; *Santhanam* v. *Subramania* ('72) A.M. 279; *Kempanna* v. *Shantarajiah* ('73) A. Mys. 66; *Chanamma* v. *Lingamma* ('72) A. Mys. 333; *Narayan* v. *Tara* ('70) A. Orissa 131; *Lakshmi Chand* v. *Sukhdevi* ('70) A. Raj. 285. In *V. S. Reddi* v. *Tulasamma* ('69) A.A.P. 300 there was a decree for maintenance and subsequently a compromise. Reference may also be made to *Bindroo* v. *Munshi* ('71) A.J.&K. 142.

(n2) *Eramma* v. *Veerupana* ('66) A.S.C. 1879.

(n3) *Annapurnamma* v. *Bhima Sankerrao* ('60) A.A.P. 359; *Pathumma Beebi* v. *Krishnan Asari* ('61) A. Kerala 247; *Rampali Devi* v. *Chando Bibi* ('66) A.A. 584 [Decree must also be one affording foundation of title and not merely declaratory]; *Saraswathi Ammal* v. *Anantha* ('68) A. Kerala 66; *Venkamma* v. *Venkatareddi* ('59) A.A.P. 158.

(n4) *Chajju Ram* v. *Bhuri* ('69) A. Delhi 273.

(n5) According to the Punjab High Court there can be an oral gift within the ambit of this subsection, *Blanda* v. *Dunni Chand* ('63) A. Punj. 34.

or not in any such case must obviously be a question of construction to be determined in accordance with the canons of construction applied with regard to such instrument, decree, order or award.

Restrictions by way of conditions or limitations envisaged by this sub-section must be such as are recognised as valid. They must not be repugnant to or prohibited by any statutory enactment affecting the parties and where there is no statutory rule affecting the matter they must be such as do not result in any estate unknown to Hindu law.

*Civil Court.*—The expression "Civil Court" in this sub-section has been interpreted by the High Court of Orissa as including a Deputy Commissioner acting as revenue court (*n*6).

**15.** (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

General rules of succession in the case of female Hindus.

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

**Succession to property of a female dying intestate.**—This section propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. The rules laid down in this section are pivotal and have to be read along with the rules set out in S. 16. They have also to be read along with certain other sections in the Chapter which contain supplementary provisions which are not merely explanatory but lay down substantive rules involving legal principles.

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(*n*6) *Arakhita* v. *Hari* ('63) A. Orissa 162; I.L.R. (1963) Cutt. 628.

The section groups the heirs of a female intestate into five categories described as entries (a) to (e) and specified in sub-section (1). Sub-section (1), however, is not a complete statement of the law. Two exceptions both of the same nature, are engrafted by sub-section (2) on the otherwise uniform order of succession prescribed by sub-section (1). Broadly stated the two exceptions are that if the female dies *without leaving any issue,* then (1) in respect of property inherited by her from her father or mother, that property will devolve not according to the order laid down in the five entries but upon the heirs of the father; and (2) in respect of property inherited by her from her husband or father-in-law it will devolve not according to the order laid down in the five entries but upon the heirs of the husband.

The two exceptions mentioned above are confined to property "inherited" from the father, mother, husband and father-in-law of the female Hindu and do not affect property acquired by her by device under a will of any of them. Property acquired by her under any device or bequest under a will from any such person would devolve on her death in the manner prescribed in sub-section (1). Reference may be made to Notes under sub-section (2) *infra.*

Under the previous law—succession to Stridhan—Woman's property—varied according as a woman was married or unmarried and according as she was married in an approved form or in an unapproved form. It also varied according to the source from which the Stridhan came and the mode and manner of her acquisition of the property. The rules of descent of the different schools also varied. S. 14, it must have been noticed, abolishes the various kinds of Stridhan and property of every kind possessed by a female Hindu howsoever acquired and whenever acquired becomes now her absolute property. The present section which has to be read in conjunction with sec. 16 evolves a new and uniform order of succession to her property and regulates the manner of its distribution. The provisions in sub-section (1) and sub-section 2(a) of section 15 do not apply to persons governed by Marumakkattayam and Aliyasantana laws as will be seen from sec. 17.

The heritable property of a female intestate devolves upon her heirs enumerated in the five entries. Among heirs so specified those in entry (a) are preferred to those in entry (b); the heirs in entry (b) are preferred to those in entry (c) and so on in case of succeeding entries (*n*7). Therefore, it is only in case of failure of the heirs specified in entry (a), but not until then, that the property will devolve upon the heirs listed in the next entry and similarly in order of succession.

When property devolves by operation of Entries (b), (d) or (e) of sub-section (1) upon the heirs therein mentioned it is the property of the deceased female of which devolution takes place and not of the property of the husband or father or mother (*n*8).

**Property.**—The expression 'property' in this section means property of the deceased heritable under the Act. It includes both moveable and immove-

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(*n*7) S. 16, Rule 1.

(*n*8) Reference may be made to *Arunachalathammal* v. *Ramachandran* ('63) A.M. 255.

able property owned by a female Hindu and acquired by her by inheritance; or by devise; or at a partition; or by gift from any person whether her relative or not (before, at or after her marriage); or by her own skill or exertion; or by purchase; or by prescription; or in any other manner whatsoever (*o*). It also includes all property which was held and possessed by her at the date of the commencement of the Act and of which she is declared to be the full owner by section 14 of the Act. It also includes agricultural land subject to this that legislation relating to prevention of fragmentation of agricultural holdings or fixation of ceilings or the devolution of tenancy rights in respect of such holdings is not to be affected by anything contained in the Act. But the rules of succession laid down in this section do not apply to property expressly excluded from the operation of the Act by sec. 5.

The rules of succession laid down in this section cannot apply to property acquired by a female under an Instrument or a decree or order of a civil court or under an award which itself prescribed a restricted estate in such property. In any such case succession to such property would be controlled by the nature and extent of the restricted estate thereby created (*p*).

Nor can the rules of succession laid down in this section apply to the case of the death of a female, who had acquired property as a limited owner and alienated the same before the commencement of the Act. In her case section 14 would not become applicable as the property cannot be regarded as property of the deceased intestate (*p*1).

**Property of a female Hindu . . . shall devolve.**—The language of the section and particularly the words "shall devolve" plainly indicate that the section is prospective in its operation. It applies where death of a female intestate and consequent devolution of her property takes place after the commencement of the Act and does not govern succession to the property of a female Hindu whose death took place before the Act came into force. In the latter case all questions of inheritance would be determined according to the previous law.

**Order of succession.**—The effect of the rules laid down in this section is that the property of a female intestate will devolve as summarised in the following propositions (*p*2):

(1) *The general order of succession* laid down in entries (a) to (e) in sub-section (1) applies to all property of a female intestate howsoever acquired except in case of property inherited by her from her father, mother, husband or father-in-law.

(2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue take the property

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(*o*) Cf. Explanation to Section 14(1).

(*p*) See Section 14(2).

(*p*1) *Renuka Bala* v. *Aswini Kumar* ('61) A.P. 498. Reference may also be made to the Notes under section 14 *supra*.

(*p*2) In these propositions and subsequent Notes on the subject the word "issue" means son, daughter, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter and daughter of a predeceased daughter.

simultaneously; and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case sub-section (2) does not at all come into operation.

(3) In case of a female intestate *dying without issue* but leaving her husband, the husband will take all her property, except property inherited by her from her father or mother which will revert to the heirs of the father in existence at the time of her death.

(4) In case of a female intestate *dying without issue* property inherited by her from her husband or father-in-law, (the husband being dead), will go to the heirs of the husband and not in accordance with the general order of succession laid down in sub-section (1).

(5) In case of a female intestate *dying without issue* property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not in accordance with the general order of succession laid down in sub-section (1).

Propositions (3), (4) and (5) above state the *special order of succession* which is confined only to property acquired by the female intestate from the specified sources. Proposition (2) is the obvious corollary to the statement of law in the whole section.

# GENERAL ORDER OF SUCCESSION

## *Entry (a)*

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| These are specified in the Entry as *children of predeceased son or daughter.* | Son<br>Daughter<br>Son of a predeceased son<br>Daughter of a predeceased son<br>Son of a predeceased daughter<br>Daughter of a predeceased daughter<br>Husband | These are heirs specified in Entry (a). They take *simultaneously** and to the exclusion of those specified in the subsequent entries. |

**SON.**—The expression 'son' used in Entry (a) has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. In case of a female intestate who had remarried after the death of her husband or after divorce her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu regardless of the source of the property: [See Illustrations to Entry (a) at p. 917 *infra*.]

The proviso to sec. 3 (1) (j) in terms lays down *inter alia* that illegitimate children shall be deemed to be related to their mother and any word in the Act expressing relationship or denoting a relative shall be construed accordingly. Therefore, the expression 'son' used in this entry also includes an illegitimate son. For 'Son born of a void or voidable marriage' reference may be made to Notes under that heading at pp. 867-868 *supra* and Illustrations given there.

An *adopted son* would be included in the expression 'son' used in this entry; that is if the female intestate was in the position of the adoptive mother. Under the old law in force prior to the coming into operation of the Hindu Adoptions and Maintenance Act, 1956, a son could be adopted by a male and in certain cases a wife could adopt a son to her husband and a widow could adopt a son to her deceased husband. In all such cases of adoption, made before that Act came into operation, the adopted son will be an heir of the adoptive mother under this Entry.

Under the Hindu Adoptions and Maintenance Act, 1956 (sec. 14), a son adopted by a Hindu who has a wife living, is deemed also to be her adopted son and she is in the position of his *adoptive mother*; and when the adoption is made by a person who has more than one wife, the seniormost in marriage among them is deemed to be the adoptive mother and the others to be his step-mothers. In any such case the adopted son will be a 'son' of the adoptive mother within the meaning of this Entry.

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* But in accordance with Rules in section 16.

Under sec. 8 of the Hindu Adoptions and Maintenance Act, 1956, a female Hindu, who is not married or if married whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or has been declared by a court to be of unsound mind, has now the *capacity to take a son or daughter in adoption to herself.* Such a son is, therefore, an heir under this Entry. Reference may be made to Notes under s. 8 of that Act.

Also see "Relative by adoption" at pp. 864-865 *supra* and sections 5, 7, 8, 12 and 14 of the Hindu Adoptions and Maintenance Act, 1956.

A *step-son* is not entitled as 'son' to inherit to his step-mother as one of the heirs under this Entry but he can succeed to her property as an heir of her husband under Entry (b) of the sub-section (*p*3).

A *posthumous son* of her husband by her is as much a natural son of the female as a son born during the lifetime of her husband (*q*).

**DAUGHTER.**—The rules relating to a 'son' stated above apply *mutatis mutandis* to the case of a daughter. Illustrations under Entry (a) may also be seen: p. 917 *infra.*

**Adopted son and adopted daughter.**—Under the provisions of the Hindu Adoptions and Maintenance Act, 1956, it is competent to a female Hindu to have both an adopted son and an adopted daughter. Therefore, under this Entry both an adopted son and an adopted daughter can be her heirs and take simultaneously.

**SON OF A PREDECEASED SON.**—The son of a predeceased son is entitled to succeed as a child of a predeceased son under Entry (a) and includes both a natural son of a predeceased son and a son of a predeceased son adopted by the latter in accordance with the law relating to adoptions among Hindu in force at the time of adoption. The proviso to sec. 3 (1) (j) lays down *inter alia* that illegitimate children shall be deemed to be related to their mother and their legitimate descendants shall be deemed to be related to them and to their mother, and any words expressing relationship or denoting a relative shall be construed accordingly. Therefore, a legitimate son of a predeceased illegitimate son of a female is an heir under this Entry. A posthumous son of the predeceased son is also included in this Entry.

Also see "Relative by adoption" at pp. 864-865 *supra* and sections 5, 7, 8, 12 and 14 of the Hindu Adoptions and Maintenance Act, 1956.

Also see "Son" *supra.* Illustrations under Entry (a) may also be seen: p. 917 *infra.*

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(*p*3) *Mallappa* v. *Shivappa* ('62) A. Mys. 140. (*q*) See S. 20, *Infra.*

**DAUGHTER OF A PREDECEASED SON.**—The rules relating to 'son of a predeceased son' stated above apply *mutatis mutandis* to the case of a daughter of a predeceased son.

Also see "Son" and "Daughter" *supra*. Illustrations under Entry (a) may also be seen p. 917 *infra*.

**SON OF A PREDECEASED DAUGHTER.**—The son of a predeceased daughter is entitled to succeed as a child of a predeceased daughter under Entry (a) and includes both a natural son of a predeceased daughter and a son of a predeceased daughter adopted by the latter in accordance with the law relating to adoptions among Hindus in force at the time of adoption. If the daughter had remarried after the death of her husband or after divorce her sons by different husbands would all be her natural sons. Proviso to section 3(1)(j) lays down that illegitimate children shall be deemed to be related to their mother and their legitimate descendants shall be deemed to be related to them and to their mother, and any words expressing relationship or denoting a relative shall be construed accordingly. Therefore, a legitimate son of a predeceased illegitimate daughter of a female is an heir under this Entry. A legitimate son of the predeceased daughter who was in her womb at the time of the death of the intestate is also included in this Entry.

Also see "Relative by adoption" at pp. 864-865 *supra* and sections 5, 7, 8, 12 and 14 of the Hindu Adoptions and Maintenance Act, 1956.

Also see "Son" and "Daughter" *supra*. Illustrations under Entry (a) may also be seen: p. 917 *infra*.

**DAUGHTER OF A PREDECEASED DAUGHTER.**—The rules relating to son of a predeceased daughter stated above apply *mutatis mutandis* to the case of a daughter of a predeceased daughter.

Also see "Son" and "Daughter" *supra*. Illustration under Entry (a) may also be seen: p. 917 *infra*.

**HUSBAND.**—The husband entitled to succeed under this entry must be a person who was lawfully married to the female intestate and whose marriage had not been annulled or dissolved by a decree of a court or dissolved by any valid custom governing the parties (*r*). In general, the effect of annulment or dissolution of marriage is total severance of all relationship between the divorcee and the other spouse as also his relations. But a decree for judicial separation or non-compliance with a decree for restitution of conjugal rights does not have the effect of dissolving the marriage. Illustrations below may also be seen.

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(*r*) Section 29(2), Hindu Marriage Act, 1955.

### *Illustrations: Entry (a)*

1. *A* dies leaving her surviving a son *S;* two daughters *D* and *D*1; *DD*2 the daughter of a predeceased daughter *D*2; *SS*1 the adopted son of a predeceased son *S*1; and *SSS*2 the son of a predeceased son of a predeceased son *S*2. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *D*, *D*1, *SS*1 and *DD*2 as heirs specified in Entry (a). *SSS*2 although a great-grandson of *A* will not succeed as her heir with the others (*s*). He is not an heir under Entry (*a*) and will be excluded by the others who are heirs specified in that Entry.

2. *A* dies leaving her surviving a son *S*; an adopted daughter *D*; and her husband *H*. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *D* and *H* as heirs specified in Entry (a).

3. *A* dies leaving her surviving a son *S* by her first husband and property which she had inherited from her second husband *B*. The property will devolve upon *S* under Entry (a) and not upon the heirs of *B*. (*s*1).

4. *A* dies leaving her surviving a son *S* by her first husband and a daughter *D* by her second husband. All the property of *A* howsoever acquired and including property inherited by her from either or both her predeceased husbands will devolve upon *S* and *D* in equal shares (*ss*1).

5. See Illustration under Sub-section (2): Clause (b) *infra.*

## GENERAL ORDER OF SUCCESSION (*contd.*)

### *Entry (b)*

**HEIRS OF THE HUSBAND.**—Failing all heirs of the intestate female specified in Entry (a), but not until then, all her property will devolve upon the heirs of the husband as heirs specified in this entry. But property that she might have inherited from her father or mother will not devolve upon them and will devolve upon the heirs of the father.

The devolution upon the heirs of the husband of the female intestate shall be in the same order and according to the same rules as would have applied if the property had belonged to the husband and he had died intestate in respect thereof immediately after her death (sec. 16, rule 3). The devolution of the property of a male intestate is governed by the general rules of succession declared in sec. 8; the order of succession laid down in s. 9; and the rules of distribution of property stated in sec. 10; and must be in accordance with other relevant provisions of Chapter II. Therefore, in case of a female intestate who dies without leaving any issue or her husband, the *terminus a quo* will be the husband of the intestate as if he were the propositus and the ascertainment of the heirs will once again commence from Class I of the Schedule.

Where a female intestate had remarried after the death of her first husband the "heirs of the husband" would be the heirs of the second husband who if alive at the time of the death of the intestate would himself have

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(*s*) But failing heirs in Entry (a) he may succeed to her property as an heir of the husband under Entry (b). See Illus. 1 at p. 918, *infra.* Reference may also be made to the pedegree in facts of *Munnalal* v. *Rajkumar* ('62) S.C. 1493.

(*s*1) *Rama Ananda* v. *Bhima* ('69) A.B. 205; *Keshri Lodhi* v. *Harprasad* ('71) A.M.P. 129.

(*ss*1) Reference may be made to *Ram Kali* v. *Sohan Lal* ('72) P.&H. 419. Also see *Gurbachan Singh* v. *Khichar Singh* ('71) A.P.&H. 240 [son of second husband].

been entitled to succeed as her husband under entry (a). Therefore, so far as the expression "heirs of the husband" relates to the general order of succession laid down in sub-section (1), the heirs contemplated in entry (b) must be the heirs of the last husband, that is of the person whose widow the intestate was at the time of her death.

The position, however, is quite different in respect of a case governed by clause (b) of sub-section (2) which has the effect of laying down a special order of succession under which in case of a female intestate who dies without issue, the property inherited by her from her husband or father-in-law does not devolve upon the other heir or heirs referred to in sub-section (1) in the order specified therein, but *upon the heirs of the husband.* It follows from the context that the heirs of the husband mentioned in sub-section (2) (b) are not the heirs of the husband she had married after the death of her first husband but heirs of *"the husband"* whose property she had inherited as his widow; and in case of property inherited from her father-in-law which could only be as the widow of a predeceased son, the heirs there contemplated are heirs of *"the husband"* from whose father she inherited the property. Therefore in respect of property that the intestate might have inherited from her first husband or the father of the first husband as the widow of a predeceased son such property will, in the event of her dying without issue, devolve upon the heirs of that husband. In such a case the heirs of the second husband cannot succeed to the property of the intestate so inherited by her. Reference may be made to 'Clause (b)' at pp. 924-925 *infra.*

## *Illustrations: Entry (b)*

1. *A* dies leaving her surviving *SSS* the son of a predeceased son of a predeceased son and *SDS* the son of a predeceased daughter of a predeceased son and *HB* the brother of her husband *H*. *A*'s property will devolve on *SSS* alone as the heir of her husband under this entry. *SSS* is the heir of *H* specified in Class I of the Schedule and *SDS* and *HB* are heirs specified in Class II of the Schedule. *SSS* will, therefore, exclude *SDS* and *HB*.

2. *A* dies leaving her surviving *S* and *D* the son and daughter of her deceased husband by another wife; and her brother *B*. *A*'s property will devolve on *S* and *D* under this entry as heirs of the husband. Property that *A* might have inherited from her father or mother will not devolve on *S* or *D* and will devolve on *B* as an heir of *A*'s father.

3. *A* dies leaving her surviving *SHB* and *DHB* the son and daughter of her husband's brother and *HS* her husband's sister. *A*'s property will devolve on the heirs of her husband *H*. *HS* the husband's sister will take the property to the exclusion of *SHB* and *DHB* as she is an heir specified in entry II of Class II of the Schedule while *SHB* and *DHB* are heirs specified in entry IV of that class.

4. *A* dies leaving her surviving *SW* the widow of *S* her predeceased son and *B* her brother. The property of *A* will devolve upon *SW* as the heir of her husband under this entry.

*Note*: These illustrations must be read subject to the Rules relating to special order of succession under sub-section (2).

## GENERAL ORDER OF SUCCESSION (*contd.*)

### *Entry (c)*

| | |
|---|---|
| Mother<br>Father | These heirs specified in Entry (c) succeed simultaneously and share the property equally and to the exclusion of those specified in the subsequent entries. |

**MOTHER AND FATHER.**—Failing all heirs of the intestate female specified in entries (a) and (b), but not until then, all her property, howsoever acquired, will devolve upon her mother and father.

The property that will devolve under this entry will include property inherited by her from the mother when the intestate is survived by the father and property inherited by her from the father when the intestate is survived by the mother.

**MOTHER.**—The expression 'mother' includes both a natural mother and an adoptive mother of the intestate. Under the general law in force prior to the coming into operation of the Hindu Adoptions and Maintenance Act, 1956, adoption of a daughter was unknown. But under the Act of 1956, which is the first statutory recognition of the status of an adopted daughter, it is now competent to a male as well as a female Hindu to take a daughter in adoption to himself or herself. A daughter adopted by a Hindu who has a wife living, is deemed to be wife's adopted daughter and the wife is in the position of the adoptive mother; and when the adoption is made by a person who has more than one wife, the seniormost in marriage among them is deemed to be the adoptive mother and the others to be step-mothers (*s*2). Again under sec. 8 of the Act of 1956, a female Hindu who is not married or if married whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or been declared by a court to be of unsound mind, has now the capacity to take a daughter in adoption *to herself*. In any such case the adoptive mother will be a 'mother' of the adopted daughter within the meaning of this Entry. Adoption has the effect of severing all the ties of the daughter with her natural parents and their family and therefore her natural mother is not entitled to succeed to her property as an heir under this Entry.

Unchastity of a mother is no bar to her succeeding as heir to her daughter; nor does remarriage constitute any such bar.

A mother is entitled to succeed to the property of her *illegitimate daughter* as an heir under this Entry read with sec. 3 (1) (j).

A step-mother is not entitled as 'mother' to inherit to her step-daughter as one of the heirs under this Entry but she can succeed to her property as an heir of her father under Entry (d).

Also see Notes under "Mother" at pp. 871-872 *supra*.

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(*s*2) S. 14, Hindu Adoptions and Maintenance Act, 1956.

**FATHER.**—The expression 'father' includes both a natural father and an adoptive father of the intestate. The rules relating to 'father' by adoption of a male intestate stated at pp. 873-874 *supra apply mutatis mutandis* to the case of an adoptive father of a female intestate.

Also see Notes under "Father" pp. 873-874 *supra*.

### *Illustration: Entry (c)*

*A* dies unmarried leaving her surviving her father, her step-mother, a step-brother and her mother's brother. *A* had inherited considerable property from her mother's mother. All the property of *A* will devolve on her father as her heir under this Entry.

## GENERAL ORDER OF SUCCESSION (*contd.*)

### *Entry (d)*

**HEIRS OF THE FATHER.**—Failing all heirs of the female intestate specified in Entries (a) to (c), but not until then, all her property howsoever acquired will devolve upon the heirs of her father. The devolution upon the heirs of the father shall be in the same order and according to the same rules as would have applied if the property had belonged to the father and he had died intestate in respect thereof immediately after her death (sec. 16, rule 3). The devolution of the property of a male intestate is governed by the general rules of succession declared in sec. 8; the order of succession laid down in sec. 9; and the rules of distribution of property stated in sec. 10. Succession in a case falling under this entry will be in accordance with those sections and other relevant provisions of Chapter II. Therefore in case of a female intestate where there is no heir specified in any of the first three entries [(a) to (c)] the *terminus a quo* will be the father of the intestate as if he were the propositus and the ascertainment of the heirs will once again commence from Class I of the Schedule.

### *Illustrations: Entry (d)*

1. *A* dies unmarried leaving her surviving her step-mother **FW** and her brother *B*. *A*'s property will devolve on *FW* and *B* as heirs of her father under this entry. Property that she might have inherited from her own mother will also be included because it will not on *A*'s death devolve upon the heirs of the mother but upon the heirs of the father under sub-section (2)(a).

2. *A* dies unmarried leaving her surviving her brother *B* and *WB*1 the widow of a predeceased brother. *A*'s property will devolve under this entry on the heirs of her father. *B* and *WB*1 will take simultaneously as heirs of the father in Class I of the Schedule.

## GENERAL ORDER OF SUCCESSION (*contd.*)

### *Entry (e)*

**HEIRS OF THE MOTHER.**—Failing all heirs of the female intestate specified in entries (a) to (d), but not until then, all her property, howsoever acquired, devolves upon the heirs of her mother. The devolution upon the

heirs of the mother shall be in the same order and according to the same rules as would have applied if the property had belonged to the mother and she had died intestate in respect thereof immediately after her death (s. 16, r. 3). The devolution of the property of a female intestate is governed by the general rules of succession declared in this section and must be in accordance with the other relevant provisions of the Act. Therefore, in case of a female intestate when there is no heir specified in any of the first four entries [(a) to (d)] the *terminus a quo* will be the mother of the intestate as if she were the propositus and the ascertainment of the heirs will once again commence from entry (a) and so on in order of the entries.

**Uterine brother and uterine sister of the intestate can succeed as heirs of the mother.**—Relationship by blood includes relationship by full-blood, half-blood and uterine blood. Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands [sec. 3(1) (e) (ii)]. Relations by uterine blood have legitimate kinship and can claim relationship by blood with the intestate with the result that a uterine brother or a uterine sister of the intestate will be entitled to succeed to her as son or daughter of her mother specified in entry (a) of sub-section (1). In a case falling under entry (e) the mother of the intestate becomes the starting point. All her sons and daughters by different husbands are her sons and daughters within the scope of entry (a) and are, therefore, entitled to succeed as such.

**Illegitimate brother and illegitimate sister.**—An illegitimate brother or an illegitimate sister of the female intestate who was herself a legitimate offspring can succeed to her property *as an heir of her mother*. If the intestate herself was an illegitimate child of her mother the position would be the same. Although the expression 'related' means related by legitimate kinship, the proviso to the definition of 'related' in sec. 3(1) (j) states an express rule having the effect of giving recognition to the rights of such illegitimate offspring to be deemed as related to their mother and to one another and of their legitimate descendants to be deemed as related to them and to one another. In such a case her illegitimate brother or illegitimate sister as also the legitimate children of such brother or sister can succeed to the property of the female intestate under this entry.

### *Illustrations: Entry (e)*

1. *A* dies unmarried leaving her surviving *MB* her mother's brother and *MSD* her mother's sister's daughter. If *A*'s mother had died immediately after *A* she would have been survived only by *MB* and *MSD* her brother and sister's daughter respectively. There being no heir of *A* under entries (a) to (d) all the property of *A* will devolve upon the heirs of the mother. Then with mother as the starting point, *MB* and *MSD* will take simultaneously by reference to entry (d) read with Class I of the Schedule (as the only heirs of the mother's father).

2. *A* dies unmarried leaving her surviving *UB* a uterine brother, *US* a uterine sister and *SF* her step-father, her mother having remarried after the death of *A*'s father. There being no heir of *A* under entries (a) to (d) all the property of *A* will devolve upon the heirs of the mother. With the mother as the starting point, *UB*, *US* and *SF* will take simultaneously by reference to entry (a).

3. *A* and *C* were the illegitimate daughters of *M* their mother. *C* had married and died during *A*'s lifetime leaving her surviving her son *CS* and *CSS* the son of a

predeceased son. *A* dies unmarried leaving her surviving *CS* and *CSS*. All the property of *A* must devolve upon the heirs of *M* with *M* as the starting point. *CS* being the daughter's son of *M* will take the property to the exclusion of *CSS* who does not come under entry (a): [See s. 3(1)(j)].

4. *A* and *C* were the illegitimate daughters and *B* was the illegitimate son of *M* their mother. *B* had married and died during the lifetime of *A* leaving him surviving *BS* his son. *C* died during the lifetime of *A* leaving her surviving *CD* an illegitimate daughter. *A* dies unmarried leaving her surviving *BS* and *CD*. All the property of *A* must devolve upon the heirs of *M*. *BS* being the legitimate descendant of the illegitimate son of *M* will take the property to the exclusion of *CD* who is the illegitimate daughter of *C* the illegitimate daughter of *M*. In this case if *C* had survived *A* she would have succeeded to *A*'s property simultaneously with *BS* [See s. 3(1)(j)].

**Sub-section (2): Special order of succession in case of childless female intestate in respect of property inherited by her from her father, mother, husband or father-in-law.**—Sub-section (1) lays down the general order of succession to the property of a female intestate who dies after the commencement of the Act and propounds a definite scheme of succession to her property which is different from the order of succession to the property of a male intestate. Sub-section (2) carves out two exceptions to that general scheme and order of succession. Clause (a) of sub-section (2) relates to property inherited by the intestate from her mother or father and clause (b) relates to property inherited by her from husband or father-in-law. The two exceptions, both of the same nature, seem to have been made on the ground that they prevent such property passing into the hands of persons to whom justice would require it should not pass and on the ground that they are in the interest of the intestate herself.

**Clause (a): Property inherited from father or mother.**—This clause engrafts an important exception on the provisions relating to the general order of succession to the property of a female intestate laid down in sub-section (1). This exception provides for a special order of succession in case of property inherited by her from her father or mother but its operation is confined to the case of her dying without leaving a son or a daughter or children of any predeceased son or daughter. The clause enacts that in any such case the property so inherited is to devolve *"not upon the other heir but upon the heirs of the father"* meaning thereby that the property is not to devolve upon the heirs other than sons and daughters and children of predeceased son or daughter who would have inherited if the order specified in sub-section (1) were to be followed but such property is to devolve upon the heirs of the father. The other heirs—but for the exception provided in this clause—would have included the husband or the heirs of the husband by application of the latter part of entry (a) and entry (b) of sub-section (1) and the purpose of the clause is that such property should not pass into their hands but should go instead to the heirs of the father.

The effect of this clause read with Rule 3 of section 16 is that in case of a female intestate dying without issue the property inherited by her from her father or mother will not devolve upon the husband under entry (a) of sub-section (1), or on the heirs of the husband under entry (b) of sub-section (1), but will devolve upon the heirs of the father as if the father had died intestate in respect thereof immediately after her death. Of course, if she dies leaving any issue enumerated in this clause, no question can arise of the application

of this clause and the property will devolve as prescribed in sub-section (1) (a): [See Illus. 1 below].

The exception laid down in this clause is confined to property "inherited" from the father or mother of the female Hindu as heir of the father or mother, that is by succession, and does not affect property acquired by her by device under a will of the father or mother. Property acquired by her under any device or bequest under a will would devolve on her death in the manner prescribed in sub-section (1) (*t*) [see illustrations 6 and 7 below]. Nor would property given to her by way of gift by her father or mother fall under this exception (*tt*) [see illustration 8 below].

## *Illustrations: Clause (a)*

1. *A* dies leaving her surviving *DD* her daughter's daughter, *H* her husband and *M* her mother. *A* had inherited property from her father. All property of *A* including that inherited by her from her father will devolve simultaneously on *DD* and *H*. The case does not fall under clause (a) of sub-section (2) because *A* had left issue. It is governed by entry (a) of sub-section (1).

2. *A* dies leaving her surviving *H* her husband, *M* her mother and *B* her brother. *A* had inherited property from her father. *A*'s (other) property will devolve on *H*; but the property inherited by *A* from her father will not devolve on *H* and will devolve on *M* and *B* who will take it simultaneously as heir of her father.

3. *A* dies leaving her surviving her brother and her step-mother (her father having married again after the death of *A*'s mother). *A* had inherited property from her mother. The property will devolve upon the brother and the step-mother in equal shares as heirs of her father (*t*1).

3A. *A* dies leaving her surviving her father's sister and her father's brother's son. *A* had inherited property left by her father. The property will devolve on the father's sister in preference to the father's brother's son as a sister under class II of the Schedule is a nearer heir than a brother's son (*t*2).

3B. *A* dies leaving her surviving sons and daughters of her father's sister and sons and daughters of her father's brother. *A* had property which she had inherited from her mother who in her turn had inherited the same from her husband that is *A*'s father. *A* became a full owner of the property when the Act came into force in 1956. The property will devolve on all the children of the father's sister and the father's brother simultaneously and in equal shares (*t*3).

4. *A* dies leaving her surviving *FBD* her father's brother's daughter, *MB* her mother's brother, and *MS* her mother's sister. *A* left property which she had inherited from her mother. The property will devolve on *FBD* as heir of her father.

5. *A* dies leaving her surviving *H* her husband, *B* her full brother and *US* her uterine sister her mother having remarried after the death of her father. *A* left property which she had inherited from her mother. The property will not devolve upon *H* but will devolve only upon *B* as heir of *A*'s father. *US* is not an heir of *A*'s father and cannot claim any share. Also see illustration 2 under Entry (b) of sub-section (1) *supra*.

6. *K* died childless leaving her surviving her husband as her nearest heir. *K* had acquired property under a will of her mother *M* whereby *M* had devised her property in favour of *K* as a legatee. The property will devolve upon the husband of *K* under cl. (a) of sub-section (1) and not under sub-section (2) (a) upon any heir of *K*'s father [*Jayantilal* v. *Chhanalal* ('68) A. Guj. 212].

7. *K* had acquired property under the will of her mother. *K* died after her husband. The property will devolve upon her husband's brother's son under cl. (b)

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(*t*) *Jayantilal* v. *Chhanalal* ('68) A. Guj. 212; *Kameswararao* v. *Vasudevrao* ('72) A.A.P. 189.

(*tt*) *Ayi Ammal* v. *Subramania Asari* ('66) A.M. 369.

(*t*1) This illustration has been remodelled after an error in it was pointed out in the decision in *Rangamma* v. *Annapurnamma* ('63) A. Mys. 168.

(*t*2) *Aparti Bewa* v. *Suna Stree* ('63) A. Orissa 166.

(*t*3) *Arunachalathammal* v. *Ramachandran* ('63' A.M. 255.

of sub-section (1) and not upon any heir of her father under sub-section (2) (a) [*Kameshwararao* v. *Vasudevarao* ('72) A.A.P. 189].

8. *K* who was a widow died without leaving any issue. *K* left property which she had received by way of gift from her father during the father's lifetime. The property will devolve upon the heirs of *K*'s husband under clause (b) of sub-section (1) and not upon *K*'s brother under sub-section (2) (a). This is because sub-section (2) (a) applies only to property which was "inherited" by the female Hindu [*Ayi Ammal* v. *Subramania Asari* ('66) A.M. 369].

Question may arise as to the devolution of property of the female intestate dying without leaving any issue when the property left by her had been inherited by her from her father or mother and there is no heir of the father at the time of her death but there are alive other heirs mentioned in sub-section (1) such as the husband or the husband's heirs or the mother's heirs. It was evidently not the intention of the authors of the enactment that in such a case the property should not go to any of such persons although they are referred to in sub-section (1). The clause seems only intended to affect and modify the general order of succession prescribed in sub-section (1) by varying "the order specified therein" and giving preference to the heirs of the father. There is nothing in the language of the section to prevent such property devolving on the husband or the heirs of the husband in any case and clause (a) must be read as applying to the situation envisaged by it, viz. when there are heirs of the father alive when the succession opens. In case of failure of the heirs of the father in any such case this clause (a) would have no application and succession would be governed by the rules laid down in sub-section (1). In such a case of failure of the father's heirs the property that might have been inherited by the female intestate from her mother will devolve upon the husband or the husband's heirs (where there are any such heirs) and not upon the heirs of the mother and if it was the intention of the Legislature that in case of the female intestate dying without issue property inherited by her from her father or mother should go in that direction and not devolve upon her husband or husband's heirs such intention has not become fully effective.

**Clause (b): Property inherited from husband or father-in-law.**—This clause engrafts another exception on the provisions relating to the general order of succession to the property of a female intestate laid down in sub-section (1). This exception provides for a special order of succession in case of property inherited by her from her husband or her father-in-law but its operation is confined to the case of her dying without leaving a son or a daughter or children of any predeceased son or daughter, in which case it says the devolution will not be upon the other heirs referred to in sub-section (1). A female may have inherited property from her husband as his heir. She may also have inherited property from her father-in-law as the widow of a predeceased son. In any such case the property so inherited is to go not to the other heirs referred to in sub-section (1) but to the heirs of the husband. It follows from the context that the heirs of the husband mentioned in this clause are not the heirs of the husband she might have remarried after the death of her first husband but heirs of *"the husband"* whose property she had inherited as his widow; and in case of property inherited from her father-in-law which could only be as widow of a predeceased son, the heirs contemplated are heirs of *"the husband"* from whose

father she inherited the property. The *other heirs referred to in sub-section* (1) are the father and mother of the intestate and the heirs of the father and the heirs of the mother. It would perhaps seem that clause (b) is redundant in this section because the order of priority in entries (a) and (b) of sub-section (1) would bring about the same result even in the absence of the clause. Entry (b) read with entry (a) in effect declares that in case the intestate dies without leaving any issue and the husband the property will devolve upon the heirs of the husband. Nonetheless the clause has a place in this section because it is conceivable that the intestate may have remarried after the death of her husband from whom she may have inherited property or after the death of the father-in-law from whom she may have inherited property and may die without issue but leaving her second husband. In such a case, in the absence of the present clause the property so inherited would pass to the second husband. Such a case would not be governed by entries (a) and (b) but would be governed by the present clause which enacts that such property will not devolve upon the other heirs referred to in sub-section (1), which would include the second husband who survives her, but will devolve upon the heirs of the first husband. The clause is not elegantly drafted but it must follow from the language used that the expression heirs of "*the husband*" in the clause refers to the husband whose property had been inherited by the intestate and the reference to the property inherited from the father-in-law as the widow of a predeceased son also indicates that the heirs must be of "*the husband*" from whose father she inherited the property. This seems to be the speciality of the situation and it is submitted that the heirs of the husband contemplated by the clause are heirs of the husband who was the source of the inheritance or whose father was the source of the inheritance.

Clause (b) has also a bearing on section 17 which lays down special provisions respecting persons governed by Marumakkattayam and Aliyasantana laws.

## *Illustrations: Clause (b)*

1. *A* dies childless leaving her surviving *H2* her second husband whom she remarried after the death of *H* her first husband. *H* had died leaving him surviving his widow *A* and his two brothers *B* and *C*. On the death of *H*, *A* had inherited his entire property. The property so inherited by *A* will on *A*'s death devolve under this clause upon *B* and *C* as the heirs of *H* and not upon *H2*. The same will be the position if *A* had inherited property from the father of *H* as the widow of a predeceased son and thereafter remarried *H2*.

2. *A* had remarried *H2* after the death of *H* her first husband. *H* had died leaving him surviving his widow *A* and his two brothers *B* and *C*. On the death of *H*, *A* had inherited his entire property. *H2* died during the lifetime of *A* leaving him surviving his widow *A* and *SH2* a son by a predeceased wife. On *A*'s death *A*'s (other) property will devolve upon her step-son *SH2* but the property inherited by her from *H* will revert to the heirs of *H* as if the property had been of *H* and *H* had died immediately after *A*. *B* and *C* will take the property as "the heirs of the husband" under this clause. *SH2* the step-son of *A* although an heir of *H2* the second husband will not be entitled to claim such property as an heir of *A*'s husband under entry (b) of sub-section (1) although the other property left by *A* will devolve upon him.

3. See illustrations 3 and 4 under Entry (a) sub-section (1) at p. 917 *supra*.

4. *A* dies leaving her surviving a son *S* and a daughter *D* by her first husband, and *H2* whom she had remarried after the death of *H* her first husband. Along with *S* and *D*, *A* had inherited an equal share in the property left by *H* and *A* left that pro-

perty (her share) when she died. The property left by her will devolve in equal shares upon *S*, *D* and *H2* under sub-section (1)(a) and clause (b) of sub-section (2) will not be applicable. *S* and *D* cannot exclusively claim the property on the ground that the property had been inherited by *A* from *H*.

5. In illustration 1 above if instead of inheriting the property *A* had acquired it by device under the will of *H* or the will of the father of *H* the property will devolve not upon *B* and *C* but upon *H2*. This is because clause (b) only applies to property acquired by inheritance (*t*4).

6. The same rule and the same reason as applied in illustration 5 above will apply in case of illustration 2 above if the property left by *A* had been acquired by her by device or bequest under the will of her first husband *H*. The property on *A*'s death will devolve upon *SH2* and not upon *B* and *C*.

Order of succession and manner of distribution among heirs of a female Hindu.

**16.** The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:—

*Rule 1.*—Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

*Rule 2.*—If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

*Rule 3.*—The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

This section read with section 15 may be said to constitute the Statute of Distribution applicable to heirs of a female intestate. The section lays down rules relating to the order of succession and the mode or manner of computation of shares of the various heirs of a female intestate.

**Rules 1 and 2.**—Rule 1 contains the explicit declaration of the law that among the heirs enumerated in entries (a) to (e) of sub-section (1) of section 15, those heirs referred to in a prior entry are to be preferred to those in any subsequent entry and those included in the same entry are to succeed simultaneously. Entry (a) includes sons; daughters; children of predeceased son and of predeceased daughter; and husband. These heirs, therefore, take the property simultaneously. The case of children of a predeceased

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(*t*4) Reference may be made to cases cited in f.n. (*t*) and (*tt*) above where the identical expression "inherited" used in cl. (a) of this sub-section came up for interpretation in a similar context.

son or daughter is, however, further governed by Rule 2 so that the children of a predeceased son or a predeceased daughter will not take *per capita* with the son or daughter or husband of the intestate but will take between them the share which their father or mother, as the case may be, would have taken if alive at the time of the death of the intestate, that is to say they will take *per stirpes*. Entry (c) includes mother and father who, in case of absence of heirs of the intestate in entries (a) and (b), will take simultaneously.

*Illustrations*

1. *A* dies leaving her surviving *H* her husband; *S*1 and *S*2 her two sons; *SS* the son of *S* a predeceased son; *WS*3 the widow of *S*3 another predeceased son; *D*1 and *D*2 two daughters; *DD* the daughter of *D* a predeceased daughter and *B* her brother. All these except *WS*3 and *B* will succeed to *A*'s property howsoever acquired as heirs included in entry (a) of sub-section (1) of section 15. They will take simultaneously and to the exclusion of *WS*3 and *B*. *WS*3 could have been an heir only under entry (b) and *B* could have been an heir only under entry (d) and are not entitled to succeed as there are heirs included in entry (a).

In the above illustration *S*1, *S*2, *SS*, *D*1, *D*2, *DD* and *H* who succeed simultaneously will each take one-seventh share. If *S* the predeceased son had instead of *SS* left more children they would also have taken only one share between themselves and could not have claimed an equal share with *S*1, *S*2 and the others. In their case the distribution would have been *per stirpes* and not *per capita*.

2. *A* dies leaving her surviving *S* a son by her first husband *H;* and *S*1 and *D* son and daughter respectively by her second husband *H*2. *A* had inherited property from *H*. All her property including the property inherited from *H* will devolve upon *S*, *S*1, *D* and *H*2 simultaneously and they will each take a one-fourth share. The case will not be governed by clause (b) of section 15(2) because *A* dies leaving issue.*

Also see illustrations under section 15.

3. *A* dies leaving her surviving *SW* the widow of *S* her predeceased son; *SSS*1 and *DSS*1 the son and daughter respectively of *SS*1 the predeceased son of her predeceased son *S*1. None of these are heirs included in entry (a) of section 15(1) but are heirs of her husband under entry (b). The property of *A* will be so divided between them that *SW* will take one-half and *SS*1 and *DSS*1 will each take one-fourth share. But property that *A* might have inherited from her mother or father will not devolve upon any of these persons as the heirs of *A*'s husband in accordance with entry (b) but will devolve upon the heirs of her father under section 15(2)(a).

Also see illustrations under section 15.

4. *A* dies unmarried leaving her surviving *B* her brother; *SB*1 and *DB*1 the son and daughter respectively of her predeceased brother *B*1; *CS*1, *CS*2 and *CS*3 the sons of *C* her predeceased sister; and *FW* her step-mother. In the absence of any heirs enumerated in entries (a) to (c) *A*'s property will devolve upon *B*, *SB*1, *DB*1, *CS*1, *CS*2, *CS*3 and *FW* as the heirs of her father. *SB*1 and *DB*1 will take only one share between them and *CS*1, *CS*2 and *CS*3 will take only one share between them. The shares of *B* and *FW* will be one-fourth each. The shares of *SB*1 and *DB*1 will be one-eighth each; and the shares of *CS*1, *CS*2 and *CS*3 will be one-twelfth each. This distribution is in accordance with Rule 3 of section 10. The property to be distributed will include any property that *A* might have inherited from her mother or father.

5. *A*'s mother *M* had remarried *MH*2 after the death of *A*'s father *F* and left her surviving *A; MH*2; and *UB* and *US* her son and daughter respectively by *MH*2 her second husband. Upon the death of her mother *A* had inherited her share of the property left by *M*. *A* dies unmarried leaving her surviving *UB* and *US* (her uterine brother and uterine sister); *MH*2 her step-father; and *FB* and *FSis.* her own father's brother and sister respectively. *A*'s property including property inherited by *A* from *M* will devolve upon *FB* and *FSis.* in equal shares as the heirs of her father *F* in preference to the heirs of her mother [s. 15(2)(a)].

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* Referred to in *Ram Kali* v. *Sohan Lal* ('72) A. P.&H. 419.

**Rule 3.**—The application of this rule in case of devolution of the property of the intestate under sub-section (1) of section 15 on the heirs of her husband, heirs of her father and heirs of her mother referred to respectively in entries (b), (d) and (e) of the same has already been pointed out. The rule also applies as has also been pointed out to the devolution of the property of the intestate on the heirs referred to in the two clauses of sub-section (2) of section 15, viz. the heirs of the father where she dies without leaving any issue and has left property inherited by her from her father or mother; and the heirs of the husband where she dies without leaving any issue and has left property inherited by her from her husband or father-in-law.

In all the above cases the *terminus a quo* is the husband or father or mother as if the husband or father or mother were the propositus and the ascertainment of the heirs will once again commence from the husband or father or mother as the case may be.

Special provisions respecting persons governed by marumakkattayam and aliyasantana laws.

**17.** The provisions of sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the *marumakkattayam* law or *aliyasantana* law if this Act had not been passed as if—

(i) for sub-clauses (c) and (d) of section 8, the following had been substituted, namely:—

"(c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates";

(ii) for clauses (a) to (e) of sub-section (1) of section 15, the following had been substituted, namely:—

"(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the mother;

(b) secondly, upon the father and the husband;

(c) thirdly, upon the heirs of the mother;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the husband";

(iii) clause (a) of sub-section (2) of section 15 had been omitted;

(iv) section 23 had been omitted.

**Succession to the property of a male or female Hindu governed by Marumakkattayam law or Aliyasantana law dying intestate.**—The Act as expressly stated in section 2 applies to all Hindus. It, therefore, applies to all persons including those who were governed by the Mitakshara school, the Dayabhaga school as well as those governed by the Marumakkattayam, Aliyasantana and Nambudri systems of law. Devolution of interest in the property of a *tarwad, tavazhi* or *illom* in case of persons governed by the Marumakkattayam or Nambudri law is regulated by section 7(1) of the Act. Devolution

of interest in the property of a *kutumba* or *kavaru* in case of persons governed by the Aliyasantana law is regulated by section 7(2) of the Act. And devolution to property known as *sthanam* held by a *sthani* or *sthanamdar* is regulated by section 7(3) of the Act. As regards the separate or self-acquired property of a person male or female governed by the Nambudri law the rules of succession to be now applied are those laid down in the various provisions of this Act. Succession to the separate or self-acquired property of a person male or female governed by the Marumakkattayam or Aliyasantana law is also governed by the provisions of this Act but with certain modifications, changes and omissions expressly stated in this section under the head "special provisions respecting persons governed by Marumakkattayam and Aliyasantana law."

## SUCCESSION IN CASE OF MALE INTESTATE

**Clause (i)** of this section relates to succession to the property of a male Hindu hitherto governed by any of the two systems of law. The initial words of the section so far as they relate to succession to male intestate refer to sections 8, 10 and 23. The effect of clause (i) read with the initial part of the section is by substitution to modify, change and omit certain provisions of the Act and to rule that all the provisions of the Act apply in case of such succession subject to such modification, change or omission. The effect of clause (iv) is that section 23 which contains special provisions respecting dwelling houses is not to apply in case of succession to the property of a person governed by any of the two systems of law. The general rules of succession laid down in section 8 in their application to the case of succession to the property of a male intestate governed by any of the two systems may be read as if the Act laid down:

*The property of a male Hindu, hitherto governed by the Marumakkattayam law or the Aliyasantana law, dying intestate (after the coming into operation of this Act), shall devolve according to the provisions of this Chapter:—*

(a) *firstly, upon the heirs, being the relatives specified in Class I of the Schedule;*

(b) *secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule; and*

(c) *thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates.*

Where a male Hindu governed by any of the two systems dies intestate his property devolves upon the heirs mentioned in the first or the second class (or category) as in any other case according to the general rules laid down in section 8. On failure of heirs in the two classes (or categories) the property devolves upon relatives constituted by the third category which includes relatives both agnates and cognates. The other provisions of the Act apply to any such case but subject to the variations already mentioned. Reference may be made to the Notes under section 8 and particularly to the Notes

relating to the first two classes under section 8 at pp. 866-879 *supra*. Reference may also be made to the Notes under Agnates and Cognates under section 8 bearing in mind the Rule laid down in the present section that there is to be no distinction or preference between agnates and cognates in case of persons governed by the two systems. Reference may also be made to the Notes under the other sections bearing in mind the variations already mentioned.

The modification, as regards succession to the property of a male intestate who was governed by any of the two systems, which affects agnates and cognates, will be seen from the illustrations below which only relate to cases where there is failure of heirs in Classes I and II of the Schedule.

*Illustrations*

1. Illustrations 1 to 8 under s. 9 at pp. 882-883 *supra* are equally applicable to the case of a male intestate governed by any of the two systems.

2. Illustrations 1 to 5 under s. 10 at pp. 885-886 *supra* are equally applicable to the case of a male intestate governed by any of the two systems.

3. Illustrations 1 to 3 under s. 11 at p. 887 *supra* are equally applicable to the case of a male intestate governed by any of the two systems.

4. Illustrations under s. 8 which relate only to the question of computation of degrees are equally applicable to the case of a male intestate governed by any of the two systems.

5. The heirs to be considered are *SSSS*, son's son's son's son; *SSSD*, son's son's son's daughter; *DSSS*, daughter's son's son's son; and *DDDD*, daughter's daughter's daughter's daughter. Here *SSSS* and *SSSD* are agnates and *DSSS* and *DDDD* are cognates. But they all belong to the same category by operation of clause (c). They have no degrees of ascent and they all have five degrees of descent. They are, therefore, entitled to succeed simultaneously. In practice there is no likelihood of such descendants becoming competing heirs but reference is made to them as they rank high up in the order of succession.

6. The heirs to be considered are *FFM*, father's father's mother; *FFF*, father's father's father; *FMM*, father's mother's mother; *FMF*, father's mother's father; *MMM*, mother's mother's mother; *MMF*, mother's mother's father; *MFM*, mother's father's mother; *MFF* mother's father's father. Here *FFM* and *FFF* are ascendants who are agnates and the rest are ascendants who are cognates. But they all belong to the same category by operation of clause (c). They all have four degrees of ascent and no degrees of descent. They are, therefore, entitled to succeed simultaneously. The remark at the end of illustration 5 above applies also to this illustration.

7. The competing heirs are *BSS*, brother's son's son, *BSD*, brother's son's daughter; *BDD*, brother's daughter's daughter; *BDS*, brother's daughter's son; *P* step-brother's son's son; *Q*, step-brother's daughter's daughter; *MBS*, mother's brother's son; *MBD*, mother's brother's daughter; *MSis.S*, mother's sister's son; and *MSis.D*, mother's sister's daughter. Here *BSS*, *BSD*, *BDD*, *BDS*, *P* and *Q* have all two degrees of ascent and three degrees of descent. *MBS*, *MBD*, *MSis.S* and *MSis.D* have three degrees of ascent and two degrees of descent. Therefore, in computation of degrees, the others are entitled to be preferred to *MBS*, *MBD*, *MSis.S* and *MSis.D*. But *BSS*, *BSD*, *BDD* and *BDS* are related to the intestate by full blood whereas *P* and *Q* are related to him by half-blood. Therefore, *BSS*, *BSD*, *BDD* and *BDS* are entitled to be preferred to all others. Each of them will take one-fourth share in the property of the intestate.

8. The competing heirs are *BSS*, brother's son's son; *BDS*, brother's daughter's son; *UB*, uterine brother; and *USis.* the uterine sister of the male intestate. Here *BSS* is an agnate and the others are cognates but they all belong to the same category by operation of clause (c). Relationship in case of heirs other than those in Classes I and II of the Schedule includes relationship by uterine blood. *BSS* and *BDS* have two degrees of ascent and three degrees of descent. *UB* and *USis.* have two degrees of ascent but only one degree of descent and are, therefore, entitled to be preferred. In the above illustration if the competing heirs had (instead of *BSS* and *BDS*) been *BS* and

*BD* the brother's son and brother's daughter respectively and *UB* and *USis.* the uterine brother and uterine sister of the male intestate, the position would have been different. *BS* and *BD* would have been entitled to succeed to the property as heirs specified in Class II of the Schedule and excluded *UB* and *USis.* who, being cognates, are heirs only in the third category of clause (c).

## SUCCESSION IN CASE OF FEMALE INTESTATE

**Clause (ii)** of this section propounds a definite scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act in case of persons who would have been governed by the Marumakkattayam law or Aliyasantana law if this Act had not been passed. The initial words of the section refer to sections 8, 10, 15 and 23 in so far as they relate to succession to a female intestate. Section 15 of the Act lays down general rules of succession in the case of female Hindus and the effect of clauses (ii) to (iv) of the present section is to substitute clause (ii) for sub-section (1) of section 15 and omit clause (a) of sub-section (2) of that section and also to rule that section 23 which contains special provisions respecting dwelling houses is not to apply in case of succession to the property of a person governed by any of the two systems of law. The general rules of succession laid down in section 15 in their application to the case of succession to the property of a female intestate governed by any of the two systems may be read as if the Act laid down:

(1) *The property of a female Hindu hitherto governed by the Marumakkattayam law or Aliyasantana law, dying intestate (after the coming into operation of this Act), shall devolve according to the rules set out in section* 16—

(a) *firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;*

(b) *secondly, upon the father and the husband;*

(c) *thirdly, upon the heirs of the mother;—*

(d) *fourthly, upon the heirs of the father; and*

(e) *lastly, upon the heirs of the husband.*

(2) *Notwithstanding anything contained in sub-section* (1)—

*any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.*

It will be noticed that the scheme of succession laid down here is in many important respects materially different from that under section 15 of the Act. Reference may be made to the Notes under section 15 bearing in mind the different scheme of succession propounded in this section.

The substituting clause (ii) groups the heirs of the female intestate into five categories described as entries (a) to (e). The order of succession laid

down in these entries is not, however, a complete statement of the law. An exception is engrafted on the same to the effect that in case the female intestate dies without leaving any issue (son, daughter, or children of any predeceased son or daughter), any property inherited by her from her husband or from her father-in-law, is to devolve not upon the other heirs mentioned in the entries, in the order specified therein, but upon the heirs of the husband. Subject to this exception the heritable property of a female intestate devolves upon her heirs enumerated in the five entries. Among the heirs so specified those in entry (a) are preferred to those in entry (b); the heirs in entry (b) are preferred to the heirs in entry (c) and so on in case of succeeding entries (*w*). Therefore, it is only in case of failure of the heirs specified in entry (a), but not until then, that the property will devolve upon the heirs listed in the next entry and similarly in order of succession.

The effect of the rules laid down in this section in relation to the property of a female intestate may be summarised as follows:

(1) The *general order of succession* laid down in the substituted entries (a) to (e) applies in case of all property of a female intestate howsoever acquired except in case of property inherited by her from her husband or father-in-law.

(2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue must take the property simultaneously, and if the mother of the intestate is alive they take simultaneously with her in accordance with the substituted entry (a). In such a case the exception does not at all come into operation.

(3) In case of a female intestate *dying without issue* but leaving her mother the mother will take all her property *except*:

(a) property inherited by her from her husband or father-in-law which will revert to the heirs of the husband in existence at the time of her death; and

(b) in case the female intestate had remarried after the death of her first husband the property inherited by her from him or his father (as the widow of a predeceased son) will revert to the heirs of the first husband in existence at the time of her death.

(4) In case of a female intestate *dying without issue* property inherited by her from her husband or father-in-law will go to the heirs of the husband and in such a case the *terminus a quo* will be the husband as if the husband were the propositus and the ascertainment of the heirs will once again commence from the husband and the order of succession will be in accordance with the substituted clauses (a) to (c) relating to the estate of a male intestate.

**Order of succession and manner of distribution among heirs of a female Hindu under section 17 read with sections 15 and 16.**—Clauses (ii) and (iii)

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(*w*) S. 16, Rule I.

of the present section have to be read with section 15 as already indicated. The substituted entries (a) to (e) and the exception to the operation of the order specified in those entries have to be read with section 16 which may be said to constitute the Statute of Distribution. The following Illustrations relate to succession to the property of a female intestate governed by any of the two matriarchal systems and the distributive shares or portions of the persons entitled to her property. *Reference to the entries in the Illustrations is to the substituted entries.*

*Illustrations*

1. *A* dies leaving her surviving *S*, her son; *SS*1 and *DS*1, son and daughter respectively of *S*1 her predeceased son; *D* and *D*1, her two daughters; *M* her mother; and *H* her husband. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *SS*1, *DS*1, *D*, *D*1 and *M* as heirs specified in entry (a). *H* could have been an heir only under entry (b) and is not entitled to succeed as there are heirs under entry (a). The shares of *S*, *D*, *D*1 and *M* will be one-fifth each. *SS*1 and *DS*1 will between them take only one share (*per stirpes*) that is they will get one-tenth each of the property by operation of rule 2 of section 16.

2. *A* dies leaving her surviving her adopted daughter *D* and her husband *H*. All the property of *A*, howsoever acquired, will devolve only upon *D*.

3. *A* dies leaving her surviving *SH* and *DH* her son and daughter by *H* her first husband and *DH*1 a daughter by her second husband. *A* had inherited half of *H*1's property on his death. All the property of *A* will devolve in equal shares upon *SH*, *DH* and *DH*1 under entry (a). Since *A* dies leaving issue the exception does not come into operation in this case.

4. *A* dies leaving her surviving her father, her husband and her mother's brother. *A* had inherited considerable property from her mother. All the property of *A* will devolve upon her father and husband in equal shares under entry (b). The mother's brother features only in entry (c) and is therefore not entitled to any share.

5. *A* dies leaving her surviving *SSS* the son of a predeceased son of a predeceased son and *SDS* the son of a predeceased daughter of a predeceased son and *B* her brother. *SSS* and *SDS* are not heirs specified in entry (a) or (b) or (c). *A*'s property will, therefore, devolve on *B* alone as the heir of *A*'s mother under entry (c). If, however, *A* has left any property inherited by her from her husband or father-in-law such property will not devolve on *B* but will devolve on the heirs of the husband. *SSS* and *SDS* will become entitled to the same in equal shares as the husband's heirs under Class I of the Schedule.

6. *A* dies unmarried leaving her surviving *FB*, her father's brother and *MB*, her mother's brother. The property left by *A* had been inherited by her from her father. It will devolve upon *MB* as the heir of her mother under entry (c)—which will operate twice over—in preference to *FB* who is only an heir mentioned in entry (d).

7. *A* dies unmarried leaving her surviving *B*, her full brother; *C* her full sister; and *UB* and *US* her uterine brother and uterine sister respectively (*A*'s mother having married again after the death of *A*'s father). All the property left by *A* will devolve upon *B*, *C*, *UB* and *US* as the heirs of her mother under entry (c).

8. *A* dies unmarried leaving her surviving *FBS*, her father's brother's son and three daughters of her father's sister. The property left by *A* will devolve upon *FBS* and the three daughters of her father's sister in equal shares as the heirs of her father under Entry (d). *FBS* and the three daughters of the father's sister are the father's heirs under clause (b) relating to succession to the property of a male intestate (heirs enumerated in Entry IV of Class II of the Schedule).

9. *A* dies leaving her surviving *M* her mother; *F* her father; *P* her husband's father's brother's son and *Q*, her husband's mother's sister's daughter. *A* had inherited the property from her husband and a part of it from her father-in-law. *A*'s property will not devolve upon *M* or *F* but upon the heirs of her husband. *P* is her husband's agnate having three degrees of ascent and two degrees of descent and *Q* is her husband's cognate having three degrees of ascent and two degrees of descent. *A*'s property will be divided between *P* and *Q* in equal shares. This will be by operation of the exception and under the substituted clause (c) relating to agnates and cognates.

In the above illustration if *P*'s father was not the full brother but step-brother of *A*'s husband's father, *P* would not have become entitled to a share in the property. The nature of relationship of *P* and *Q* with *A* is the same in every respect (by computation of degrees) but full blood is to be preferred to half-blood (s. 18).

## GENERAL PROVISIONS RELATING TO SUCCESSION

Full-blood preferred to half-blood.

**18.** Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

Succession to the property of a Hindu is now governed by the provisions contained in Chapter II of this Act. Sections 5 to 17 are grouped under the heading "General" and sections 18 to 28 under the heading "General provisions relating to succession." The rules laid down in sections 18 to 28 are supplementary to the provisions in sections 5 to 17. These rules are not merely explanatory but some of them lay down substantive rules involving legal principles.

This section is a substantial reproduction of the rule of Hindu law whereby relations of the whole blood are preferred to those of the half-blood. The section lays down a rule of general applicability to heirs male and female alike. It must be noted that the applicability of this rule of preference is conditioned by the words "if the nature of the relationship is the same in every other respect." The words *if the nature of relationship is the same in every other respect* may require judicial interpretation. It is plain that a full brother is preferred to a half brother and a full sister is preferred to a half sister. But doubt may perhaps be raised as to whether the nature of the relationship with the intestate of his brother and sister enumerated in Entry II of Class II of the Schedule can be said to be the same in every respect, and a full brother would be preferred to a half sister or a full sister would be preferred to a half brother and the same doubt may be raised in other cases where the competing heirs are similarly related to the intestate. The rules of preference applicable to agnates and cognates of a male intestate emphasize that the nearness of relationship recognised under the Act depends in their case on the number of degrees of ascent or descent or both of ascent and descent and the same doubt may perhaps be raised in case of some of those relatives. The section speaks of the nature of relationship being the same and not the relationship being the same and it would seem that in all such cases heirs related to an intestate by full blood would be preferred to heirs related by half-blood having regard *inter alia* to the nature of relationship indicated in the scheme of the Act itself. The meaning of the words "nature of relationship" must be found in the sense in which they best harmonise with the scheme and object of the Act and not so much in a strictly etymological propriety of language. The general scheme of succession under the Act is to treat the son and the daughter in *aequali jura* and to regulate the order of succession having regard to the degree of kindred to him. It is therefore, submitted that since a brother and a sister of the intestate stand in the same degree of relation to him the nature of their relationship with the

intestate is the same in every other respect (*w*1). The same considerations apply to cases under Entries IV, VI, VII and IX in Class II of the Schedule and where the competing heirs are agnates or cognates and relationship is by full blood and half-blood (see Illustrations below).

The rule laid down in the section applies only when the nature of relationship is the same according to every relevant mode or manner affecting its nature and the rules of preference laid down in the Act for determination of the order of succession. It cannot therefore be evoked when a particular heir is preferred to another by operation of any such rule regulating the order of succession. Thus for instance it has no application where the competing heirs are a full brother's son and a half-brother or a half-sister of a male intestate. The full brother's son is not related to the intestate equally with them in every respect. He is an heir under Entry III of Class II of the Schedule while the half-brother and half-sister are heirs specified in Entry II and therefore entitled to be preferred irrespective of their being related to the intestate by half-blood.

*Illustrations*

1. *P* a male intestate dies leaving him surviving *A*, a full sister's daughter and *B*, a half-brother's son. Brother's son and sister's daughter are both heirs specified in Entry IV of Class II of the Schedule. The nature of their relationship with the intestate is the same and the full sister's daughter will be preferred to the half-brother's son.

2. *P* a male intestate dies leaving him surviving *A*, his father's half-brother; *B* his father's sister; *C*, his father's full brother's son; and *D*, his mother's full brother. *A* and *B* are heirs specified in Entry VII of Class II of the Schedule, *D* is an heir under Entry IX and *C* is only an agnate. *C* and *D* are excluded as remoter heirs. The relationship of *A* and *B* with the intestate is the same in every respect except that *B* is related to him by full blood and *A* by half-blood. *B* will be preferred to *A* and inherit the whole of *P*'s property.

3. *P* a male intestate dies leaving him surviving *A*, his mother's half-brother; *B*, his mother's half-sister; and *C*, his mother's full-brother's son. *C* is excluded as a remoter heir. The relationship of *A* and *B* with the intestate is the same in every respect and both are specified as heirs under Entry IX of Class II of the Schedule. They are both related to the intestate by half-blood and not entitled to any preference *inter se* and will take *P*'s property in equal shares.

4. The competing heirs of *P* a male intestate are *A*, the son of his father's half brother; and *B*, the daughter of his father's full brother. They are both agnates of *P* and the nature of their relationship with him is the same. *B* is related to *P* by full blood and will be preferred to *A*.

5. The competing heirs of *P* a male intestate are *A*, the son's son of his father's full brother; and *B*, the daughter of his father's half brother. *A* and *B* are both collateral agnates. Both the claimants have three degrees of ascent but *A* has three degrees of descent and *B* has only two degrees of descent with the result that she is preferred to *A* although she is related to *P* by half-blood and *A* is related to *P* by full blood. The nature of relationship of *A* and *B* with *P* is not the same in every respect.

6. The competing heirs of *P* a male intestate are *A*, his mother's full brother's son; and *B* his mother's half sister's son. *A* and *B* are both collateral cognates. Both the claimants have three degrees of ascent and two degrees of descent. The nature of their relationship with *P* is the same. *A* is related to *P* by full blood and will be preferred to *B*.

7. *P* a female intestate dies leaving her surviving *A*, her husband's half-brother; *B*, her husband's full sister; and *M*, her mother. All the property of *P* except any property that she might have inherited from her father will devolve upon the heirs of *P*'s husband under Entry (b) of section 15(1) as if such property had been the

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(*w*1) The same view has been taken in *Sarwan Singh* v. *Dhan Kaur* ('71) A.P.&H. 323 [full sisters preferred to step brothers].

husband's and the husband had died intestate in respect thereof immediately after *P*'s death. *B* as the full sister of *P*'s husband will inherit such property in preference to *A*.

8. *P* a female intestate dies leaving her surviving *H*, her husband; *B*, her full-brother; and *C*, *D* and *E*, her step-sisters her father *F* having remarried after the death of *M* her mother. On the death of *M* her property had devolved on *B*, *P* and *F*. All the property left by *P* had been inherited by her from her mother. Under section 15(2)(a) her property will not devolve upon her husband but will devolve upon the heirs of her father. The heirs of the father being *B*, *C*, *D* and *E*, it may possibly be contended that they should in any such case inherit *P*'s property in equal shares. The rule about full-blood being preferred to half-blood is, however, of general application and the purpose of ascertaining the heirs of the father is really to determine the heirs of the intestate. Ultimately, therefore, the question of relationship by full blood being preferred to half-blood must operate and *B*, her full brother, will be preferred to the step-sisters (*w*2).

**19.** If two or more heirs succeed together to the property of an intestate, they shall take the property,—

Mode of succession of two or more heirs.

(a) save as otherwise expressly provided in this Act. *per capita* and not *per stirpes*; and

(b) as tenants-in-common and not as joint tenants.

This section also is a substantial reproduction of the rule of Hindu law whereby subject to limited exceptions persons of the same relationship to the intestate take *per capita*, that is, the estate is divided into as many shares as the number of heirs, each heir taking one share. The section lays down the general rule of distribution that two or more heirs of a male or female intestate who succeed together under the Act take property *per capita* and as tenants-in-common and not *per stirpes* unless there is an express provision to the contrary.

In case where distribution of an intestate's estate takes place *per capita* each claimant has a share in his or her own right as in equal relationship declared to exist by any specific provision or equal degree of kinship established by reckoning degrees of ascent or descent or both. Thus for instance distribution among the four heirs of a male intestate mentioned in Entry II of Class II of the Schedule, viz. son's daughter's son, son's daughter's daughter, brother and sister is *per capita*. They all succeed together and each has an equal share in his or her right as an heir claiming relationship *in equali jura* declared to exist by one specific entry. There is no express provision to the contrary in the Act applicable to heirs enumerated in any particular entry in Class II and section 11 enacts that heirs specified in any one entry in that class share equally. In distribution *per stirpes* the claimant gets a share as representing another person. Thus for instance in case of distribution of property of a male intestate among his heirs in Class I of the Schedule while the surviving sons and daughters and the mother of the intestate are *each entitled to take one share, that is per capita* the heirs in the branch of a predeceased son or a predeceased daughter *takes between them one share* as expressly laid down in section 10, rule 3. Here in case of the latter, distribution is *per stirpes* and on the principle of representation.

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(*w*2) This illustration came up for consideration in *Rangamma* v. *Annapurnamma* ('63) A. Mys. 168. Reference may be made to illus. 3 under Notes on Sub-section (2) Clause (a) of Section 15 *ante* which had now been modified.

Instances of exceptions to the general rule about distribution *per capita* are expressly provided in rules 1, 3 and 4 of section 10: rule 2 of section 16; by operation of sub-section (2) of section 15 whereunder the property of a female intestate devolves in certain cases on the heirs of the father or husband of the intestate; and under the proviso to section 6 which brings about the operation of rules 1, 3 and 4 of section 10 in the case of a male Hindu who dies leaving any heirs mentioned in the proviso to section 6 and having at the time of his death an interest in a Mitakshara coparceneray.

**20.** A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

Right of child in womb.

It is by fiction or indulgence of the law that the rights of a child born *in justo matrimonio* are regarded by reference to the moment of conception and not of birth and the unborn child in the womb if born alive is treated as actually born for the purpose of conferring on him benefits of inheritance. The child in embryo is treated as *in esse* for various purposes when it is for his benefit to be so treated. This view is not peculiar to the ancient Hindu law but one which is adopted by all mature systems of jurisprudence. This section recognises that rule of beneficent indulgence and the child *in utero* although subsequently born is to be deemed to be born before the death of the intestate and inheritance is to be deemed to vest in the child with effect from the date of the death of the intestate.

The section is in words of sufficient amplitude and applies not only to cases where under the Act the heir male or female in order to become entitled to succeed to the intestate must be born of *justum matrimonium* but also to those cases where an illegitimate child is entitled to claim relationship and inheritance by virtue of the proviso to section 3(1)(j). The rule will also apply to the case of children of a void or voidable marriage who are within the purview of section 16 of the Hindu Marriage Act, 1955 (*y*). That section in terms speaks of children in the womb of their mother. The operation of that section is, however, limited as pointed out in the Notes under that section.

It is required that the child in the womb must be born alive.

In any such case, although the general law is that succession is never in abeyance, the legal fiction comes into operation and the child takes the inheritance or his or her share of the inheritance and since the inheritance is deemed to vest from the date of the death of the intestate the necessary consequence is to divest wholly or partially the property which might have vested in any other person or persons as heirs of the intestate. The alienee of any property from any such heir is also affected by the rule. Such divesting of

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(*y*) See Notes at pp. 760-765 *supra*.

property will occur in case of all the different modes of succession laid down in sections 6, 8, 15 and 17. A natural corollary of the rule relating to vesting recognised in this section is that in case of the death of the child at any time after birth the inheritance devolving on the child will go by succession to the heirs of the child.

Presumption in cases of simultaneous deaths.

**21.** Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

**Presumption in cases of simultaneous deaths.**—The question whether any artificial presumption should be invoked or not has not been free from difficulty when disputes have arisen about continuance of life and time of death in case of persons, often members of the same family, perishing in a common calamity in circumstances rendering it uncertain which of them survived the other or others and rights of third parties are affected. Allowing the question to be determined by ordinary rules of burden of proof in any such case can hardly be said to have given satisfactory results and if anything has been an inducement to excessive subtleties reprobated in law. Death may or may not have been simultaneous in case of catastrophe such as shipwreck, earthquake, explosion, conflagration, railway or flying accident, bombing and the like. The section is intended to apply to such cases and lays down a rule of artificial presumption when question arises as to the priority in point of time of the death of any such person or persons termed *commorientes* in the Roman Law.

The section follows the rule now enacted in England in Law of Property Act, 1925, sec. 184: "In all cases where . . . two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such death shall, subject to any order of the court, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." That section has been considered by Courts in England and it has been held that the words "subject to any order of the court" mean that the presumption is to prevail unless there is evidence leading to a defined and warranted conclusion that one died before the other (*z*). The same is the effect of the words "until the contrary is proved" which find place in the present section. The statutory presumption may be rebutted by evidence beyond doubt that each died at precisely the same moment of time or that the elder had in fact survived the younger. The court will not, however, exclude the presumption in favour of the survival of the younger unless there is evidence leading to a defined and warranted conclusion to the contrary.

The section applies both in case of testamentary and intestate succession and in case of *commorientes* governed by the present Act it would operate as

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(*z*) *Hickman* v. *Peacy* (1945) A.C. 304; *Chillingworth* v. *Bate* (1947) 2 All E.R. 418; *Lee-Barber* v. *Reynolds* (1942) 2 All E.R. 46.

an important proviso to s. 105(2) of the Indian Succession Act and illustration (vi) to that section would have no bearing (*zz*). It has been observed that this section has retrospective effect as the law of evidence is a law of procedure (*zz*1).

*M* and her daughter *K* died in a fire and on consideration of evidence the conclusion was reached that they had perished in circumstances rendering it uncertain whether either of them had survived. Applying the rule of presumption laid down in this section it was held that *K* the daughter had survived her mother. Prior to her death *M* had executed a will and left her property to *K* as a legatee and the property devolved on the heirs of *K* (*zz*).

A defendant in a partition suit was murdered at night along with her foster daughter in whose favour the defendant had bequeathed her property by a will. It was uncertain as to who died first. The heirs of the foster daughter were directed to be brought on the record of the partition suit in preference to the sons of the defendant who claimed to be the heirs of the latter on basis of intestacy (*zz*2).

**22.** (1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

Preferential right to acquire property in certain cases.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

*Explanation.*—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

**Pre-emption.**—This section appears to have been thought necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an outsider by a co-heir of his or her interest in property simultaneously inherit-

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(*zz*1) *In re Mahabir Singh* ('63) A. Punj. 66 [husband and wife: wife legatee]. Also see *In re Mahabir Singh* ('63) A. Punj. 66.

(*zz*) *Jayanilal* v. *Chhanalal* ('68) A. Guj. 212.

(*zz*2) *Setty* v. *Gyanachandrappa* ('70) A. Mys. 87.

ed along with other co-heirs. The right declared by the section is analogous to the right of pre-emption which tends to raise clogs and fetters on the full sale and purchase of property and is in general regarded as opposed to equity and good conscience. Even when recognised it requires to be encompassed by rigid rules and limits lest the right should be exercised vexatiously. The note of the Joint Committee says that it would be just and proper to provide that in case any heir desires to transfer his or her interest in the property inherited under the provisions of this Act, the right of pre-emption should be given to others. The preferential right to acquire property under the section is confined only to cases of devolution of property upon two or more heirs specified in Class I of the Schedule.

The section requires more explicit and stringent language. It does not say how and when the right of preference is to be exercised. It is loosely worded and the expression 'transfer' itself is likely to create some difficulty. It could not have been intended to apply, for instance, to transfer of interest by way of mortgage. Probably the operation of the rule was meant to apply to an out and out sale of the interest or a gift of the same to an outsider. Sub-section (2) would seem to indicate such intention. Moreover there is the danger of subtle devices being resorted to for defeating the object underlying the section.

The effect of the section may be thus summarised:

(1) In case any heir specified in Class I of the Schedule desires to dispose of his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an intestate under the provisions of the Act the latter have a preferential right to acquire that interest by purchase.

(2) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by sub-section (1) the price will be determined by the court in an application made for the purpose. The intending purchaser is not, however, bound to pay the price fixed by the court. If he does not choose to pay the same he will only be liable to pay costs of the application.

(3) In case of two or more heirs seeking to exercise the right conferred by sub-section (1) that heir who offers the highest consideration must by preferred and allowed to acquire the interest.

**Sub-section (1)** does not apply to all categories of heirs who succeed simultaneously to the property of an intestate but its operation is confined to cases where the property referred to in the section devolves upon two or more heirs specified in Class I of the Schedule. The intestate may be a male or a female. The sub-section applies to any immovable property of an intestate as also the interest of the intestate in any business carried on by him or her alone or in conjunction with others. The business includes business carried on by the intestate in partnership with others. It may be noted that rights of the other partners or the incidents of partnership are not intended to be affected by the rule.

**Sub-section (2)** deals with the question of quantum of consideration to be paid by the other heir or heirs who claim the preferential right to acquire the interest proposed to be transferred by a co-heir. If the parties are unable to agree as to the price, an application can be made to the court and the court will assess the price that should be paid by the intending purchaser or purchasers. If the intending purchaser is not willing to pay the amount at which the interest is valued by the court he cannot be compelled to do so unless he has actually agreed to pay the price that may be determined by the court. But in such a case he will have to pay the costs of the application. The court will fix the fair value of the interest after taking into consideration all relevant facts and evidence as to price that may be produced before it. It will also take into account the highest amount that any one of the parties may be willing to pay. This would enable the court to assess the fair value which may be more but would normally not be assessed at anything less than what any intending purchaser (outsider) is willing to pay.

**Sub-section (3)** lays down in effect that where there are two or more heirs willing to acquire any interest under this section for the consideration determined by the court the one who offers the highest amount will be preferred.

**23.** Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Special provisions respecting dwelling-houses.

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

**Special provision respecting dwelling-houses.**—The object and importance of the rule here enacted is easily discernible. One objection raised against the right of a female to be recognised as an unqualified heir and to equable distribution of the property of a Hindu who dies intestate was that in many cases the property may consist substantially of the family dwelling-house and the allotment of a share to a daughter and particularly a married daughter in such a case would be fraught with serious consequences to the sons of the intestate. The note of the Joint Committee says that this section restricts the right of a female heir to claim partition of the family dwelling-house so long as the male heirs do not choose to effect partition of the same, but it expressly recognises her right to reside in such house. The proviso to the section was added at a later stage of legislation.

The section cannot have retrospective operation and does not apply to the case of an intestate who died before the commencement of the Act (*z*1).

It is rather unfortunate that the rule enacted in this section, which must necessarily apply even to small and modest family dwelling-houses in towns and villages, should not have been more clearly stated. The rule is a statutory novelty and obviously required careful particularity of language. The section is not very lucid as it stands. The expression "members of his or her family" used in describing the occupants of the family dwelling-house is likely to raise some doubtful points. Some other difficulties of interpretation likely to arise are mentioned in the notes which follow.

Partition is a necessary incident of the tenancy-in-common declared by the Act generally to exist in case of all heirs male and female who succeed at the same time. The section is intended to ensure easement of disruptive influences which would operate if the right of a female heir to claim partition of the family dwelling-house were left unrestricted. The restriction imposed by the section is applicable where the intestate or female is survived by male and female heirs enumerated in Class I of the Schedule and not where the intestate is survived only by heirs in Class II of the Schedule or by agnates or cognates. The restriction is confined to the right of any of the female heirs where there are other male heirs enumerated in Class I and does not apply to a case where the heirs in that class are only males or only females. The restriction it will be observed does not affect in any manner the devolution of the family dwelling-house upon all the heirs including female heirs of the intestate; nor does it affect the right of any such female heir to transfer her interest in it subject to the provisions of section 22. The restriction also does not affect the right of a son of a predeceased daughter (who is one of the heirs specified in Class I of the Schedule) to claim partition of the dwelling house. The restriction is strictly *confined to the right of such female heir to ask for partition* of the family dwelling-house and operates only:

(1) if the whole family dwelling-house is occupied by the members of the family of the male or female intestate, and

(2) until the male heirs choose to divide their shares in it.

As the daughter is an heir to the property of the intestate including the dwelling-house she would be a necessary party to a suit or appeal relating to the dwelling-house and non-impleading of her would result in abatement (*z*2).

**"Surviving . . . her . . . heirs specified in Class I of the Schedule".**—The words *heirs specified in Class I of the Schedule* are used in a descriptive sense and the reference to the heirs in Class I of the Schedule is to economise words. In case of a female intestate, her male heirs, therefore, who may prevent partition of the family dwelling-house can only be her son, son's son, son's son's son and daughter's son and not her husband. It must follow that if a female intestate dies leaving her surviving her husband, a married daughter and other daughters who are unmarried, the married daughter can enforce partition of the family dwelling-house although it is wholly occupied by mem-

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(*z*1) Reference may be made to *Upendra Nath Das* v. *Chintamani Devi* A.I.R. (1963), Cal. 22.
(*z*2) *Raghunandan* v. *Rambalak* ('64) A.P. 206.

bers of the family. But if in such a case the intestate had also left sons of a predeceased daughter the married daughter will not be entitled to insist on partition until the latter choose to divide their respective shares in the dwelling house and even though the daughter's sons were not living with the family. The husband of the intestate may in such a case enforce his own independent right to partition as an heir of the intestate under section 15 but he may not be willing to do so. Some anomalous situations, as already mentioned, are likely to arise from the language of the section.

**"Dwelling-house wholly occupied by members of his or her family".**— The expression dwelling-house is not defined in the Act. It is a thing rather difficult to define. But the context shows that the reference is to the dwelling-house which in the colloquial sense the intestate normally occupied with the members of his or her family and regarded as his or her abode of permanent residence and which upon his or her death the members of the family can be said to have continued to occupy. Occupation by the members of the family does not necessarily mean actual residence or continuous residence in the house; nor does it mean that all the members must be residing in the house. In practice much difficulty need not arise because the linguistic equivalent of the expression family house used in ordinary parlance in various part of the country will be a pointer to the dwelling-house respecting which special provision is made in this section and if any problem arises it will have to be solved in a commonsense way. Whether a particular house can be regarded as the dwelling-house contemplated by the section or not will also depend on the facts and circumstances of the particular case. The house must be wholly occupied by the members of the family and the restriction on the right to claim partition will not operate for instance where it is only partly occupied and partly or substantially let out to tenants. The occupation contemplated by the section is of members of the family of the intestate and it may not be easy to say who are to be regarded as members of the family of the male or female intestate and particularly of the latter. It seems doubtful whether any hard and fast rule will be laid down. Here also any difficulty that may arise will have to be resolved in a commonsense way and having regard to the facts and circumstances of the case.

**"Until the male heirs choose to divide their respective shares therein".**— The right of a female heir specified in Class I of the Schedule to demand actual partition of the family dwelling-house is deferred and kept in abeyance until the male heirs specified in Class I decide to partition it, that is to divide it by metes and bounds or realise its sale proceeds. Question may perhaps arise whether the special restriction enacted in this section on the right of a female heir to demand actual partition of the family dwelling-house applies when there is only one male heir of the intestate under Class I of the Schedule. The words 'until the male heirs choose to divide their respective shares therein' may suggest that there must be at least two such male heirs if the restriction is to operate. The object of the special provision is to prevent female heirs and particularly a daughter of the intestate from creating a situation in which partition of the family house may entail a forced sale of it or otherwise cause hardship to the son or sons of the intestate where it may not be possible for the son or sons to buy off the share of the female heir who

insists on actual partition of it. It is submitted that there is nothing repugnant in the subject or context to prevent the operation of the rule laid down in section 13(2) of the General Clauses Act to the effect that the plural shall include the singular and the restriction will apply even where there is only one male heir who does not choose to divide his respective share in the dwelling-house. It would seem that the right of a female heir to demand partition may be deferred and remain in abeyance under this section till the lifetime of the male heirs enumerated in Class I of the Schedule or the last survivor of them unless a partition of the dwelling-house is sought by any one of them before such time. The restriction will cease to operate on the death of the last of such male heirs of the intestate.

Certain widows re-marrying may not inherit as widows.

**24.** Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

**Disqualified heirs.**—Sections 24 to 28 deal with the question of dis-qualification of heirs. Section 28 lays down that no person shall be disqualified from succeeding to any property on any ground whatsoever except on those expressly mentioned in the Act, viz. remarriage in cases falling under section 24; murder in cases falling under section 25; and conversion in cases falling under section 26. Section 27 lays down a general rule. Succession in any case where there is a disqualified heir takes place as if such person had died before the intestate.

This section deals with one of the grounds for disqualification, namely remarriage, but the disqualification is confined only to certain heirs. It will be noticed that remarriage is not a disqualification in case of every female relative of the intestate. It is confined to the case of the three female heirs mentioned in this section and who are entitled to succeed under the Act as widows of relatives of the intestate. The step-mother does succeed as the widow of the father but the disqualification does not reach her. The mother of the intestate does not succeed as a widow of the father but in her own right (*z*3) and in case of the widow of the intestate there can be no question of any remarriage before the succession opens.

*Widow*: See p. 869 *supra*.

*Mother*: See pp. 871, 919 *supra*.

*Step-mother*: See pp. 872, 919 *supra*.

**"Related to the intestate as the widow of a predeceased son . . .".**—The section applies to certain heirs of a male as well as female intestate. In case of a female intestate the heirs of her husband and the heirs of her father can succeed to her property under sub-clauses (b) and (d) of section 15(1) and

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(*z*3) For instance see *Mantorabai* v. *Paretanbai* ('72) A.M.P. 145.

the question of the application of this section can arise. The section in its application to heirs of a female intestate reads: "related to an intestate as the widow of a predeceased son . . ."; it does not say that the person disqualified must be related to an intestate as the widow of *her* predeceased son, etc. Thus for instance the widow of a predeceased son of her husband by another wife who may otherwise become entitled to succeed to the property of the female intestate may have remarried before the succession opens. The disqualification enacted in this section, it would seem, covers the case of any widow who claims to succeed as—the widow of a predeceased son; or the widow of a predeceased son of a predeceased son; or the widow of a brother of the husband or father of the female intestate under sub-clauses (b) and (d) of section 15(1); or by operation of the provisions of section 15(2) or under section 17.

**". . . as such widow".**—The disqualification laid down in the section applies only when the heir who is a widow claims to succeed on the ground that she is the widow of a predeceased son, or widow of a predeceased son of a predeceased son or widow of a brother and not where the same heir claims to succeed on the ground of any other relationship with the intestate.

**". . . if on the date the succession opens, she has remarried".**—The words 'if on the date the succession opens' make it clear that the disqualification does not apply where the widow remarries after the succession has opened. In such a case there can be no divesting of the property which becomes vested in her immediately the succession opens. It is not necessary, however, for the application of the section that the subsequent marriage should be subsisting or that the husband by the subsequent marriage should be alive at the time the succession opens. Even if the subsequent husband has died or she has been divorced before that time, her case will be covered by the section. The reason is that a widow succeeds as the surviving half of her husband, and she ceases to be so by remarriage.

**25.** A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committeed or abetted the commission of the murder.

Murderer disqualified.

**Murderer disqualified.**—The doctrinaire theory that provisions of a Statute of Distribution are paramount and forbid the consideration of any disqualification not contained in the statute itself was discountenanced by the Judicial Committee of the Privy Council in *Kenchava* v. *Girimallappa* (*a*) where it was observed that statutes regulating heirship or descent, or giving force to wills should be read as not intended to affect paramount questions of public policy or dapart from well-settled principles of jurisprudence. It was held in that case (a) that a murderer is disqualified from inheriting any interest in the property of the person murdered and (b) that the murderer in such a case should be treated as non-existent and not as one who forms the

(*a*) (1924) 51 I.A. 368; ('21) A.B. 270.

stock for a fresh line of descent. In this section which has to be read with section 27 the Legislature gives statutory effect to the rule laid down in the Privy Council case by adopting the principle of public policy underlying that decision. The disqualification it will be noticed is not general but confined to certain property. The murderer does not *ipso facto* forfeit his right to property in general or his right to inherit property of any other person succession to whose estate is not in any manner altered or accelerated by the murder.

The section has the effect of laying down that a person who commits murder or abets the commission of murder is disqualified from inheriting—

(a) the property of the person murdered, or

(b) any other property he may become entitled to succeed by reason of furtherance of succession resulting from the murder.

It is not necessary for the application of this section that the person disqualified should have been convicted of murder or abetment of murder. The disqualification will apply if it is established in any subsequent proceeding that the person to be disqualified had committed or abetted the murder (*a*1).

**". . . in furtherance of succession . . .".**—The reason of the rule laid down in the section is that it is contrary to public policy to permit a person to take advantage of his own wrong. Advantage may be sought by a person by murdering not the person whose property he seeks to acquire by inheritance but some other person through whom or after whose death he may in future acquire property by inheritance. Such a case would result in furtherance of succession to the owner of the property or to state it differently would result in acceleration of succession. Thus for instance if *A* has a brother *B* and his nephew *C* (the son of a predeceased brother) and *C* commits the murder of *B* (*B* being the nearer heir would have been entitled on *A*'s death to succeed to *A*'s property to the exclusion of *C*), *C* becomes disqualified from inheriting the property of *A*. Or the person murdered may have restricted interest in the property and the murder may have been committed with a view to accelerating succession by removal of the person holding such restricted interest.

**Disqualification confined to murderer and those claiming title through the murderer.**—The effect of this section read with section 27 is that the murderer is absolutely disqualified from inheriting the property of his victim or transmitting any title in respect of it. In the context of rules of succession under the old law the murderer had to be treated as non-existent and could not form the stock for a fresh descent. That basic principle has been adopted in this Act but the scheme of succession under the Act is different. The disqualification it will be noticed is confined to the murderer and not to others. A son or daughter of the murderer, for instance, is not affected by the disqualification except in cases where the son or daughter can claim his title to succeed only through the murderer. Where such person is entitled to succeed in his or her own right as an heir of the deceased under the Act the rule laid down in

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(*a*1) But see *Seetharamaiah* v. *Ramakrishnaiah* ('70) A.A.P. 407.

the section has no application. In such a case though related to the murderer the heir does not trace any title or right to succeed through the murderer. What section 27 requires is that the property shall devolve as if the murderer had died before the intestate and the effect of it is not that no relationship can be traced through the murderer but that no title or right to succeed can be traced through him. Thus for instance where *A* the propositus died leaving him surviving as is heirs only his brother *B* and *D* the daughter of *B* and *B* had committed *A*'s murder *B* will be disqualified from inheriting the property of *A*. *D* will, however, be entitled to succeed to the property of a *A* as an heir specified in Entry IV of Class II of the Schedule. (Brother's daughter).

**26.** Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

Convert's descendants disqualified.

**Conversion.**—Change of religion and loss of caste which at one time were grounds of forfeiture of property and of exclusion from inheritance ceased to be so after the passing of the Caste Disabilities Removal Act, 1850.

Succession to the property of the apostate is governed by the personal law applicable to followers of the religion to which he had been converted or by the provisions of the Indian Succession Act. Consequently, the property of a Mahommedan converted from Hinduism passes according to Mahomedan law to his descendants and the Hindu collaterals cannot claim to succeed under Hindu law or by virtue of any provision of the Caste Disabilities Removal Act (*c*). This section lays down the converse rule that the children born to the convert after his conversion and the descendants of such children cannot inherit the property of any of their Hindu relatives unless they are themselves Hindus at the time when the succession opens. It makes no difference to the application of the rule whether the convert ceased to be a Hindu before or after the commencement of this Act. The expression Hindu in this section is to be understood in the wide sense stated and explained in section 2. It will be noticed that the children of the apostate born before his conversion are not affected by the rule. Nor are children or descendants of his children born after his conversion affected by the rule if they are Hindus at the time when the succession opens.

**27.** If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

Succession when heir disqualified.

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(*c*) See § 97 *ante* at pp. 161-162.

This section lays down the general rule relating to the effect of disability or disqualification resulting from any of the causes mentioned in the group of sections 24 to 28 and is in accordance with the rule of Hindu law that where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person had died before the intestate (*d*). A disqualified person transmits no interest to his or her own heir. It may be noted that as a general rule disqualification from inheritance is purely personal and does not extend to the issue of the disqualified heir unless there is any provision of law to the contrary, e.g. the provision relating to the descendants of a convert from Hinduism.

The effect of the rule laid down in this section is that no title or right to succeed can be traced by any person through one who is disqualified from inheriting any property under the provisions of sections 24 to 26. The section does not affect the rights of those who cannot be said to claim through the disqualified person.

**28.** No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

Disease, defect, etc. not to disqualify.

Under the texts of the Dharmashastras as interpreted by the courts, certain defects, deformities and diseases (§§ 98, 162-163 *ante*) excluded an heir from inheritance. This was substantially remedied by the Hindu Inheritance (Removal of Disabilities) Act, 1928, which ruled that "no person, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect." The present section discards almost all the grounds which imposed exclusion from inheritance. It rules out disqualification on any ground whatsoever excepting those expressly recognized by any provisions of the Act. Unchastity of a widow is not a disqualification under the Act (*dd*).

This section is not retrospective in its operation (*d*1).

## ESCHEAT

**29.** If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

Failure of heirs.

**Failure of all heirs: Escheat.**—Escheat in Indian law is the term commonly employed to denote lapsing of property to the Crown or Government in default of heirs on the death of the owner intestate. In recent times escheat is

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(*d*) See § 101 at p. 164 *ante*.
(*dd*) *Jayalakshmi* v. *Ganesa Iyer* ('72) A.M. 357.
(*d*1) *Appa Saheb* v. *Gurubasamma* ('60) A. Mys. 79. Also see *Vedavyas Rao* v. *Narayan Rao* ('62) A. Mys. 18.

rare, for persons owning property but having no known heirs make wills and even when they do not, some person having remote kinship is usually found. Under the previous law on failure of all heirs of an intestate the Crown took by escheat. Where the Crown or Government claims by escheat, the onus lies on it to show that the owner of the estate died without heirs (*e*). An estate taken by escheat is subject to the trusts, charges and legal obligations (if any) previously affecting the estate, e.g. maintenance of dependants, mortgages and other incumbrances. This section rules that in case of failure of all the heirs recognized under the Act, on the death of the owner intestate, his or her property devolves on the Government. The Government takes the property subject to all legal obligations and liabilities to which an heir would have been subject if the property had devolved upon the heir by succession (*e*1).

Reference may be made to §§ 59 and 92 *ante*.

## CHAPTER III

## TESTAMENTARY SUCCESSION

Testamentary succession.

**30.** * Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

*Explanation.*—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad, tavazhi, illom, kutumba* or *kavaru* in the property of the *tarwad, tavazhi, illom, kutumba* or *kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.

**Right to dispose of property by will.**—This section is merely an assertion of the general rule that a Hindu may dispose of by will any property which it is within his power to bequeath by any testamentary disposition. It is the Explanation which is really the vital and most important part of the section. It might have been enacted in a more direct manner that the interest of a male Hindu in a Mitakshara coparcenery property or the interest of a member in the property of a *tarward*, etc. is property now capable of being disposed of by will notwithstanding any other rule of law to the contrary.

Neither under the customary law nor under the Aliyasantana Act, 1949, the interest of a coparcener in an Aliyasantana Kutumba could have been

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(*e*) See § 59 at pp. 140-141 *ante*.

(*e*1) Reference may be made to *Kothawale* v. *State of Maharashtra* ('70) A.B. 205 [case under S. 72 Bombay Land Revenue Code 1879].

* Part of this section was repealed by s. 29 of the Hindu Adoption and Maintenance Act, 1956, and by the Repealing and Amending Act, 58 of 1960.

disposed of by a will. In that regard a definite change is made by the Explanation with the result that now a member of an Aliyasantana *Kutumba* or *Kavaru* can dispose of his interest in the Kutumba properties by a will (*f*). So also can the interest of a Hindu governed by the Marumakkattayam or Nambudri law in the property of a *tarwad, tavazhi* or *illom,* can now be disposed of by will.

According to the Dayabhaga law, a father may dispose of by will all his property, whether ancestral or self-acquired. Similarly a coparcener under that law may dispose of by will the whole of his interest in the joint family property. These rules are well-established and sub-section (1) in effect reiterates the same.

According to the Mitakshara law, no coparcener, not even a father, can dispose of by will his undivided coparcenary interest even if the other coparceners consent to the disposition, the reason being that at the moment of death the right of survivorship (of the other coparceners) is in conflict with the right by device. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by device. That rule of Mitakshara law is now abrogated by the Explanation which lays down in explicit terms that such interest is to be deemed to be property capable of being disposed of by will notwithstanding anything contained in any provision of the Act or any other law for the time being in force.

**Will by female Hindu.**—Prior to the coming into force of this Act, neither under the Mitakshara nor under the Dayabhaga law a widow or other limited female heir could in any case dispose of by will any property inherited by her or any portion thereof, whether the property was moveable or immoveable. The effect of section 14 of this Act *inter alia* is to abrogate that traditional limitation. She is now full owner of all property howsoever acquired and held by her and can dispose of it by will. The only qualification to this rule is that she cannot do so where she holds any property as 'restricted estate' as visualized under section 14(2). This is so because in any such case she is not and has not become full owner of the property. Similar is the position in respect of a female owner governed by any of the matriarchal systems of law.

**Sub-section (2).**—Sub-section (2) of this Act, which is now repealed by section 29 of the Hindu Adoptions and Maintenance Act, 1956, was as under:

> "For the removal of doubts it is hereby declared that nothing contained in sub-section (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate."

Reference may be made to section 22 of the Hindu Adoptions and Maintenance Act, 1956. The provisions of that section have now rendered sub-section (2) of the present section unnecessary.

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(*f*) *Sundara* v. *Girija* ('62) A. Mys. 72 (F.B.). As to the effect of section 43 of the Travancore Kshatriya Act and this Explanation reference may be made to *Bank of New India Ltd.* v. *Ponnamma* ('61) A. Kerala 105 (F.B.).

## CHAPTER IV

## REPEALS

31. [Repealed]

## THE SCHEDULE

(See section 8)

### HEIRS IN CLASS I AND CLASS II

*Class I*

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

*Class II*

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

*Explanation.*—In this Schedule, references to a brother or sister do not include reference to a brother or sister by uterine blood.

# THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

No. 32 OF 1956

## ARRANGEMENT OF SECTIONS

SECTIONS


1. Short title and extent.
2. Act to be supplemental to Act 8 of 1890.
3. Application of Act.
4. Definitions.
5. Over-riding effect of Act.
6. Natural guardians of a Hindu minor.
7. Natural guardianship of adopted son.
8. Powers of natural guardian.
9. Testamentary guardians and their powers.
10. Incapacity of minor to act as guardian of property.
11. *De facto* guardian not to deal with minor's property.
12. Guardian not to be appointed for minor's undivided interest in joint family property.
13. Welfare of minor to be paramount consideration.

# INTRODUCTORY NOTE

"The king shall protect the inherited (and other) property of a minor, until he has returned (from his teacher's house) or until he has passed his minority."

—Manu VIII, 27.

"Till the eighth year a child is comparable (for legal purposes) to one in its mother's womb. Till he attains the age of sixteen he is called a minor (*poganda*). Then he becomes *sui juris* (*vyavacharagna*)."

—Narada III, 35, 36.

In Hindu law, apart from statute, the generally accepted view has been that non-age terminates at the completion of the sixteenth year and minority is a term applied to the period of life of a male or female which precedes the completion of that age. There was some difference of opinion as to the age when a person, under the laws of the Smritis, could be said to have attained full age or majority. That difference lost much of its importance after the passing of the Indian Majority Act, 1875, which applies to all persons domiciled in India and to all matters except marriage, dower, divorce and adoption. According to that Act, every minor of whose person or property a guardian has been appointed by any Court and every minor of whose property the superintendence has been assumed by a Court of Wards is deemed to have attained his majority at the completion of the twenty-first year; and in all other cases, at the completion of the eighteenth year. The Indian Majority Act is a very short enactment and aims at uniformity and certainty in the matter of non-age and its object is to fix the age of majority.

**Indian Majority Act, 1875.**

According to the law relating to guardians as hitherto applied in case of Hindus, guardians could be divided into three classes, namely (1) natural guardians; (2) guardians appointed by a father's will (testamentary guardians); and (3) guardians appointed under the Guardians and Wards Act, 1890. The guardians under the Guardians and Wards Act can be appointed by a District Court or by a Chartered High Court in the exercise of its ordinary original civil jurisdiction. A Chartered High Court can also appoint a guardian in the exercise of its inherent powers.

**Three classes of guardians.**

The principal enactment on the subject is the Guardians and Wards Act of 1890 which is a consolidating enactment and is intended to be a complete code defining the rights and remedies of guardians and wards. Section 8 of that Act, however, *inter alia* saves the rights of appointment of guardians of minor children under the Hindu law and leaves unaffected the preferential claims of guardians under that law according to which the father is the natural guardian of the *person* and the *separate property* of his minor children and next to him the mother. No relation other than the parents under that law is entitled as of right to the guardianship of a minor except that the husband is the lawful guardian of his minor wife. The Act vests wide powers in the Court to appoint or declare a guardian of the person or property or both of a

**Guardian and Wards Act, 1890.**

**Natural guardians under Hindu Law.**

minor and empowers it to do so where it is satisfied that it is for the *welfare of a minor* to make such order. But the Act was not intended to affect the rights of the parents and the husband to act as the natural guardians of the person of the minor and the Court has under that enactment no authority to appoint a guardian of the person of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor; nor in case of a married female, if a minor, whose husband is not in the opinion of the Court unfit to be guardian of her person.

The Guardians and Wards Act did not alter or affect the rights of the natural guardians under the Hindu Law and it was only if a guardian was appointed by the Court that the rights of the natural guardian became extinguished. The rights of the natural guardian under that law as interpreted by the Courts were comparatively very wide. The natural guardian could mortgage, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the Court, provided the alienation was for the benefit of the minor's estate. The law on the subject was well settled by a long course of decisions since *Hunooman Persaud Pandey's* case (6 M.I.A. 393). The principle enunciated by the Privy Council in that case in a passage which is now *locus classicus* is: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. . . . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. . . . The lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But . . . if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge." But doubts and difficulties at times beset the question of contracts by natural guardians and their right to bind the minor by personal covenants and the precise extent of the powers of the natural guardian of a minor to deal with the properties of the infant on grounds of necessity or benefit of the minor. The delimitations on the power were well defined but difficulty sometimes arose in applying the principle to facts which were at times complex and gave rise to difficult situations.

Rights of natural guardian under Hindu Law.

Under Hindu Law as hitherto administered by the Courts a Hindu father could by word of mouth or by writing, nominate a guardian both of the person and property of his children, so as to exclude even the mother from the guardianship. The mother, even if the father was dead, did not have the testamentary power to appoint a guardian by will. The power of a testamentary guardian to deal with property belonging to his ward was under that law subject only to the restrictions imposed by the will. The Guardians and Wards Act did not affect the power of the father to appoint a testamentary guardian. Section 6 of the Guardians and Wards Act, contains a saving *inter alia* to the effect that nothing in that enactment is to take away or

Testamentary guardians under Hindu Law.

derogate from any power to appoint a guardian (including testamentary guardian) of the person and property of a minor where under the personal law of the minor such appointment is competent. The power of a testamentary guardian to mortgage, sell or otherwise dispose of the immovable property of the minor is under that Act only subject to the restrictions which may be imposed by the will unless he is also declared to be a guardian by an order of the Court. In the latter case his powers are controlled by the relevant provisions of the Guardians and Wards Act (section 28).

Powers of testamentary guardian.

Section 27 of the Guardians and Wards Act which applies to all classes of guardians lays down general rules affecting the duties and powers of guardians. A guardian is bound to deal with the property of the minor ward as carefully as a man of ordinary prudence would deal with it if it were his own, and subject to limitations on his powers laid down in the Act, he has the power to do all acts which are reasonable and proper for the realisation, protection or benefit of the property of the minor. Section 29 of that Act lays down certain limitations on the powers of a guardian appointed or declared by the Court in respect of his dealing with and management of the immovable property of the minor ward. He cannot, without the permission of the Court, mortgage or charge, or transfer by sale, gift, exchange or otherwise any such property: Nor can he without the permission of the Court lease any part of that property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the ward. The powers of the natural guardian or a testamentary guardian of a Hindu minor were not affected by these limitations. The rights of any such guardian to deal with and manage the minor's property continued to be governed by the rules to which reference has already been made unless and until the Court in the exercise of its wide powers removed him or appointed or declared him to be a guardian of the minor in which latter case his powers to deal with and manage the minor's property became limited as provided in section 29 of the Act.

Powers of natural and testamentary guardians not affected by Guardians and Wards Act.

The keystone of the Guardians and Wards Act is the satisfaction of the Court as to what is for the welfare of the minor and the Act provides the machinery which enables the Court to protect the interest and welfare of the minor who by reason of his immature age is incapable of looking after the same. Section 17 of the Act is pivotal and *inter alia* enacts that in appointing or declaring the guardian of a minor, the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the Court may consider that preference. In numerous decisions under the Act it has been emphasized that the welfare of the minor is the paramount consideration and the recognised rights of guardians under the personal law

must, if necessary, be subordinated to that main consideration and the Court is not bound to appoint as guardian the person who has a preferential claim for guardianship according to the personal law if the appointment of such person will not conduce to the minor's welfare.

Supplemental enactment.

The present Act does not codify the entire law of guardianship applicable to Hindus but amends and codifies only certain parts of the law relating to minority and guardianship among Hindus. Section 2 of the Act expressly lays down that the provisions of this Act are in addition to and not in derogation of the Guardians and Wards Act, 1890. The provisions of the Act are, therefore, to be read as supplemental to that Act. In respect, however, of matters expressly dealt with by the Act the provisions of this Act are to have over-riding effect. Such provisions abrogate all the rules of the law of guardianship hitherto applicable to Hindus by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in those provisions. They also supersede any other law, contained in any State or Central legislation (including the Guardians and Wards Act) in force immediately before it came into operation in so far as such legislation is inconsistent with those provisions. Rules relating to matters for which no provision is made are not over-ridden by the Act.

Over-riding effect of provisions of the Act.

Principal changes brought about by the Act.

Reference to the provisions of this short enactment will show that it is principally intended to crystallize in statutory form as to who are the persons entitled to act as the natural and testamentary guardians of a Hindu minor and particularly to impose certain limitations on the powers of such guardians in the matter of disposal of and management of the immovable property of the minor. Section 6 declares the status of the father and mother as natural guardians of the minor children in respect of their person as well as property; and of the husband as the natural guardian of the person and property of his minor wife. There is no substantial change in the law on this matter. But material change is effected in the matter of the powers of the natural guardian which are now substantially the same as and subject to the same limitations as are imposed upon the powers of a guardian declared or appointed by the Court under the Guardians and Wards Act. The result is that the natural guardian does not now have in the matter of disposal of the immovable property of the minor, any powers larger than those conferred on a guardian appointed or declared by that Act. The language of section 8 of the present Act in relation to limitations on the powers of management of immovable property of the minor is *in pari materia* with that of the provisions contained in section 29 of the Guardians and Wards Act which have already been stated above (*a*). Section 9 of the present Act rules that a Hindu father has the power to appoint a testamentary guardian of his minor legitimate children both in respect of the person and property of such children. A similar power is now recognised in case of the mother where the father has predeceased the mother. A mother is also entitled to appoint

Restrictions imposed on powers of natural and testamentary guardians.

(*a*) P. 955, *supra*.

a testamentary guardian of her minor illegitimate children. The powers, however, of any testamentary guardian of a minor Hindu in the matter of dealing with and management of the immovable property of the minor are not to be governed by the personal law of the parties but are now subject to the same limitations as are imposed upon the powers of a natural guardian. The result of these principal changes in the law relating to Hindu minors is that neither a natural guardian nor a testamentary guardian can now, without the sanction of the Court, mortgage, charge, sell or otherwise alienate any immovable property of the minor or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the ward. Any disposal of immovable property by a natural guardian or a testamentary guardian in contravention of the above limitations is voidable at the instance of the minor. The power vested in the Court to sanction any such disposal of the minor's immovable property can only be exercised if there is necessity for such disposal or if the Court is satisfied that the disposal of the property is to the evident advantage of the minor (*b*).

Powers of *de facto* guardian abrogated.

Another change brought about by the present enactment relates to *de facto* guardians. The powers of a *de facto* guardian or a *de facto* manager of a Hindu minor to bind the minor's estate by alienations of immoveable property of the minor in case on necessity or for the benefit of the minor's estate have been recognized by the Courts in numerous decisions (*c*). Section 11 of the Act now abrogates those powers and lays down in express terms that after the coming into operation of the Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor on the ground of his or her being the *de jacto* guardian of the minor.

The Crown or the State as *pater patriae* has jurisdiction to do all acts and things necessary for the protection of minors for they cannot take care of themselves and one common principle of law is that it is a prime duty of the Court where satisfied that it is for the welfare of the minor that an order should be made appointing or declaring a guardian of his person or porperty it should make such order. Sections 7 and 17 of the Guardians and Wards Act give statutory form to this general rule of guardianship law. The present enactment, although it is not exhaustive of the law on the subject and gives only certain supplemental rules principally affecting natural and testamentary guardians and the restrictions on the powers of such guardians, reiterates the salutary rule that in appointing or declaring guardians of the person or property of a Hindu minor, the paramount consideration of the Court should be the welfare of the minor (s. 13). The expression 'welfare' in this context, it is settled law, is to be understood in its widest sense and embraces not merely the material and physical well-being of the minor and happiness but every circumstance and every factor bearing upon the moral and religious welfare and the education and upbringing of the minor. In the matter of any such appointment or declaration of a guardian the first and the inevitable starting point and the dominant consideration for the Court is the welfare of the minor.

Welfare of the minor must be paramount consideration of the Court.

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(*b*) See Section 8 and Section 9(5).

(*c*) See § 528, *ante*.

# THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

No. 32 OF 1956

[*25th August*, 1956]

**An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus.**

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows: —

**Preamble.**—A codifying enactment is passed to codify the existing law and its purpose is to declare the whole of the law upon some particular subject or certain particular matters dealt with in it. The preamble to the present enactment in terms states that it is intended to amend and codify *certain parts of the law* relating to minority and guardianship among Hindus and it is only in respect of the points and matters specifically dealt with in it that the law relating to minority and guardianship among Hindus is codified in this enactment which does not purport to give the whole law on the subject of guardianship. Section 2 of the Act states in explicit terms that the provisions of the Act are supplemental to and to be read as additional to and not in derogation of those contained in the Guardians and Wards Act of 1890 which is the principal enactment on the subject. Where, however, any express provision on any point or matter is contained in this Act it is to prevail and effect must be given to it irrespective of what may have been laid down in the other enactment.

**Rules of interpretation of a statute.**—For some of the rules relating to interpretation, see Notes at pp. 666-669 *supra*.

Short title and extent.

**1.** (1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

**Commencement and extent.**—The Act received the assent of the President on 25th August 1956 and came into operation of that day (*d*).

The Act applies to Hindus in the whole of India except the State of Jammu and Kashmir. The Act also applies to Hindus domiciled in India but who are living outside India. The general principle of private international law is that the *lex loci* governs matters relating to immovable property and the law of the domicile governs personal relations.

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(*d*) S. 5(1)(*b*), General Clauses Act.

Act to be supplemental to Act 8 of 1890.

**2.** The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890).

**Act is supplemental to the Guardians and Wards Act.**—The Act, although it is an amending and codifying enactment, is not exhaustive of the law on the subject of minority and guardianship among Hindus. The effect of this section read with section 5 of the Act, which gives over-riding operation to the provisions of this Act, is to abrogate all the rules of the law of guardianship hitherto applicable to Hindus by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all matters dealt with in the Act. The Act also supersedes any other law, contained in any Central or State legislation, in force before it came into operation in so far as such legislation is inconsistent with those provisions. Rules relating to matters for which no provision is made are not over-ridden by the Act. The Guardians and Wards Act, as already pointed out (*e*), is the principal enactment on the subject and is a complete code defining the rights and remedies of guardians and wards. That Act, however, saves from its operation the personal law of the minors in certain matters and does not purport to lay down the law in respect of the powers of the natural and testamentary guardians under such personal law. The present Act is principally intended to declare in statutory form as to who are the persons entitled to act as the natural guardians of a Hindu minor in respect of the person and property of the minor and to impose certain restrictions on the powers of such guardians. It is also intended to state the law relating to testamentary guardians and the delimitations on the powers of such guardians. It is, therefore, both a codifying and a supplemental enactment and its provisions must be read in the context of the law laid down in the Guardians and Wards Act, 1890.

The provisions of this Act and the Guardian and Wards Act, 1890 are complementary. In case of repugnancy the provisions of this Act would prevail (*e*1).

Application of Act.

**3.** (1) This Act applies—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

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(*e*) p. 953, *supra*.

(*e*1) *Kusa Paride* v. *Baishnab* ('66) A. Orissa 60.

*Explanation.*—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be: —

(i) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of a tribe, community, group or family to which such parent belongs or belonged; and

(iii) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

**Persons governed by the Act.**—It must have been seen from § 6(1) that Hindu law has been applicable to a wide category of persons. The present section substantially codifies the law on the question as it existed at the time of the passing of this enactment and is *in pari materia* with the law on the question enacted in section 2(1)(c) of the Hindu Marriage Act, 1955.

Reference may be made to Notes at pp. 671-673 *supra.*

Reference may also be made to §§ 6 and 7 *ante.*

**Sub-section (1) (a): Hindu.**—See pp. 671-672 *supra.*

**Sub-section (1) (b).**—See p. 672 *supra.*

**Sub-section (1) (c).**—See p. 672 *supra.*

**Explanation (ii).**—See p. 672 *supra.*

**Explanation (iii).**—See p. 672 *supra.*

**Sub-section (2): Scheduled Tribes.**—See pp. 672-673 *supra.*

**Sub-section (3).**—See p. 673 *supra.*

**4.** In this Act,—

Definitions.

(a) "minor" means a person who has not completed the age of eighteen years;

(b) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(i) a natural guardian,

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

(c) "natural guardian" means any of the guardians mentioned in section 6.

It will be noticed that the practice of inserting the words "unless the context otherwise requires" usually followed by the Legislature in the matter of sections giving statutory definitions has not been adhered to in this section. Nevertheless definitions and abbreviations have to be read subject to the qualification that their application must not be inconsistent with the context or subject-matter. This follows as a corollary to the general principle of construction that if there is repugnance in the context, words and expressions in a statute must be understood in a manner as will be in harmony with the context and to effectuate the intention of the Legislature. The definitions in this section seem mainly intended to stress that for the purpose of the Act a person is to be regarded as a minor till completion of the age of eighteen and to make it clear that the expression "guardian" has a wide connotation.

After the Act came into force no person can claim to be the legal guardian of a minor unless he or she comes within one of the four classes of persons enumerated in clause (b) of the section (*e*2). A stranger who makes a gift of property to a minor is not entitled to appoint a guardian for the minor simply by reason of the factum of the gift. He may, however, provide for management of such property by resorting to a trust (*e*3).

Reference to the provisions of the Act will show that a person though not a natural guardian, or a testamentary guardian, or one appointed or declared by the Court or empowered by any statute relating to the Court of Wards may be guardian within the ambit of this Act if he has taken upon himself or herself the care of the person or property or both of a minor, e.g. a *de facto* guardian though, of course, after the commencement of this Act, he is not entitled to dispose of, or deal with, the property of the minor (*f*).

**5.** Save as otherwise expressly provided in this Act,—

**Over-riding effect of Act.**

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act:

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(*e*2) *Ramachandra* v. *Annapurni Ammal* ('64) A. Kerala 269. Also see s. 11 *infra*. 113.

(*e*3) *Rajalakshmi* v. *Ramachandran* ('67) A.M.

(*f*) Sec. 11.

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

**Over-riding effect of the Act.**—This section gives over-riding application to the provisions of the Act and in effect lays down that in respect of matters dealt with in the Act it seeks to repeal all existing law on the matters dealt with in it, whether in the shape of enactments or otherwise, which may be inconsistent with it. The result is that immediately on the coming into operation of the Act the law of guardianship hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law ceases to have effect with respect to all the matters dealt with in the Act. The Act also supersedes the rules of the law of guardianship contained in any Central or State enactment (*f*1) and any other law in force immediately before it came into operation by enacting that all other law shall cease to have effect with respect to such matters in so far as it is inconsistent with any provisions contained in the Act. This section may be read with section 2 which refers to the Guardians and Wards Act, 1890, and draws attention to the supplemental nature of the provisions of this Act.

The effect of sections 4(a) and 5(b) is not to override the first part of section 3 of the Guardian and Wards Act. The age of majority, therefore, of a minor for whose person a guardian has been appointed by the Court will be 21 years and not 18 years (*f*2).

Natural guardians of a Hindu minor.

**6.** The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*).

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(*f*1) For instance see Travancore Nayar Act S. 10(2). Also see *Kamalakshmi Amma* v. *Bhaskara Menon* ('61) A. Kerala 154. And see *Ramachandra* v. *Annapurni Ammal supra*; *Kusa Paride* v. *Baishnab supra*. Reference may also be made to S. 15 of the Madras Marumakkathayam Act, 1932 and *Raghavan Nair* v. *Lakshmikutty Amma* ('61) A. Kerala 193.

(*f*2) *Swaminathan* v. *Angayarkanni Ammal* ('64) A.M. 11.

*Explanation.*—In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother.

**Natural guardians.**—The subject of persons who can be natural guardian of a Hindu minor, under the law hitherto applied, has been dealt with in §§ 518-527 *ante*. This section does not make any substantial alteration in the law on the subject and is mainly declaratory of the same.

The position in the Hindu law hitherto applied and under this section is the same. Normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. There can, however, be exceptional cases where the minor can be legally represented by the mother as the natural guardian, even though the father may be alive. Thus, for instance, where the father of the minor was alive but the father and mother had fallen out and the mother with whom the minor was living had been managing the affairs of the minor daughter for over twenty years, it was held that a lease executed by the mother on behalf of the minor was valid and binding on the minor, the mother being regarded as the natural guardian of the minor in the particular circumstances of the case (*f*3).

Where the father refuses to act as the natural guardian or has neglected to discharge his obligations as such guardian in respect of the minor and his property another person and more so the mother of the minor can take recourse to legal proceedings for being appointed as a guardian of the person and property of the minor (*f*4).

The mere fact that the mother has remarried is no disqualification under the Act and she can act as the natural guardian of the minor (*ff*4).

**". . . excluding his or her undivided interest in joint family property."**—The subject matter with which the Act deals is limited to guardians in respect of minor's person or in respect of minor's property other than his undivided interest in joint family property whether they be natural guardians or testamentary guardians or guardians appointed or declared by Court and the concept of a guardian in respect of the undivided interest of a minor in joint family property is specifically excluded from the purview of the Act (*f*5).

**Clause (a): Father—Mother: Custody.**—This clause affirms the rule of Hindu law that the father is the natural guardian of the person as well as the property of a minor son and a minor unmarried daughter; and next to him the mother is the natural guardian of the person and property of such minor. The clause gives legislative sanction to the principle now well established that even though the father is the natural guardian of his minor children and entitled as such to their custody and though it is the duty of the Court to make orders for appointment of a guardian and custody of the minor, consistently with the personal law of the minor, the prime and the paramount consideration is the welfare of the minor and the custody of a child of tender years should, therefore, remain with the mother unless there are grave and weighty considerations which require that the mother should not be permitted

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(*f*3) *Jijabai* v. *Pathankhan* ('71) A.S.C. 315.
(*f*4) *Narain Singh* v. *Sapurna Kuer* ('68) A.P. 318.
(*ff*4) *Bakshi Ram* v. *Shila Devi* ('60) A. Punj. 304. Also see § 523 *ante*.
(*f*5) *In re Krishnakant* ('61) A. Guj. 68.

to have the minor with her. This clause rules that though the father is the natural guardian of the minor's person and property, the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Unless there are some special facts and circumstances clearly indicating that it is not in the interest and well-being of the minor of such tender age to be with the mother, the custody of the minor should be with the mother. The rule is not to be understood to suggest that on completion of the age of five years the custody of the child should be directed to be handed over to the father in view of his preferential rights. The Court takes into consideration all the circumstances of the matter bearing in mind that the pivotal factor is the benefit and well-being of the minor. The facts and circumstances that the Court takes into consideration may vary in each particular case and obviously cannot be listed. Sub-sections (2) and (3) of section 17 of the Guardians and Wards Act state rules which are of some guidance on the question. In considering what will be for the welfare of the minor, the Court shall have regard among other factors to the age, sex and religion of the minor, the character and capacity of the guardian and if the minor is old enough to form an intelligent preference, the Court may consider that preference.

The proposition is now firmly established that even the preferential right of the father as a natural guardian should be subordinated to and even overriden by the sole consideration that the welfare of the minor is to be the determinative factor in all these matters of guardianship. For some recent decisions illustrative of the rule see f.n. (*f*6) below.

The father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot, therefore, during his lifetime, substitute another person to be the guardian in his place. He may, in the exercise of his discretion as guardian, entrust the custody and education (subject to the mother's right to custody of a child of tender years) of his children to another. The authority he may thus confer would be a revocable authority and if the welfare of his children requires it he can take such custody and education once more into his own hands notwithstanding any agreement or arrangement to the contrary made by him. But if the authority has been acted upon in such a way as in the opinion of the Court, exercising its jurisdiction over infants, to create associations or to give rise to expectations on the part of the children which it would be undesirable in their interest to disturb or disappoint, the Court will interfere to prevent its revocation (*g*).

**Clause (b).**—This clause affirms the rule of Hindu law that the mother is the lawful guardian of her illegitimate children (*h*); it, however, lays down that the father of such children has no preferential right and is the natural guardian only after the mother.

**Clause (c).**—This clause affirms the rule of Hindu law that the husband is the lawful guardian of his minor wife (*i*).

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(*f*6) *V. V. Narasaiah* v. *C. P. Raju* ('71) A.A.P. 134; *Radhabai* v. *S. K. Mudaliar* ('71) A. Mys. 69; *Sunil Kumar* v. *Satirani* ('69) A.C. 573; *Chander Prabha* v. *Prem Nath* ('69) A. Delhi 283. Also see *Kamalamma* v. *Laxminarayan* ('71) A. Mys. 211 [Mother was not appointed]; *Gheesi* v. *Shri Rama* ('72) A. Raj. 256.

(*g*) *Besant* v. *Narayaniah* (1914) 41 I.A. 314, 38 Mad. 807, 24 I.C. 290, ('14) A.P.C. 41. The Court may, of course, permit revocation of the entrustment if it is in the interest of the minor, *Sheokumar* v. *Shiv Rani* ('66) A.M.P. 189.

(*h*) See § 522 *ante*.

(*i*) See § 443 *ante*.

**Disqualifications.**—The proviso to the section enacts that no person (father, mother or husband) is entitled to act as the natural guardian of a minor under the provisions of this section (i) if he has ceased to be a Hindu by conversion to any other religion (*j*); or (ii) if he has completely and finally renounced the world by becoming a hermit or an ascetic.

**Step-father; Step-mother.**—A step-father or a step-mother is not the natural guardian of the minor child. The position of an adoptive father or adoptive mother is, however, different as will be seen from the next section.

**Natural guardianship of adopted son.**

7. The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

**Guardianship of adopted son.**—This section adopts the rule of Hindu law that guardianship of an adopted son who is a minor passes on his adoption from his natural father and mother to his adoptive father and mother (*k*).

**Guardianship of adopted daughter.**—This section speaks only of the natural guardianship of an adopted son and does not refer to an adopted daughter. The Act came into force before the passing of the Hindu Adoptions and Maintenance Act, 1956, and the general Hindu law as administered by the Courts did not recognise any adoption of a daughter. The Hindu Adoptions and Maintenance Act now recognises adoption of a daughter and confers that right both upon a male Hindu as well as a female Hindu (*l*). Section 12 of that enactment rules that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. There are exceptions to the application of this legal fiction but they do not touch the question of guardianship. The effect of that section would seem to be that the adoptive father and the adoptive mother would be regarded as the natural guardians of the adopted child in consonance with the rules relating to the law of adoption laid down in that Act.

**Powers of natural guardian.**

8. (1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

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(*j*) Other than Hinduism, Jainism, Sikhism or Buddhism.

(*k*) See § 521 *ante*.

(*l*) Sec. 7.

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

**Powers of natural guardian.**—The powers of a natural guardian under Hindu law as hitherto applied have been dealt with in §§ 528-531 *ante*. The rights of a natural guardian under that law as interpreted by the Courts were comparatively very wide. The natural guardian, as must have been seen from § 528, could mortgage, charge, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the Court, provided the

alienation or any other dealing with such property by the guardian was for the benefit of the minor's estate. Reference has been made to the subject in the Introductory Note to the commentary on this Act and as already pointed out the powers of the natural guardian in the matter of dealing with the immovable property of the minor were not affected by the limitations enacted in section 29 of the Guardians and Wards Act which relate to a guardian appointed or declared by the Court. Sub-section (1) of the present section lays down the rule relating to the general powers of a natural guardian in language which is *in pari materia* with that in section 27 of the Guardians and Wards Act. Reference may be made to cases decided under section 27 of the Guardians and Wards Act.

The section deals with the 'minor's estate' or the 'immovable property of the minor'. It does not apply to the undivided interest of the minor in any joint family property as a coparcener. It can apply to definite property of which the minor is the owner. It does not affect the right of the manager or Karta of the joint family who can alienate joint family property so as to bind the interest of the minor coparcener provided the alienation is for legal necessity or for the benefit of the estate (*l*1). Reference may be made to section 12 *infra* and Notes thereunder.

**Personal covenant.**—In numerous cases which were considered under the Guardians and Wards Act and particularly section 27 of that enactment, it was held that although it was within the competence of a guardian to bind the minor's estate by contracts entered into for the purpose of realisation, protection or benefit of the estate, the guardian had no power to bind the minor by personal covenants. The position under Hindu law has already been pointed out (*m*). Sub-section (1) of the present section expressly rules that the natural guardian can in no case bind the minor by any personal covenant. Reference may be made to cases on the subject decided under section 27 of the Guardians and Wards Act.

**Sub-section (2): Limitation of powers of natural guardian.**—The effect of this sub-section read with section 5 of the Act is to supersede the law relating to the powers of a natural guardian in the matter of disposal of the immovable property of the minor hitherto applied in case of Hindu minors. It is now laid down in express and explicit terms that the natural guardian cannot, without the previous sanction of the Court, mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor: nor can he, without such previous sanction, lease any part of such property for any term exceeding five years or for a term extending more than one year beyond the date on which the minor attains majority. Application for the sanction of the Court cannot be made by an intending purchaser or other transferee; only the natural guardian would have to apply for sanction (*m*1).

For purchase of property for a minor, no permission of the court is necessary. The court can enforce specific performance of any such agreement by the natural guardian (mother) where it is satisfied that the purchase

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(*l*1) *Subramaniam* v. *Krishnaswami* ('72) A.M. 377.

(*m*) § 529 *ante*.

(*m*1) *Shivamurthi* v. *Vijayasing* ('72) A.B. 152.

is for the benefit of the minor having regard to all the facts and circumstances of the case (*mm*1).

**Sub-section (3).**—This sub-section is a corollary to the limitations enacted in sub-section (2). Any dealing by a natural guardian with the immovable property of the minor, in contravention of the rule laid down in sub-section (2) is not binding on the minor. Any transfer prohibited by this sub-section can be avoided by the minor and it is not incumbent on the minor to file a suit simply for the purpose of avoiding the same (*m*2).

The rule is enacted for the benefit and protection of the minor. Any such transaction in contravention of the provisions of this sub-section is, however, not void for in such a case the minor may lose the benefit of the same even if it was to his advantage, but is only rendered voidable at his instance and the minor may, therefore, repudiate it or adopt it if he so chooses.

In the undermentioned case it has been held that an alienation by a de facto guardian being void under section 11 and not merely voidable, it cannot be ratified by the minor on attaining majority (*m*3).

**Sub-sections (4) and (5): Sanction of Court: Practice.**—Sub-section (4) lays down the rule that the power vested in the Court, to sanction any mortgage, charge or transfer of any immovable property of the minor or any lease of such property for a term longer than that mentioned in clause (b) of sub-section (2), is to be exercised only if it is satisfied that creation of such mortgage, charge, transfer or lease is a *matter of necessity* or to do so is to the *evident advantage of the minor.* The language of this sub-section is *in pari materia* with that in sub-section (1) of section 31 of the Guardians and Wards Act. Sub-sections (4) and (5) have to be read together. Sub-section (5) rules that any application for such sanction by the Court under the present section shall be disposed of as if it were in all respects an application under sub-section (2) of section 29 of the Guardians and Wards Act. Sub-sections (2) to (4) of section 31 of the Guardians and Wards Act contain rules which lay down the practice to be followed by the Court before granting such sanction and the conditions which the Court may in its discretion impose in case of any such proposed disposal of the minor's immovable property. Sub-sections (2) to (4) of that section are as under:

> "(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the Court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation, and be dated and signed by him.
>
> (3) The Court may, in its discretion, attach to the permission the following among other conditions, namely:—

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(*mm*1) *Radheyshyam* v. *Kiran Bala* ('71) A.C 341.

(*m*2) *Santha* v. *Cherukutty* ('72) A. Kerala 71.

(*m*3) *Talari Erappa* v. *Muthyalappa* ('72) A. Mys. 31.

(a) that a sale shall not be completed without the sanction of the Court;

(b) that a sale shall be made to the highest bidder by public auction, before the Court or some person specially appointed by the Court for that purpose, at a time and place to be specified by the Court after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs;

(c) that a lease shall not be made in consideration of a premium or shall be made for such terms of years, and subject to such rents and covenants, as the Court directs;

(d) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian, to be disbursed therefrom, or to be invested by the Court on prescribed securities or to be otherwise disposed as the Court directs.

(4) Before granting permission to a guardian to do an act mentioned in section 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application."

Clause (b) of sub-section (5) of the present section in terms states that in the matter of granting such sanction the Court must observe the procedure and can exercise the powers specified in the provisions of section 31 of the Guardians and Wards Act (set out above). Clause (a) of sub-section (5) of the present section in effect incorporates the provisions of section 4A of the Guardians and Wards Act which *inter alia* empower the High Court to confer jurisdiction on subordinate judicial officers to dispose of any proceedings under the Guardians and Wards Act. Clause (c) of sub-section (5) of the present section relates to appeals from orders refusing sanction to a natural guardian in any application to the Court as required by the present section when he wants to mortgage, charge or otherwise transfer any immovable property of the minor or grant a lease of the same for a term longer than that mentioned in clause (b) of sub-section (2) on the ground that it is necessary to do so or that it is evidently to the advantage of the minor to do so.

**Sub-section (6)—"Court".**—This sub-section relates to the question of forum for an application for the requisite sanction of the Court. The application may be made to a city civil court, or a district court, or a court empowered by the High Court or a court to which the matter is transferred under the provisions of section 4A of the Guardians and Wards Act. The application may be made to any of these courts within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate; and if the property is situate within the local limits of more than one such court the application may be made to any of such courts.

**9.** (1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property [other than the undivided interest referred to in section 12 (*m*1)] or in respect of both.

Testamentary guardians and their powers.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive, if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

**Testamentary guardians and their powers.**—The right of a Hindu father to appoint a testamentary guardian of his minor children and the powers of such guardian under Hindu law as hitherto applied have been dealt with in § 532 *ante*. The rights of such testamentary guardian under that law as interpreted by the Courts were comparatively very wide. The testamentary guardian, as must have been seen from § 532, could deal with the minor's property subject only to such restrictions as were imposed by the will. In the absence of any such restrictions he exercised powers similar to those of a natural guardian. The testamentary guardian could, therefore, in the absence of any restrictions in the will, mortgage, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the Court, provided the alienation or any other dealing with such property by the guardian was for the benefit of the minor's estate. Reference has been made to the subject in the Introductory Note to the commentary on this Act. The powers of a testamentary guardian under the Guardians and Wards Act are only subject to the restrictions imposed by the will unless he is also declared to be

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(*m*1) Also see f.n. (*f*5) at p. 963.

a guardian by an order of the Court. In the latter case his powers are controlled by the relevant provisions of that Act. Section 28 of that Act is as follows:

> "Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise immovable property belonging to his ward, is subject to any restriction which may be imposed by the instrument, unless he has, under this Act, been declared guardian, and the Court which made the declaration, permits him, by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order."

The present section brings about some important changes in the law relating to testamentary guardians of a Hindu minor. The right of a Hindu father to appoint, by will, a guardian of the person as well as the property of his minor children is reiterated in sub-section (1). The position affecting the undivided interest of the minor in joint family property is different and no testamentary guardian can be appointed by the father of any such interest of his minor children (section 12). Sub-sections (2), (3) and (4) of the present section relate to the rights of the mother to appoint a testamentary guardian of a minor child. Sub-section (5) which is the vital clause in this section imposes the same restrictions on the powers of a testamentary guardian of a Hindu minor as are now by section 8 imposed on the powers of a natural guardian in the matter of dealing with and disposal of a minor's immovable property. The powers of a testamentary guardian are moreover subject to the restrictions that may be imposed by the will. Sub-section (6) rules that the rights of a testamentary guardian of a minor girl cease on her marriage. After marriage her husband becomes her natural guardian.

**Sub-sections (1) and (2).**—Sub-section (1) reaffirms the right of a Hindu father to appoint, by will, a guardian of his legitimate minor children in respect of the person as well as the property of such minors. Being the natural guardian of such children he is entitled to exercise this power unless he has become disentitled to act as the natural guardian of the minors by operation of the proviso to section 6 or any other provision of law which may disentitle him to act as such natural guardian, as for instance where he is removed from guardianship by an order of the Court. A father cannot, however, after the coming into operation of this Act, appoint a testamentary guardian for his minor children so as to exclude the mother from her right to act as the natural guardian of the children after the father [section 6(a)]. It will be seen from sub-section (3) that the present Act confers also on the mother in certain circumstances the right to appoint a testamentary guardian of the minor children. Moreover that sub-section gives full effect to the rights of the mother to act as the natural guardian of the minor children after the father and rules that after the death of the father she as a Hindu widow has the right to appoint, by will, a guardian in respect of the person as well as the property of the minor children. Sub-section (2) in terms lays down the rule that an appointment of a testamentary guardian by the father shall not have effect if the father predeceases the mother. In case the mother dies

without appointing by her will, a guardian for the minor children, the appointment made by the father, in his will, is revived and such testamentary guardian will be entitled to act as the guardian of the minor children after the mother's death.

As to guardianship in respect of the undivided interest of a minor in joint family property the position is different. The position under Hindu law as interpreted by the courts was not quite clear though the preferable view was that the father had no power to appoint a guardian by his will of joint property [§ 532 (3) J. Sub-section (1) of the present section now expressly excludes the undivided interest of minor children in joint family property from its operation so that the father has no right to appoint, by his will, a guardian of the undivided interest of a minor in joint family property. Reference may also be made to Notes under section 12 which rules that the Court has no power to appoint a guardian for the minor in respect of such undivided interest where the property is under the management of an adult member of the family. This restriction on the powers of the Court does not affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

**Sub-section (3).**—The effect of this sub-section is to enlarge the rights of the mother who next to the father is the natural guardian of the minor children. It is laid down in sub-section (2) that any appointment of a testamentary guardian by the father shall have no effect if he predeceased the mother with the result that it is not now competent to the father by his will to appoint a testamentary guardian of the person and property of the minor children so as to exclude the right of the mother to act as their natural guardian. The first part of the present sub-section in express terms recognizes the right of the mother after the death of the father to appoint a guardian by will, in respect of the person as well as the property of the minor children [notwithstanding any appointment of a testamentary guardian that may have been made by the father (sub-section 2)]. A mother has also the right to act as the natural guardian of the minor children where the father has become disentitled (for instance by ceasing to be a Hindu or renouncing the world) to act as the natural guardian of the children and the latter part of the present sub-section in terms confers on her in such case the right to appoint a guardian, by will, in respect of the person as well as the property of the minor children. Under the law as previously applied the mother had no right to nominate a guardian by will [§ 532(1)].

**Sub-section (4).**—Both under the Hindu law as previously applied and under the present Act the mother is the natural guardian of her illegitimate children [section 6(b)] and it is only in case of the death of the mother or her becoming disentitled to act as such guardian that the father can act as the natural guardian of his illegitimate children. The present sub-section rules that a mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian in respect of the person as well as the property of such children. The father has no right in any case to appoint a testamentary guardian of his illegitimate children. Reference may also be made to section 16 of the Hindu Marriage Act and the Notes thereunder as to legitimacy of children of void and voidable marriages.

**Sub-section (5).**—This is the vital clause in the section and materially affects the rights of a testamentary guardian of a Hindu minor as previously recognized under Hindu law and section 28 of the Guardians and Wards Act. Under the law as previously applied in case of testamentary guardians the view was taken that the testamentary guardian derived his powers of management not only from the will of the father but also from the principle of Hindu law enuniciaed by the Privy Council in the case of *Hunooman Persaud Pandey* (*n*) and in several other later cases (*o*). Hindu law conferred on the guardian not in his own interest but in the interest of the minor ward comparatively large powers over even the immovable property of the minor under his management. Though a limited and qualified power to be exercised solely for the benefit of the minor's estate or in case of necessity, yet it was wide enough to include an authority to charge, mortgage or even sell a sufficient portion of it, if circumstances warranted the exercise of such power. It was held in cases under this head that where the will did not impose any further restrictions or limitations on the exercise of this power in the matter of the disposal of the immovable property belonging to the minor the testamentary guardian could alienate such property in case of need or for the benefit of the minor's estate.

**Incapacity of minor to act as guardian of property.**

**10.** A minor shall be incompetent to act as guardian of the property of any minor.

**Incapacity of minor to act as guardian of property.**—This section lays down in express terms that a minor, that is a person who has not completed the age of eighteen years [s. 4(a),] is incompetent to act as guardian of the property of any minor. It supersedes to a large extent the rule laid down in section 21 of the Guardians and Wards Act. That section by implication recognizes the right of a minor to act as the guardian of the property of his minor wife or child. That section also assumes by implication that a minor is competent to be the "managing member of an undivided Hindu family" and that he is, as such manager, competent to be the guardian of the minor wife or child of another minor member of that family. It was observed in a decision of the Madras High Court: "It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is entitled to the custody of their persons and the management of their properties while his own person is subject to the custody of the legal guardian of his person and his properties are under the management of the legal guardian of his properties." It was suggested in that case that the right of a minor to act as a guardian should be confined over his wife and child to the control of their persons and he should have no power to interfere with the management of their properties (*p*). This section would seem substantially to adopt that suggestion. A Hindu minor, therefore, now has no capacity to act as the guardian of the property of any person. He can only act as the natural guardian of the person of his minor wife and children. This section, however, only postulates the incompetency of the minor to be the guardian of the

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(*n*) 6 M.I.A. 393.
(*o*) *Ramanathan* v. *Palaniappa* ('39) A.M. 531.
(*p*) *Ibrahim* v. *Ibrahim* (1916) 39 Mad. 608, 614.

property of any other minor. He can, therefore be the *karta* and manager of a Joint Hindu family. Section 21 of the Guardians and Wards Act is based upon that positive assumption (*q*).

*De facto* guardian not to deal with minor's property.

**11.** After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

**De facto guardian.**—This section brings about material change in the law relating to *de facto* guardians or *de facto* managers of a Hindu minor's estate by enacting in express terms that after the commencement of this Act, no person has the right or authority to do any act as a *de facto* guardian of such minor. Any act done by a *de facto* guardian or a *de facto* manager of a minor Hindu, before this Act came into operation, is not affected by the section and will be binding on the minor if it was for necessity or for the benefit of the minor's estate (*r*). A person who is not an *ad hoc* guardian but manages the affairs of an infant in the same way as a *de jure* guardian does can be described as a *de facto* guardian although he is not a natural guardian or a testamentary guardian or a guardian appointed by the Court. Strictly speaking there is in law nothing like a *de facto* guardian. Although the expression has been used in a number of decisions of courts any such person who takes upon himself the general management of a minor may more appropriately be described as *de facto* manager. The expression aptly describes the relations and friends who are interested in a minor who has no legal guardian and who out of love and affection for him assume superintendence and management of his estate. A *de facto* manager must be distinguished from a person who is in no way attached to the minor by any ties of affinity and is a mere intermeddler with his estate (*s*). In *Hunooman Persaud Pandey's* case (*t*) the Privy Council ruled that a *de facto* guardian had the same power of alienating the property of his ward as a natural guardian. The reasons for recognising the rule relating to the authority of a *de facto* manager of a minor's estate as also the demerits of the rule were discussed in a number of cases and by the Federal Court in *Kondamudi* v. *Myneni* (*u*). The present section now does away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the *de facto* guardian of such minor. It has accordingly been held that an alienee from a *de facto* guardian would now be governed by this section and any alienation so made after the commencement of this Act would be void *ab initio* and the alienee would acquire no title to the property (*u*1).

Reference may be made to §§ 538 and 538A *ante*.

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(*q*) *Budhi Jena* v. *Dhobai Naik* ('58) A. Orissa 7.

(*r*) See § 538 *ante*.

(*s*) *Kondamudi* v. *Myneni* (1949) 11 F.C.R. 65, ('49) A.F.C. 218. Also see *Rajalakshmi* v. *Ramachandran* ('67) A.M. 113; *Kusa Paride* v. *Baishnab* ('66) A. Orissa 60.

(*t*) 6 M.I.A. 393.

(*u*) See f.n. (*s*) above.

(*u*1) *Daneyi Gurumurty* v. *Raghu Podhan* ('67) A. Orissa 68.

Guardian not to be appointed for minor's undivided interest in joint family property.

**12.** Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest (*u2*):

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

**Guardian of minor's undivided coparcenary interest.**—This section substantially reaffirms the law on the subject as previously interpreted by Courts. If the minor is a member of a joint family governed by the Mitakshara law, the father as *karta* and manager of the joint family is entitled to the management of the whole coparcenary property including the minor's interest. After the father's death the management of the coparcenery property, including the minor's interest therein, passes to the eldest son as *karta*. The mother is not entitled to the custody of the undivided interest of her minor son in the joint property, because such property is not separate property, though she is as a natural guardian entitled to the custody of his person and of his separate property, if any. If all the coparceners are minors the Court may appoint a guardian of the whole of the joint property until one of them attains majority. On any one of the coparceners attaining majority, the guardianship of the property constituted by the Court ceases, and the Court is bound to hand over the joint family property to the adult coparcener, notwithstanding the fact that there are other minor coparceners. The reason why a guardian cannot be appointed by the Court of the undivided interest of a minor in coparcenary property in cases governed by the Mitakshara law is that the interest of a member of a joint Mitakshara family is not separate or individual property. Such cases are governed by the general principles of the law relating to joint family property. The subject has been dealt with in §§ 519 and 536 *ante*. Reference may also be made to §537 *ante* which deals with the inherent powers of a Chartered High Court in the matter of appointing guardian of a minor's undivided coparcenary interest in certain circumstances. The present section lays down in effect that the Court cannot appoint a guardian of the undivided interest of a minor coparcener in the joint family property where the property is under the management of an adult member of the family.

The High Court of Mysore did not have and does not have any jurisdiction to appoint a guardian for a Hindu minor in respect of his undivided interest in a joint family property which is in the management of an adult member of the family (*v*).

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(*u2*) See f.n. (*f5*) at p. 963, *supra*.

(*u*) *Govindappa* v. *Doddathayappa* ('68) A. Mys. 178.

Welfare of minor to be paramount consideration.

**13.** (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

**Welfare of the minor to be paramount consideration.**—The Act, as already pointed out, contains provisions which are supplementary to the law relating to guardians laid down in the Guardians and Wards Act. It does not specifically deal with the question of the powers of the Court to appoint or declare guardians or other questions relating to the general law on the subject of guardianship. Section 7 of the Guardians and Wards Act deals with the powers of the Court to appoint guardians and section 17 states matters to be considered by the Court in appointing guardians. Both the sections emphasize that the powers of the Court are to be exercised for the welfare of the minor which should be the paramount consideration in the appointment and declaration of any person as guardian of a minor. The present section does not lay down any new rule or principle but reiterates the salutary rule and is evidently intended to emphasize the importance of that general rule which is the key-stone of the whole law on the subject. In all matters relating to the custody and upbringing of the minor as well as the administration and management of the minor's property the primary and paramount consideration for the Court must be the welfare of the minor. Reference may be made to Notes under section 6(a) *ante*.

This section makes it quite clear that in all cases, irrespective of the status of the person claiming guardianship (e.g. father), the welfare of the minor would be the paramount consideration and if necessary section 19 of the Guardians and Wards Act will have to be read subject to this section (*w*).

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(w) *Sunil Kumar* v. *Satirani* ('69) A.C. 573. Also see *Lalta Prasad* v. *Ganga Sahai* ('73) A. Raj. 93.

# THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

No. 78 OF 1956

## ARRANGEMENT OF SECTIONS

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# INTRODUCTORY NOTE

"He whom his father and mother give to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed is considered as a son given, the gift being confirmed by pouring water."

—*Manu.*

"But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and then having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive as his son by adoption, a boy nearly allied to him or (on failure of such) even one remotely allied."

—*Vasistha.*

"The aged parents, a virtuous wife, and an infant child must be maintained even by doing a hundred misdeeds."

—*Manu* cited in the Mitakshara

Adoption is the admission of a stranger by birth to the privileges of a child by a legally recognized form of affiliation. Amongst the ancient Greeks and Romans and also some modern nations adoption is placed under legal regulation. Under Roman law the effect of adoption was to create the legal relation of father and son, just as if a person adopted was born of the blood of the adopter in lawful marriage. The adopted son took the name of his adopter and was bound to perform his adoptive father's religious duties. *Arrogatio* under early Roman law had to be in accordance with prescribed formulæ and took place in public with the sanction of the people in *comitia curiata.*

Adoption in Hindu law.

Marriage and sonship constitute some of the unique chapters in the *litera legis* of ancient Hindu law which recognised twelve kinds of sons of which there were five kinds of adopted sons. Modern Hindu law recognized the *aurasa* or legitimate son begotten by the man himself on the lawfully wedded wife. Of the adopted sons it recognized only two kinds, the *dattaka* and the *kritrima.* The *dattaka* form prevailed all over India; the *kritrima* form prevailed in Mithila and adjoining districts. It may be of some interest to notice that in ancient times a daughter also could be adopted. Nanda Pandit in his *Dattaka Mimansa* has favoured adoption of a daughter and regards it as conducive to spiritual benefit to the adopter and his ancestors. This is on the principle that a daughter given in marriage, which is called *kanyadana,* and a son given in adoption, which is called *putradana,* stand on the same footing being gifts for religious and secular purposes and the same consideration should apply to the gift of a daughter in adoption in order to secure spiritual benefit to the donee through the adopted daughter's son. An outstanding feature of the present Act is that it recognizes adoption both of a son and a daughter.

Maintenance of dependants.

The doctrine of maintenance has always been favoured by Hindu jurisprudentes. They speak of and insist upon the maintenance and support of various members of the family and lay down a number of beneficient injunctions. They draw a distinction between the dependants and lay down in mandatory tone the rule that it is the duty of a man to support his wife, aged parents

and infant children. In case of other dependants the injunctions are only preceptive. Modern Hindu law recognized the rule that a Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligation to maintain these dependants is personal in character, and arises from the very existence of the relationship between the parties. The present Act lays down mandatory rules for maintenance of the wife (*a*) on the same lines and imposes the duty of maintaining legitimate as well as illegitimate minor children, on both the parents (*b*). It also imposes the duty of maintaining aged or infirm parents on both a son and a daughter (*c*). The Hindu Succession Act, 1956, now puts a son and a daughter on par in matters of succession and does not draw any distinction between male and female heirs. A logical corollary to the rights of women to be *in equali jura* is that the obligation of maintenance of certain close relations should rest on male as well as female Hindus and the estate of a deceased male as well as a female Hindu should be liable for maintenance of the *dependants* of such deceased person. 'Maintenance' is defined in a comprehensive manner and includes provision for food, clothing, residence, education and medical attendance and treatment; in the case of an unmarried daughter it includes reasonable expenses of and incident to her marriage (*d*).

The Act applies not only to Hindus by religion but to a wide category of persons including Jains, Sikhs and Buddhists (*e*). It amends and codifies the law relating to adoptions and maintenance and gives overriding application to the provisions on the two subjects contained in it. In the law of adoption it brings about some fundamental and important changes and the result is that immediately on the coming into operation of the Act the law on the subjects of adoptions and maintenance hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having force of law ceases to have effect with respect to all matters dealt with in it. The Act also supersedes the rules on the subjects of adoption and maintenance contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all other law shall cease to apply to Hindus in so far as it is inconsistent with any provisions contained in the Act (*f*).

Wide and extensive application of the Act.

The present enactment is part of the scheme of codification of certain parts of Hindu law (*g*). The Hindu Marriage Act, 1955, codifies the law on the subject of marriage and divorce: The Hindu Succession Act, 1956, codifies the law relating to intestate succession: The Hindu Minority and Guardianship Act, 1956, codifies certain parts of the law relating to minority and guardianship among Hindus: and the present enactment deals with adoptions and maintenance, two subjects which are not related to one another but are presumably clustered solely to keep down the number of the new statutes

Scheme of the recent legislation.

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(*a*) Section 18.
(*b*) Section 20(2).
(*c*) Section 20(3).
(*d*) Section 3(*b*).
(*e*) Section 2.
(*f*) Section 4.
(*g*) See pp. 68-70, *ante* and p. 989 *infra*.

forming part of the scheme of codification of Hindu law. It will be noticed that these four enactments leave an undetermined residue.

**Requirements of valid adoption under previous law.**

The requirements of a valid adoption under the law applicable before the commencement of this Act as to capacity of the parties were that the persons taking and giving a son in adoption must have the legal capacity and right to do so and the person adopted should be lawfully capable of being taken in adoption. Only a male Hindu had the right to adopt a son provided he had no son, grandson or great-grandson natural or adopted living at the time of adoption. A wife could adopt a son to her husband but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorized her to do so. In other parts of India, she could adopt without such authority. But in no case could a wife or a widow adopt a son to herself; the adoption had to be made to her husband. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the person adopted. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to *datta homam*, that is, oblations of clarified butter to fire, the law was not finally settled and there was divergence of judicial opinion. On the question of capacity to adopt also there was some difference of opinion on certain aspects of the matter. The law as to adoption by a widow and her authority to adopt was different in different States. On this and a number of other questions relating to the requirements of a valid adoption the law was not uniform and it was eminently desirable that the law on the subject should be uniform and comprehensive and contained in a series of coherent propositions carefully considered and authoritatively stated by the supreme legislature.

**Woman treated as *in equali jura*.**

With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it was only logical that the fundamental guarantee of equality of status and equality before the law should be recognized also in the matter of adoptions and concrete shape should be given to the rights of women to be *in equali jura* in this branch of the law. The Act now provides for adoption of boys as well as girls. The law on the subject of adoption by a widow as interpreted by Courts had the effect of divesting certain estates already vested in others and had been the cause of much ruinous litigation. A widow can now adopt a son or daughter to herself, in her own right, but there is no question of divesting any property vested in any person or even herself by reason simply of the fact that subsequent to such vesting an adoption has been made. The present Act has considerably simplified the law on the subject. It has also the merit of giving a uniform code on the subject for the whole of India.

Chapter II of the Act codifies the law of adoption and contains a *fasciculus* of rules relating to the capacity and right of a male and female Hindu to take in adoption a son or daughter who must be a 'Hindu', an expression to be understood in the wide comprehensive

Scheme of the Chapter on adoptions.

meaning given to it in the Act. It also deals with the subjects of persons who may give in adoption and persons who may be taken in adoption. One principal provision of the Chapter relates to the formal and ceremonial requirements of the act of adoption. Another vital provision lays down the result and effects of a valid adoption. It is made abundantly clear that all adoptions made after the Act came into operation are to be regulated and governed by the provisions contained in the Chapter and that any adoption thereafter made in contravention of any of those provisions would be null and void (*h*). An adoption which is void does not affect the status or rights of any of the parties (*i*). It creates no rights in favour of the adoptee boy or girl in the adoptive family. Nor does the adoptee lose any rights in the family of his or her birth. Adoptions made prior to the coming into force of the Act on 21st December 1956 are not affected by the rules relating to the validity and effect of adoptions contained in this Act. Their validity and effect must be determined by the law as it stood before the Act came into operation (*j*).

The requirements of a valid adoption under the Act are—

Requirements of a valid adoption under the Act.

(1) The person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption (Ss. 7, 8):

(2) The person giving in adoption must be lawfully capable of doing so (s. 9):

(3) The person adopted must be lawfully capable of being taken in adoption (s. 10):

(4) The conditions relating to adoption including actual giving and taking of the child with the intention of transferring the child from the family of its birth must be complied with (s. 11).

Every male Hindu who is of sound mind and has attained majority by completing his age of eighteen years may lawfully take a son in adoption, provided he has no Hindu son, grandson or great-grandson natural or adopted living at the time of adoption; and if he has a wife living he can adopt only with her consent unless she is on account of mental incapacity unable to give consent or has disabled herself from giving requisite consent by renouncing the world or ceasing to be a Hindu. So also every male Hindu who is of sound mind and has attained majority may lawfully take a daughter in adoption provided he has no Hindu daughter or son's daughter (natural born or adopted) living at the time of adoption and subject to the same requirement about the wife's consent (*k*).

Capacity of male Hindu to adopt son as well as daughter.

It is competent now under the Act to a female Hindu who is of sound mind and has completed the age of eighteen years to take a son or daughter in adoption to herself and in her own right. If she is married she cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. A female Hindu who is unmarried or a widow or a divorcee has the capacity to

Capacity of female Hindu to adopt son as well as daughter.

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(*h*) S. 5(1).
(*i*) S. 5(2).
(*i*) S. 30.
(*k*) S. 7; S. 11(1); S. 11(2).

adopt a son to herself, in her own right, provided she has not a Hindu son, grandson or great grandson living at the time of adoption. So also she has the capacity to adopt a daughter to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption (*l*).

Who can give in adoption.

The capacity to give a son or daughter in adoption is principally confined to the father and the mother of the child and even an only child may be given in adoption. One change brought about by the Act in the matter of this requirement is that where both the parents are dead or disabled from exercising the right by reason of mental incapacity or renunciation of the world, the testamentary guardian or a guardian appointed or declared by the court can now give the ward in adoption with the previous sanction of the court. No such sanction would be granted unless the court is satisfied that the adoption will be for the welfare of the minor (*m*).

Persons who may be adopted.

The person to be adopted may be a male or a female. He or she must be a Hindu and one who has not already been adopted, and must be unmarried and must not have completed the age of fifteen years. The last two requirements are not absolute in the sense that if there is a custom or usage applicable to the parties which permits of a married person or a person who has completed the age of fifteen years being adopted, the adoption of any such person will be valid (*n*). The same child cannot be adopted simultaneously by two or more persons (*o*). Some other conditions relating to the age of the child to be adopted are that in case of adoption by a male the adoptee daughter must be at least twenty-one years younger than him (*p*): and in case of adoption by a female the adoptee son must be at least twenty-one years younger than her (*q*).

Requisite formality: Giving and taking.

The physical act of giving and receiving of the boy or the girl is absolutely necessary to the validity of an adoption. Mere expression of consent, or the execution of a deed of adoption though registered, but not accompanied by *actual delivery* of the boy or the girl does not operate as a valid adoption. To constitute an adoption there should be some overt act which signifies the actual delivery of the child with intent to transfer the child from the family of its birth to the family of its adoption. Religious ceremonies are usually performed by making oblations of clarified butter to the fire (*datta homam*) but the Act does not insist upon the performance of this or any other ceremony or form as essential to the validity of an adoption (*r*). The actual giving and taking of the child, however, is a requirement and a condition that is absolute. It is of the essence of adoption and the law does not accept any substitute for it.

The objects of adoption of a son were discussed by the smritikars and commentators. They have also been discussed in decisions of courts and are twofold. The first is religious, to secure spiritual benefit to the adopter and

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(*l*) S. 8; S. 11(1); S. 11(2).
(*m*) S. 9.
(*n*) S. 10.
(*o*) S. 11(v).
(*p*) S. 11(iii).
(*q*) S. 11(iv).
(*r*) S. 11(vi).

his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name. The temporal purpose evidently is the celebrity of the name of the adoptive father who takes him as his son for all purposes.

The result and effects of adoption are notable. After stating the rules relating to capacity of the parties and the requirements of a valid adoption the Act proceeds to lay down the effects and consequence of adoption. An adopted child is to be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption. From such date all the ties of the child in the family of his or her birth become severed and similar ties are replaced by those created by the adoption in the adoptive family (*s*). This fiction of law whereby a status is to be deemed to have been acquired and something is to be deemed to exist which would not otherwise have been so is to be given effect to with all its logical corollaries and all the incidents of the status. Full effect is to be given to the newly acquired status, for instance in matters of succession *ex parte paterna* as well as *ex parte materna* in the family of adoption. One important result of the severance of the ties in the family of birth is that the adoptee can no longer claim any right to succeed to the property of his natural father or mother or any of the relations in the family of birth. There are, however, three vital qualifications to the logical effect and corollaries to the general rule that the adoptee is to be deemed for all purposes to be the son or daughter of the adoptive parent: (a) the adopted child is not divested of any property already vested in him or her before the adoption: (b) the adoptee cannot marry any person whom the adoptee could not have married if he or she had continued in the family of birth so that even though the ties in the natural family are severed the bars relating to marriage within prohibited degrees of relationship and *sapinda* relationship in the family of birth continue to be applicable after the adoption: (c) the adopted child does not divest any person of any property which vested in him or her before the adoption (*t*). For all purposes the adoption takes effect from the date of the adoption and the vital nature and effect of this last rule cannot be minimised. The principle of divesting of vested estates in consequence of adoption had been the source of much ruinous litigation.

Result and effects of adoption.

The Act also lays down certain other rules to some of which reference may be made here. No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce its status and return to the family of birth (*u*). Another rule of some importance relates to proof. When there is a registered document placing on record the factum of adoption a presumption is to be raised that the adoption was made in compliance with all the requirements of law. The onus of proving invalidity of the adoption in any such case is on those who challenge the adoption (*v*).

Some other rules.

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(*s*) S. 12.
(*t*) Provisos to S. 12.
(*u*) S. 15.
(*v*) S. 16.

Chapter III of the Act codifies the law of maintenance applicable to Hindus. A Hindu is under the legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents. The obligation is personal. It arises from the very nature of the relationship and exists whether he possesses any property or not. The Act gives statutory form to that obligation and goes further than that and rules that a female Hindu as well as a male Hindu is now under a legal obligation to maintain legitimate or illegitimate children and aged or infirm parents. In the matter of persons who are entitled to claim maintenance under the Act the scheme is to deal in the first place with the right of maintenance of wife from her husband (*w*); the right of maintenance of minor children (legitimate and illegitimate) from the father and mother (*x*); and the right of maintenance of aged and infirm parents from their sons and daughters (*y*). In these cases as also in case of a widowed daughter-in-law the right is against an existing person, husband, father, mother, son, daughter or father-in-law as the case may be. After stating the right of the wife, the minor children and others the Act proceeds to define dependants of a deceased Hindu and lays down rules relating to the right of maintenance of dependants from heirs of a deceased Hindu or other beneficiaries who might have inherited the estate of such deceased person.

**Scheme of Chapter on maintenance.**

The right of a wife for maintenance is an incident of the status or estate of matrimony and a Hindu is under a legal obligation to maintain his wife. According to the law as applied before the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, the duty of the wife to live with her husband was emphasized with greater strictness and she had no right to separate residence or maintenance unless she satisfied the court that the husband had refused or neglected to maintain her in his own place of residence or was guilty of such misconduct as justified her in living separate and apart from him. The Act of 1946 liberalised the law in certain respects in favour of the wife and recognized wider grounds which could justify her claim for separate residence and maintenance. The present enactment lays down rules on the subject which are substantially the same.

**Maintenance of wife.**

A wife is entitled to live separately from her husband and claim maintenance from him: (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying her living separately (*z*). The grounds

**Wife when entitled to separate residence and maintenance.**

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(*w*) S. 18.
(*x*) S. 20.
(*y*) S. 20.
(*z*) S. 18(2).

stated here, it will be noticed, are similar to grounds on which the wife can obtain from the court, under the provisions of the Hindu Marriage Act, 1955, one or other of the reliefs provided for by that enactment. But she is not bound to adopt proceedings for and seek relief by way of judicial separation, or divorce or a decree for annulment of the marriage or even a decree for restitution of conjugal rights and claim maintenance in those proceedings although she may be entitled to do so. She may, if she so chooses, only claim separate residence and maintenance for her and is entitled to the same under the general law relating to maintenance now embodied in this Act.

Maintenance of children and aged parents.

A Hindu male or female is bound, during his or her lifetime to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents. The obligation of a person to maintain aged or infirm parents or an unmarried daughter, extends in so far as the parent or daughter is unable to maintain himself or herself out of his or her own property or earnings (*a*). Section 19 of the Act states the circumstances in which a daughter-in-law is entitled to claim maintenance from her father-in-law.

Maintenance of *dependants* of deceased Hindu.

The right of dependants of a male Hindu such as for instance a wife, minor children and aged parents to maintenance by him did not come to an end on his death and it was well-settled law that an heir was legally bound to provide, out of the estate which descended to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The right of a widow, when she did not succeed to her husband's property, was one of considerable importance and consequence. The position and rights of a widow both under the Mitakshara and the Dayabhaga has been stated in the relevant chapters of this work. The rights of the widow—one of the three women mentioned in the Hindu Women's Rights to Property Act, 1937—to claim maintenance was not abolished by that Act in express terms but the effect was that there was little occasion for her to claim maintenance since she was entitled to claim a share on partition. Under the Hindu Succession Act, 1956, a widow is entitled to succeed as one of the preferential heirs along with the son, daughter, mother and other specified heirs and the question of maintenance of a widow and other dependants of the deceased proprietor such as for instance an unmarried daughter, mother or widowed daughter-in-law must now be considered in the context of the provisions of that Act. If her husband was at the time of his death a member of a Mitakshara coparcenary the widow becomes entitled by operation of section 6 of that Act to a share out of the interest of the deceased husband in the coparcenary property on the footing of a notional partition deemed to have taken place immediately before his death. The law on the subject of the rights of the dependants was fairly well-settled but it was necessary that the law should be declared by the Legislature in statutory form in view of the changes brought about by the Hindu Marriage Act, 1955, and the Hindu Succession Act, 1956.

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(*a*) S. 20.

The principal general rule laid down in the Act on this aspect of maintenance is that a dependant of a male or female deceased Hindu, who has not obtained any share in the estate of the deceased, dying after the commencement of this Act, is entitled to claim maintenance from those who take the estate. Such, for instance, would be the case where a Hindu has disposed of his property by will and his dependants such as wife, children or others have not been properly provided for. The *dependants* of a deceased Hindu entitled to claim maintenance as stated above are: (i) his or her father, (ii) his or her mother; (iii) his widow (so long as she does not remarry); (iv) his or her minor son; (v) the minor son of his predeceased son; (vi) the minor son of a predeceased son of his predeceased son; (vii) his or her unmarried daughter; (viii) the unmarried daughter of his predeceased son; (ix) the unmarried daughter of a predeceased son of his predeceased son; (x) his widowed daughter; (xi) the widow of his predeceased son (so long as she does not remarry); (xii) the widow of a son of his predeceased son (so long as she does not remarry); (xiii) his or her illegitimate minor son; (xiv) his or her illegitimate daughter, so long as she remains unmarried. As a general rule it may be stated that this right of a dependant is enforceable when the dependant is unable to obtain maintenance from the estate of any other person when he or she has a prior right to claim maintenance as a dependant of such other person.

**Persons entitled to maintenance as *dependants*.**

There is no yardstick and no rigid rule for assessment of the quantum of maintenance to be paid to any person entitled to the same and the courts have always exercised a wide discretion in the matter. That discretion is, of course, exercised judicially in the light of established principles and upon an equitable view of all the circumstances attending each particular case. The Act lays down that it shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of the Act (*b*) and deals with the matter under two heads. In determining the amount of maintenance to be awarded to a wife, child or parent, regard must be had to—(a) the position of the parties; (b) the reasonable wants of the claimant; (c) if the claimant is living separately, whether the claimant is justified in doing so; (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source; (e) the number of persons entitled to maintenance from the husband or father or mother or son or daughter as the case may be (*c*). In determining the amount of maintenance to be awarded to a dependant regard must be had to—(a) the net value of the estate of the deceased after providing for the payment of his debts; (b) the provision, if any, made under a will of the deceased in respect of the dependant; (c) the degree of relationship between the two; (d) the reasonable wants of the dependant; (e) the past relations between the dependants and the deceased; (f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source; and (g) the number of dependants entitled to claim maintenance under the Act (*d*).

**Discretion of the Court.**

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(*b*) S. 23(1).
(*c*) S. 23(2).
(*d*) S. 23(2).

The Act also lays down certain other rules to some of which reference may be made here. A dependant's claim for maintenance is not a charge on the estate of the deceased or any portion of the same unless one has been created by the will of the deceased, by a decree of the court or by agreement between the dependant and the owner of the estate or any portion of it (*e*). Debts contracted or payable by the deceased take precedence over the right of maintenance of any dependant unless there is a valid charge created in respect of the same (*f*). The amount of maintenance, whether fixed by a decree of the court or by agreement at any time, may be altered if there is a material change in the circumstances justifying such alteration (*g*).

Some other rules.

(*e*) S. 27.
(*f*) S. 26.
(*g*) S. 25.

# THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

No. 78 OF 1956

[21*st December*, 1956]

**An Act to amend and codify the law relating to adoptions and maintenance among Hindus.**

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

**Preamble.**—A preamble to an enactment of the Legislature was formerly regarded as a key to open the mind of the makers of the Act, and the mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of the Legislature has disappeared and it is now regarded as well settled law that a preamble cannot either restrict or extend the enacting part when the language and scope of an Act are not open to doubt.

**Scheme of codification of Hindu law.**—The present enactment deals with two subjects, adoptions and maintenance. The enactment is part of the scheme of codification of certain parts of Hindu law (*h*). The Hindu Marriage Act, 1955, codifies the law on the subject of marriage and divorce: The Hindu Succession Act, 1956, codifies the law relating to intestate succession: The Hindu Minority and Guardianship Act, 1956, codifies certain parts of the law relating to minority and guardianship among Hindus: and the present enactment deals with adoptions and maintenance two subjects which have no real or practical connection and are not related to one another but are clustered solely to keep down the number of the new statutes forming part of the scheme of codification of Hindu law. It will be noted that these four enactments leave an undetermined residue.

**Codifying Act.**—It is clear from the preamble that it is intended by the Act not merely to amend but *to amend and codify* the law relating to adoptions and maintenance. The object of codification of a particular branch of law is that, on any matter specifically dealt with by it, such law should be sought for in the codified enactment itself. Where a statute is expressly said to codify the law, the court as a general rule is not at liberty to go outside the law so created simply because before the existence of the enactment another law prevailed. Reference may be made in this connection to the Notes at pp. 665-666 *supra* and the decisions there cited.

Question may arise whether this Act is a complete code in the sense of comprehensive legislation dealing with every phase and aspect of the law of adoptions and maintenance. In an Act intituled an Act to amend and codify a particular branch or branches of law, in so far as there is express enactment,

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(*h*) See pp. 68-70 *ante*.

that alone must be looked at since the court is bound by it and can look to nothing else and the express enactment must govern the rights of the parties even though it has radically changed or altered or modified the prior law. The Act as has already been pointed out, brought about some important changes in the law on the subjects of adoptions and maintenance previously applied to Hindus. Reference in this connection may be made to section 4 which gives over-riding effect to the provisions of the Act. It follows that with respect to matters for which provision is made in the Act the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable though such matters are indeed few.

**Rules of interpretation of a statute.**—For some of the rules relating to interpretation see Notes at pp. 666-669 *supra*.

## CHAPTER I

## PRELIMINARY

Short title and extent.

**1.** (1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

**Commencement and extent.**—The Act received the assent of the President on 21st December 1956 and came into operation on that day (*i*).

The Act applies to Hindus in the whole of India except the State of Jammu and Kashmir. It will be noticed that the Hindu Marriage Act, 1955, states that it applies "also to Hindus domiciled in the territories to which this Act extends who are outside the said territories." The Legislature has not provided in this section for extra territorial application presumably on the ground that it was unnecessary and inappropriate to do so and left the question to be dealt with by principles of international law. The general principle of private international law is that the law of domicil governs personal relations and the *lex loci* governs matters relating to immovable property.

Application of Act.

**2.** (1) This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person

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(*i*) S. 5(1)(*b*). General Clauses Act.

would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation.*—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(bb) any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh (*i*1); and

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

**Persons governed by the Act.**—It must have been seen from § 6(1) that Hindu law has been applicable to a wide category of persons. The present section substantially codifies the law on the question as it existed at the time of the commencement of this enactment and is *in pari materia* with the law on the question enacted in section 2(1) (c) of the Hindu Marriage Act, 1955, and the analogous section of the Hindu Succession Act, 1956.

Reference may be made to Notes under 'Persons governed by the Act' at p. 671 *supra.*

Reference may also be made to §§ 6 and 7 *ante.*

**Sub-section (1) (a): Hindu.**—See pp. 671-672 *supra.*

**Sub-section (1) (b).**—See p. 672 *supra.*

**Sub-section (1) (c).**—See p. 672 *supra.*

**Explanation (b).**—See p. 672 *supra.*

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(*i*1) The clause (bb) was inserted by Act 45 of 1962, s. 62.

**Explanation (c).**—See p. 672 *supra*.

**Sub-section (2): Scheduled Tribes.**—See pp. 672-673 *supra*.

**Sub-section (3).**—See p. 673 *supra*.

Definitions.

**3.** In this Act, unless the context otherwise requires,—

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy: and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;

(b) "maintenance" includes—

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;

(c) "minor" means a person who has not completed his or her age of eighteen years.

It will be noticed that the definitions given in this section are not intended merely to economise words. Some of them lay down legal principles.

**Unless the context otherwise requires.**—The definitions given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject-matter. Even when an Act contains a section giving definitions and interpretations the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the court will give such meaning to the expression as will be more in harmony with the context and allow it to prevail over the "artificial conceptions" of the definition clause.

**Clause (a): "Custom": "Usage".**—See Notes at pp. 674-675 *supra*. Also see §§ 16 to 20 *ante*.

**Clause (b): Maintenance.**—The definition of 'maintenance' is so worded that it can be rendered applicable to the case of all persons entitled to claim maintenance under the various provisions of the Act. In case of an unmarried daughter it includes both maintenance and reasonable expenses of and incidental to the marriage.

**Clause (c): Minor.**—The expression "minor", in the context of the provisions of the Act relating both to adoption and maintenance, is to be understood as referable to a person who has not completed his or her age of eighteen years.

**Overriding effect of Act.**

4. Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

**Over-riding effect of the Act.**—This section gives over-riding application to the provisions of the Act and in effect lays down that in respect of any of the matters dealt with in the Act it seeks to repeal all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. As already pointed out the Act brings about some important changes particularly in the law of adoption and the result is that immediately on the coming into operation of the Act the law of adoption and maintenance hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law ceases to have effect with respect to all matters dealt with in the Act. The Act also supersedes the rules of adoption and maintenance contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all other law shall cease to apply to Hindus in so far as it is inconsistent with any provisions contained in the Act. Adoptions made after the commencement of the Act are to be regulated by the provisions of the Act. Section 5 in terms states that no adoption shall be made after the commencement of the Act by or to a Hindu except in accorddance with the provisions contained in Chapter II (Ss. 5-17) and that any adoption made in contravention of those provisions shall be void. The Act, it will be noticed, does not recognise *Kritrima* adoption (§ 515): Nor Dwyamushyana adoption (§ 486): Nor what is often referred to as Illatom adoption in certain communities in the South (§ 515A). No such adoption can be made after the Act came into force.

The Act is a codifying enactment (*j*). It does not merely crystallise or declare the existing law upon the two subjects of adoption and maintenance but deliberately departs from the same in respect of certain matters. It supersedes prior law and lays down the whole law of adoption and maintenance in the form of a code and so far as it goes must be read as a complete enactment. Therefore, in cases governed by the Act, appeal to any rule of the law of adoption or maintenance previously applicable to Hindus is now permissible only in respect of matters for which no provision is made in the Act (*jj*). A family or caste custom prohibiting adoption would be overridden by this Act (*j*1).

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(*i*) See pp. 989-990 *supra*.

(*ii*) For instance see *Dhanraj* v. *Suraj Bai* ('73) A. Raj. 7.

(*j*1) See § 443 *ante* for such custom.

It does not follow from what has been stated above that any provision relating to maintenance in this Act affects the Court's power to grant permanent alimony and maintenance under section 25 of the Hindu Marriage Act (*j*2).

This Act does not repeal or affect in any manner the provisions of section 188 of the Criminal Procedure Code relating to maintenance. The scope of the two laws is different and both can stand together (*jj*2).

**Act is not retrospective in its operation.**—It is a fundamental and firmly established rule of interpretation that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. There is clear indication in this section read with the other important sections of the Act that it is not intended to have retrospective effect (*j*3). As to adoptions section 5 expressly rules that adoptions made after the commencement of the Act are to be regulated by the provisions of the Act. Section 30 which is evidently appended *ex abundanti cautela* states that nothing contained in the Act is to affect any adoption made before the commencement of the Act and the validity and effect of any such adoption must be determined by the law as it stood before the Act came into operation. A contrary rule would obviously result in manifiest injustice.

The general rule that an enactment like the present should operate in cases and in respect of facts which come into existence after it was passed—*nova constitutio forman imponere debet, non proeteritis*—has been accepted by the Legislature and the exceptions to its application in the Act are few. In the undermentioned case it was observed that where the Act is intended to be retrospective it expressly says so and reference was made to certain provisions of the Act relating to maintenance (*jj*3). The word retrospective is used in several different senses. A statute is "not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." Thus for instance in case of some of the grounds on which maintenance may be claimed in cases falling under Chapter III a part of the requisite facts constituting the grounds may well be antecedent to the date of the commencement of the Act. In such a case it cannot be said that by applying provisions relating to maintenance the court is giving retroactive operation to the Act. It may be said in case of any such new law, in general, that it confers new rights and it would not be strictly correct to say that there is retroactive operation.

A necessary and logical corrollary to the rule that retrospectivity is not to be presumed is that even in case of a provision intended to affect existing rights it is not to be construed to have any greater retrospectivity than is rendered necessary by the language used unless to do so would result in absurdity or an anomalous situation. In these matters the Courts have been more guided by considerations of substantial justice and convenience than rigid attention to strict grammatical form.

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(*j*2) *Seshadri* v. *Jayalakshmi* ('63) A.M. 283; I.L.R. (1963) Mad. 384.

(*jj*2) See *Nanak Chand* v. *Chandra Kishori* ('70) A.S.C. 446 and cases there examined.

(*j*3) *Ramamoorty* v *Sitharamamma* ('61) A.A.P. 131. Also see *Ramabai* v. *Ambadas* ('67) A.M.P. 86.

(*jj*3) *Gopala Rao* v. *Sitharamamma* ('65) A.S.C. 1970, 1973.

## CHAPTER II

## ADOPTION

In the Introductory Note to this commentary reference has been made to the scheme of this Chapter on adoption and an outline has been given of the principal provisions relating to requisites and conditions of a valid adoption; capacity to take in adoption; persons capable of giving in adoption; and persons who may be adopted. Attention has also been drawn in that Note to the result and effects of adoption.

**5.** (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

**Adoptions to be regulated by this Chapter.**

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

**Adoptions made after the commencement of the Act.**—Sub-section (1) of this section makes it abundantly clear that all adoptions made after the Act came into operation are to be regulated and governed by the provisions contained in this Chapter (Ss. 5-17) and that any such adoption made in contravention of those provisions would be null and void. Reference may be made to Notes under section 4.

**Adoptions made before the commencement of the Act.**—It follows from the rule laid down in sub-section (1) that the Act is not intended to deal with or affect adoptions made before the Act came into operation. Section 30 gives the express *saving* evidently appended *ex abundanti cautela* that nothing contained in the Act is to affect the validity and effect of any such adoption which must be determined by the law as it stood before the Act came into operation. A contrary rule would obviously result in manifest injustice. A void adoption which took place before the Act cannot be declared valid under this Act (*j*4). The subject of adoption under the previous law is discussed in Chapter XXIII at pp. 523-573 *supra*.

**Sub-sec. (2): Consequences of void adoption.**—This sub-section deals with the question of effect and consequences of an adoption made after the coming into force of the Act where such adoption though performed and made is void by operation of the requirements of the Act relating to the prescribed conditions for a valid adoption; capacity to take in adoption; capacity to give in adoption; or persons who may be adopted. The prime effect of a valid adoption is that an adopted child is to be deemed to be the child of his or her adoptive father or mother for all purposes from the date of the adoption

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(*j*4) *Nathuni Prasad* v. *Kacher* ('65) A.P. 160.

and all the ties of the child in the family of his or her birth become severed and replaced by those created by the adoption in the adoptive family as laid down in section 12. The present sub-section reaffirms the general rule of Hindu law that where there has been adoption in form, but such adoption is invalid, the adopted person does not acquire any rights in the adoptive family, nor does he forfeit his rights in his natural family. Reference may be made to § 510 at p. 568 *ante*.

**Gifts to person whose adoption is invalid.**—See § 511 at p. 568 *ante*.

6. No adoption shall be valid unless—

Requisites of a valid adoption.

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

**Requirements of a valid adoption.**—This section enumerates the requirements of a valid adoption—

(1) The person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption (Ss. 7, 8):

(2) The person giving in adoption must be lawfully capable of doing so (s. 9):

(3) The person adopted must be lawfully capable of being taken in adoption (s. 10):

(4) The conditions relative to adoption including actual giving and taking of the child with the intention of transferring the child from the family of its birth to the family of its adoption must be complied with (s. 11).

Failure of compliance with any of these requirements will render the adoption null and void. The section is of a mandatory character. The requirements are cumulative and must be complied with. The requirement about giving in adoption by a competent person is applicable both in case of a minor and an adult person who is adopted (*j*5).

Requirements of a valid adoption under the previous law are stated in §§ 449-493 *ante*.

Capacity of a male Hindu to take in adoption.

7. Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and

(*j*5) *Dhanraj* v. *Suraj Bai* ('73) A. Raj. 7.

finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

*Explanation.*—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary, unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

Sections 7 and 8 deal with the subject of persons who may lawfully take a son or daughter in adoption and the effect of these sections is to bring about important changes in the law on the subject of adoption. It is competent now to a male Hindu to take a son or a daughter in adoption in the circumstances mentioned in and subject to the conditions stated in section 11. It is also competent now to a female Hindu to take a son or a daughter in adoption to herself, in her own right, in the circumstances mentioned in clause (c) of section 8 and in section 11 and subject to the conditions stated in section 11. Under the previous law only a male could adopt a son. A wife could adopt a son to her husband but she could not adopt during her husband's lifetime except with his express consent. The law as to consent in case of adoption by her after his death differed in different States as summarised in § 452 *ante*. But in no case could a wife or a widow adopt a son to herself; the adoption had to be made to her husband. An adoption by a woman of a son to herself was invalid and conferred no legal rights upon the person adopted. A daughter could not be adopted by a male or a female Hindu [§ 480 (1)]. The changes now made in the law on the subject require to be carefully noticed.

**Capacity of a male Hindu to take in adoption.**—Any male Hindu who is of sound mind and is not a minor, that is has completed the age of eighteen years, has the capacity to take a son or daughter in adoption. Adoption by a male Hindu who is himself a minor is void *ab initio* and cannot become valid by mere ratification. He may, however, after attaining majority, if possible, readopt the child in accordance with the conditions laid down in the Act. Adoption by a person of unsound mind is no adoption at all. A person who wants to challenge any adoption on the ground that the adoptive father was of unsound mind will have to discharge the heavy onus of proving that at the date of the adoption the adoptive father was of unsound mind. This requirement relating to mental capacity is a very simple one which does not demand any high degree of intelligence on the part of the adoptive father to comprehend that he is adopting a son and there is always a very strong presumption in favour of sanity. This burden of proof may, however, shift where it is shown, for instance, that the adoptive father had on inquisition been found to have been a lunatic (*jj*5).

**Consent of wife.**—The capacity of a male Hindu to adopt a son or daughter recognized by this section is circumscribed by the rule enacted in the *proviso* that in case he has a wife living, he has no right to adopt except with the consent of the wife. The consent need not necessarily be express. It can be inferred from the facts and circumstances of the case. Usually where adop-

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(*jj*5) *Gopi* v. *Madanlal* ('70) A. Raj. 190.

tion ceremoniers are performed the wife has to take a prominent part in the same and no difficulty of proving consent should arise in practice. The consent may be dispensed with if the wife has finally renounced the world or has ceased to be a Hindu (by conversion to any religion other than Hinduism, Jainism, Buddhism or Sikhism) or if the wife is declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. In case the male Hindu, who wants to adopt a son or daughter, has more than one wife, the requisite consent must be obtained from all the wives except that no consent would be necessary from a wife who is unable to give consent or has disabled herself from doing so in circumstances already stated above.

It will be noticed that section 6(1) requires that the person who wants to adopt a son or a daughter must have the capacity, and also the right, to take in adoption. The present section speaks of what is described as 'capacity'. Section 11 which lays down conditions for a valid adoption requires that in case of adoption of a son the adoptive father must not have a Hindu son, son's son or great-grandson (by legitimate blood relationship or by adoption) living at the time of adoption. Section 11 also requires that in case of adoption of a daughter the adoptive father must not have a Hindu daughter or son's daughter (by legitimate blood or by adoption) living at the time of adoption.

It follows from the language of this section read with clauses (i) and (ii) of section 11 that a male Hindu has the capacity and the right to have both an adopted son and an adopted daughter provided there is compliance with the requirements and conditions of such adoptions laid down in the Act including that relating to consent of the wife.

Any adoption made by a male Hindu who does not have the requisite capacity to take in adoption or the right to take in adoption is null and void.

*Old law.*—See §§ 449 and 450 at pp. 524-525 *ante.*

**8.** Any female Hindu—

Capacity of a female Hindu to take in adoption.

(a) who is of sound mind,
(b) who is not a minor, and
(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption.

**Capacity of a female Hindu to take in adoption.**—This section brings about a very important and far-reaching change in the law of adoption as hitherto applied in case of Hindus. It is competent now to a female Hindu who is of sound mind and has completed the age of eighteen years to take a son or a daughter in adoption to herself, in her own right provided—she is not married; or is a widow; or is a divorcee; or if married, her husband

has finally renounced the world, or ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect.

It will be noticed that section 6(1) requires that the person who wants to adopt a son or a daughter must have the capacity, and also the right, to take in adoption. The present section speaks of what is described as 'capacity'. Section 11 which lays down the conditions for a valid adoption requires that in case of adoption of a son the mother, by whom the adoption is made, must not have a Hindu son, son's son or great-grandson (by legitimate blood relationship or by adoption) living at the time of adoption. Section 11 also requires that in case of adoption of a daughter the mother, by whom the adoption is made, must not have a Hindu daughter or son's daughter (by legitimate blood relationship or by adoption) living at the time of adoption.

It follows from the language of this section read with clauses (i) and (ii) of section 11 that a female Hindu has the capacity and the right to have both an adopted son and an adopted daughter provided there is compliance with the requirements and conditions of such adoptions laid down in the Act.

Any adoption made by a female Hindu who does not have the requisite capacity to take in adoption or the right to take in adoption is null and void.

**Adoption by widow.**—Under the law as previously applied no female including a wife or a widow could adopt a son to herself. After the death of the husband a widow could adopt a son in certain parts of India if he had expressly authorized her to adopt, and in other parts of India, even without such authority. The adoption, however, whether by a wife with consent of the husband or by a widow after his death was not of a son to herself but to her husband. The status in law of a female Hindu is now considerably changed. The Hindu woman's limited estate is now abolished by the Hindu Succession Act and a widow holds property acquired by her whether before or after the commencement of that Act including property inherited from the husband as her absolute property and the scheme of that Act is to treat male and female heirs equally in matters of succession. A logical corrollary of that was to permit both male and female Hindus to adopt a son or a daughter and to do so in his or her own right. The present section recognizes the right among other female Hindus of a widow to adopt a son or daughter to herself. There must, of course, be compliance with the requirements and conditions of such adoptions laid down in the Act. The effect of adoption by a widow of a son or daughter will be to clothe the adopted son or daughter with all the rights of a natural born son or daughter in the adoptive family and to create all the ties of the child in the family (S. 12). The result of this is that for all purposes (subject to the rules laid down in the provisos to section 12) the adoptee in effect becomes the son or daughter not only of the widow but of her deceased husband as well. The adoptee acquires the same status as that of a natural-born child with all the consequences and incidents of that status. Thus, for instance, the child will be in the same position as a natural born child of the adoptive mother and her deceased husband in matter of succession to all their relations.

*Old law.*—See §§ 451-473 at pp. 526-547 *ante*.

Persons capable of giving in adoption.

**9.** (1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (3) [and sub-section (4) (*j*4),] the father, if alive, shall alone have right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child (*j*5) or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known (*j*6), the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

*Explanation.*—For the purposes of this section—

(i) the expressions "father" and "mother" do not include an adoptive father and an adoptive mother;

(ia) "guardian" means a person having the care of the person of a child or of both his person and property and includes—

(a) a guardian appointed by the will of the child's father or mother, and

(b) a guardian appointed or declared by a court (*j*7); and

(ii) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

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(*j*4) Inserted by Act 45 of 1962, s. 3. (*j*5) *Ibid*, s. 3. (*j*6) *Ibid*, s. 4.
(*j*7) *Ibid*, s. 3.

**Who may give a son or daughter in adoption.**—This section deals with the subject of persons who may lawfully give a son or daughter in adoption. The section does not make any substantial changes in the law on this branch of the subject previously applicable to Hindus except that under that law the only persons who could lawfully give a son in adoption were his father and mother. The present section principally confines the capacity to give a son or a daughter in adoption to the father and the mother of the child but it also rules that where both the father and mother are dead or disabled from exercising the right by reason of mental incapacity or renunciation of the world, etc. the guardian of the child can give the child in adoption with the previous permission of the court. The rules laid down in the section are simple and not likely to give any difficulty in interpretation.

**Father.**—The primary right to give a son or daughter in adoption is that of the father alone. The right of the father to give in adoption is, however, not absolute, but is circumscribed by the condition enacted in sub-section (2) that in case the mother is living and capable of giving consent, he cannot exercise the right except with her consent. The consent need not necessarily be express. It can be inferred from the facts and circumstances of the case. Usually where adoption ceremonies are performed the wife also has to take part in the same and no difficulty of proving consent should arise in practice. The expression 'mother' in the present context must mean the natural mother of the child and not a step-mother and consent of a step-mother is not necessary. Under the previous law it had been held that an only son could be given and taken in adoption. There is nothing in the present Act which bars the giving in adoption of an only son or an only daughter by the father provided the mother gives her consent to the same. The Explanation to the section makes it abundantly clear that an adoptive father has no right to give the adopted son or adopted daughter in adoption. There cannot be a second adoption of the same child.

**Mother.**—The mother cannot give the son or daughter in adoption while the father is alive and capable of consenting, without permission of the father. The mother can, however, exercise the right if the father is dead or is disabled from giving consent. The expressions 'mother' and 'father' in the present context must mean natural mother and natural father and not a step-mother or a step-father. A step-mother has no right to give a step-son or a step-daughter in adoption even though the father may be dead or is disabled from giving consent (*j8*). She may, however, apply to the court if she was appointed the testamentary guardian of the child or on her application the court may appoint or declare her to be the guardian of the child and the court may grant her permission to give the child in adoption if it is satisfied that the adoption will be for the welfare of the minor. The Explanation to the section makes it abundantly clear that an adoptive mother has no right to give away in adoption her adopted son or adopted daughter. There cannot be a second adoption of the same child.

**Sanction of the Court.**—Sub-section (4) lays down the rule that in case of a child both of whose parents are dead or are disabled from exercising the

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(*j8*) *Dhanraj* v. *Suraj Bai* ('73) A. Raj. 7.

right to give in adoption, etc., or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous sanction of the court. The guardian may be a person who has the care of the person of a child or both his person and property or a testamentary guardian or one appointed or declared by the court. Sub-section (5) requires the court before granting such permission to satisfy itself that the adoption will be in the interest of the minor. In such a case as in all matters affecting minors the paramount consideration for the court should be the welfare of the minor. If the minor is sufficiently grown up to express its wish in the matter and capable of understanding the matter the court must ascertain and give due consideration to such wishes before deciding what will be for the welfare of the minor.

An adoption is not invalid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law as being contrary to public policy. Being contrary to public policy, the court would not, as a general rule, sanction giving of the child in adoption when the guardian who seeks permission of the court is to receive or has received any payment or reward in consideration of giving the child in adoption. Even so, the welfare of the child being the primary and paramount consideration, sub-section (5) empowers the court to sanction the adoption in any such case if it is satisfied that the adoption of the child will be for his well-being and happiness. This part of the rule laid down in sub-section (5) must be read with section 17 of the Act which lays down not only an absolute prohibition against any person receiving or agreeing to receive any payment or other reward in consideration of the adoption of any person but also renders the contravention of the rule a penal offence. It is difficult to imagine that the court would sanction any payment or reward when the receipt of the same and even the mere agreement to receive the same is prohibited and rendered illegal by making it an offence. The language of the latter part of the section may not remain a dead letter if the payment is to be received or has been received by the applicant in his capacity as the guardian, that is for the benefit of the adoptee and not for the benefit of the guardian. In such a case the court may well sanction the payment or reward as also the giving of the child as being for the welfare of the child to be given in adoption by the guardian.

The application under sub-section (4) must be made to the city civil court or the district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides [Explanation (ii)].

*Old law.*—See §§ 474-479A at pp. 547-548 *ante*.

Persons who may be adopted.

**10.** No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

**Persons who may be adopted.**—This section deals with the subject of persons who may be lawfully taken in adoption. It must have been seen from §§ 480-487 at pp. 549-553 *ante* that the law on this branch of the subject was not uniform and there was divergence of judicial opinion on certain aspects of the matter. The present section lays down some simple rules of uniform applicability to all Hindus, the expression 'Hindus' being understood in the wide connotation given to it by section 2.

The section brings about some important changes in the law on this branch of the subject. Under the law as hitherto applied the person to be adopted had to be a male since adoption of a daughter was not recognized. Under the Act adoption can be both of a son as well as of a daughter.

Under the previous law it was necessary that the person to be adopted had to belong to the same caste as his adoptive father; thus a Brahmin could not adopt a Kshatriya, a Vaishya or a Sudra. No such restrictions are imposed by the Act and the limitations pertaining to the caste of the child to be adopted are abolished. All that is now required is that the boy or girl to be adopted must be a 'Hindu', which expression is to be understood in the very wide connotation given to it by section 2. It is, therefore, permissible now to a 'Hindu' whether a Hindu by religion and belonging to any caste, or a Jain, or a Buddhist or a Sikh to take in adoption a boy or a girl who is a 'Hindu' in that expansive sense and regardless of the caste of the boy or girl. Thus, for instance, a Sudra can validly adopt a boy or a girl of any caste so long as the boy or girl is a Hindu by religion, or a Jain, or a Buddhist or a Sikh. A stranger may be adopted even though there are near relations. All that is required by clause (i) of the present section is that the person adopted must be a 'Hindu' in the wide general sense in which the expression is to be understood. The other conditions relating to the matter laid down in clauses (ii) to (iv) must, of course, be fulfilled.

Clause (ii) of the section lays down that the boy or the girl to be adopted must not already have been previously adopted. This clause reiterates the rule of Hindu law that a person can be given in adoption only once and that there cannot be a second adoption of the same person.

There was difference of opinion between the various schools of Hindu law as to the age of the son to be adopted and as to whether a married person could or could not be adopted. Clauses (iii) and (iv) of the present section now deal with this aspect of the matter. The son or daughter to be adopted must not be a person who has already been married and must not have completed the age of fifteen years. The respective conditions are sub-

ject to the important qualifications that they are not to apply if there is a custom or usage applicable to the parties which permits of a married boy or girl being adopted or a boy or girl who has completed the age of fifteen years being adopted (*jj*8).

Another condition, imposed in the matter of the person who could be taken in adoption by the law as was hitherto applied, was that the person to be adopted must not be a boy whose mother the adopting father could not have legally married; but this rule was not strictly followed and in course of time was restricted only to the case of a daughter's son, sister's son and mother's sister's son. The restriction was not applied to sudras and even as to the three other castes it was held that an adoption, though prohibited under that rule, could be valid if sanctioned by custom. The present section does not lay down any such limitation or restriction and any person may now be validly adopted provided the person is capable of being taken in adoption as laid down in the section and the other conditions relating to adoption are fulfilled. Disease, defect or deformity is now no disqualification in matter of succession. It will be noticed that the section does not lay down any bar to adoption on any such ground. Therefore a person who is deaf and dumb or suffering from any other defect, disease or deformity may validly be given and taken in adoption.

*Old law.*—See §§ 480-487 at pp. 549-553 *ante*. The effect of the rule laid down in the present section read with section 12 will be that the adoption called '*dvyamushyayana*' (§ 486) cannot be resorted to after the commencement of the Act.

Other conditions for a valid adoption.

**11.** In every adoption, the following conditions must be complied with:—

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

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(*jj*8) For instance see *Housabai* v. *Jijabai* ('72) A.B. 98 [custom in former State of Bombay permitting adoption of a male over the age of fifteen years].

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up (*j*8) to the family of its adoption:

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption.

This section lays down some vital rules relating to the law of adoption. The rules and conditions stated in the section are absolute and non-compliance with any of them will render an adoption invalid.

**Cl. (i): Adoption of a son can be only by a person who has no son.**— The objects of adoption of a son by a Hindu are twofold. The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name. Hindu law at one time recognized twelve kinds of sons of which there were five kinds of adopted sons. Modern law recognized the *aurasa* or legitimate son begotten by a man himself on the lawfully wedded wife and of the adopted sons it recognized only two kinds the *dattaka* and the *kritrima*. The *dattaka* form prevailed all over India; the *kritrima* form prevailed in Mithila and adjoining districts. The very basis of adoption being substitution of a secondary son in place of an *aurasa* or real son for the objects mentioned above the rule was fundamental that only a person who had no son, grandson or great grandson could validly take a son in adoption. Clause (i) of the section reiterates that rule—which in view of the right to adopt being now conferred on a female Hindu must evidently apply to both the adoptive father and the adoptive mother—and lays down that the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or great-grandson (whether by legitimate blood relationship or by adoption) living at the time of adoption. A person who has an adopted son living cannot adopt another son. So also a person who has a son's son or great-grandson by adoption living cannot adopt a son. Existence of an illegitimate son is not a bar to a male or female Hindu taking a son by adoption. But the existence of a son who is to be deemed to be a legitimate child of the parents by operation of section 16 of the Hindu Marriage Act, 1955, would be a bar to the father's or mother's right to take a son in adoption.

The clause speaks of the existence of a Hindu son as a bar to adoption. If a son has renounced Hinduism and been formally converted to any other

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(*j*8) Inserted by Act 45 of 1962, *s.* 4.

religion and there is no other son, or a grandson or a great-grandson the father or the mother has the right to take a son in adoption. The same considerations would apply in case an adopted son becomes a convert to any other religion.

The existence of daughter or a son's daughter or an adopted daughter or grand-daughter is no bar to the right of a Hindu male or female taking a son in adoption. After the coming into operation of the Act a Hindu male or female may have both an adopted son and an adopted daughter if the conditions laid down in the section are fulfilled.

*Old law.*—See § 450 at p. 525 *ante*.

**Cl. (ii): Adoption of a daughter can be only by a person who has no daughter.**—The object of recognizing the right to take a daughter in adoption now conferred by the Act is to permit a person male or female to have a substituted or secondary daughter in the absence of a natural born daughter and it, therefore, stands, to reason that the right should not be allowed to be exercised when there is a daughter or a son's daughter in existence. A person who has an adopted daughter or the adopted daughter of a son living cannot adopt a daughter. Existence of an illegitimate daughter is not, however, a bar to a male or even a female Hindu taking a daughter in adoption although the illegitimate daughter is entitled under the Hindu Succession Act to succeed to the property of the mother. But the existence of a daughter who is to be deemed to be a legitimate daughter of the parents by operation of section 16 of the Hindu Marriage Act, 1955, would be a bar to the father's or mother's right to take a daughter in adoption.

The clause speaks of the existence of a Hindu daughter as a bar to adoption. If a daughter has renounced Hinduism and been formally converted to any other religion and there is no other daughter or no son's daughter the father or mother has the right to take a daughter in adoption. The same considerations would apply in case an adopted daughter becomes a convert to any other religion.

The existence of a son or a grandson or a great-grandson (by legitimate bloodrelationship or by adoption) is no bar to the right of a Hindu male or female taking a daughter in adoption. After the coming into operation of the Act a Hindu male or female may have both an adopted son and an adopted daughter if the conditions laid down in the section are fulfilled.

**Cl. (iii): Age of adoptive father.**—This clause requires that in case of adoption of a daughter by a male Hindu the daughter must be at least twenty-one years younger than the adoptive father. This is obviously a precautionary measure. There was no similar rule under the previous law.

**Cl. (iv): Age of adoptive mother.**—This clause requires that in case of adoption of a son by a female Hindu the son must be at least twenty-one years younger than the adoptive mother. This is obviously a precautionary measure. There was no such restriction of age under the previous law.

**Cl. (v): Simultaneous adoption.**—This clause reiterates the rule that the simultaneous adoption of the same child by two or more persons is invalid as to the child as well as all the adoptive parties. The Act proceeds on the principle that there can be adoption of one person by one adoptive person alone either a male or a female Hindu. Simultaneous adoption of two sons or two daughters also would be invalid under the Act (*k*).

**Cl. (vi): Act of adoption and ceremonies incidental to it.**—Under the previous law the ceremonies relating to adoption which included the physical act of giving and receiving with intent to transfer the boy from one family to another were essential to the validity of an adoption. As to *datta homam*, that is oblations of clarified butter to fire, it was not settled whether its performance was essential to the validity of an adoption in all cases and there was conflict of opinion on the subject (§§ 488, 490 *ante*). The present clause states in unmistakable terms that the performance of *datta homam* is not essential to the validity of an adoption. It also states in express terms that there must be the actual (physical) giving and taking of the child with intent to transfer the child from the family of its birth to the family of its adoption. The physical act of giving and receiving is absolutely necessary to the validity of the adoption. It is of the essence of the adoption and law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by an *actual delivery* of the boy or girl, will not operate as a valid adoption (*l*). This requirement of actual giving and receiving is absolutely necessary even in case of an adult who is adopted. The expression 'child' would include a minor as well as a major (*l*1).

The power to give a son or daughter in adoption vests only in the father or the mother. A guardian, as already pointed out, may now under the Act give a child in adoption with the previous sanction of the Court (*m*). The power (or right) to give a child in adoption cannot be delegated to any person; but the father or the mother or the guardian, as the case may be, may authorize another person to perform the physical act of giving a son or a daughter in adoption. Likewise the adoptive father or the adoptive mother can authorize any person to accept the child in adoption on his or her behalf (*n*).

Reference may be made to §§ 489 and 490 at pp. 554-555 *ante* and the cases there cited.

**Free consent.**—Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it would seem, of the person adopted, if he is a major at the date of adoption (where the custom or usage applicable to the parties permits of adoption of a child who is not a minor). Reference may be made to § 491 at pp. 555-556 *ante*.

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(*k*) Reference may be made to § 485 at p. 552 *ante*.

(*l*1) *Dhanraj* v. *Suraj Bai* ('73) A. Raj. 7.

(*m*) Section 9(4).

(*n*) See § 489(2) at p. 554 *ante*.

**12.** An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Effects of adoption.

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption

**Result and effects of adoption.**—This section lays down some vital rules relating to the result of adoption. The primary and the principal result of adoption is that of transferring the adopted boy or girl from his or her natural family into the adoptive family. It confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate natural born son or daughter for all purposes with effect from the date of adoption. The adoptee is to be deemed to be the child of his or her adoptive father or mother for all purposes and from the date of adoption all the ties of the child in the family of his or her birth are to be deemed to have been severed and replaced by those created by the adoption in the adoptive family. Where a statute enacts that something shall be deemed to exist or to have happened or some status shall be deemed to have been lost or acquired on the happening of something, which would not otherwise have been so, effect must be given to the statutory fiction and it must also be carried to its logical conclusion. In such a case full effect must be given to the putative state of affairs and the status deemed to have been acquired or lost as also to all the inevitable corollaries of the state of affairs and altered status, unless there is something in the statute which prohibits the legal fiction being applied with all its inevitable corollaries and with the consequences and incidents of the state of affairs and status deemed to have come into existence (*o*). Subject to this qualification, that which is deemed to have taken place is to operate for all purposes. The section is founded on this principle and in terms states that the adoptee is to be deemed to have severed all ties in the family of his or her birth and similar ties are to be deemed to have been replaced in the adoptive family. There are, however, three qualifications to the logical effect and corollaries to the general rule and they are stated in the provisos to the

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(*o*) *East End Dwelling Co. Ltd.* v. *Finsbury Burrow Council* (1952) A.C. 109; *State of Bombay* v. *Pandurang* (1953) S.C.R. 773, 778, 779.

section. But subject to the same the principal rule applies with all its consequences and incidents. Thus, subject to the rules laid down in provisos (b) and (c), full effect is to be given to the principal rule in all matters of succession *ex parte paterna* and *ex parte materna* as also where the adoptive father or adoptive mother is or was at the time of adoption a member of a joint Hindu family. The section does not recognize any exception in favour of the form of adoption called "dvyamushyayana" (§ 486) and there cannot be any valid adoption in that form after the coming into force of this Act.

Reference may be made to "Relative by adoption" in Notes under section 8 of the Hindu Succession Act, 1956, at pp. 864-865 *ante*. Reference may also be made to notes under 'Adopted son' at p. 866 *ante*; 'Adopted daughter' at p. 870 *ante*; 'Mother' at pp. 871-872 *ante*; 'Father' at pp. 873-874 *ante* and other heads under the relevant sections of the Hindu Succession Act.

*Illustrations*

(a) In illustrations 1 to 5 at pp. 882-883 *ante* the result will be the same in case of any of the heirs mentioned there who is related to the propositus by adoption made after this Act came into force.

(b) In illustrations 1 to 5 at pp. 885-886 *ante* the result will be the same in case of any of the heirs mentioned there who is related to the propositus by adoption made after this Act came into force.

(c) In illustrations 1 to 6 at p. 892 *ante* the result will be the same in case of any of the heirs mentioned there who is related to the propositus by adoption made after this Act came into force.

(d) In the illustrations at pp. 893 and 894-895 *ante* the result will be the same in case of any of the heirs mentioned there who is related to the propositus by adoption made after this Act came into force.

(e) In the illustrations under sections 6 and 15-17 *ante* the result will be the same in case of any of the heirs mentioned there who is related to the propositus by adoption made after the Act came into force.

**". . . for all purposes with effect from the date of adoption . . .".**—It will be noticed that the adoptee is to be deemed to be the child of his or her adoptive father or mother for all purposes *with effect from the date of the adoption* and not to be deemed to have been in the womb of the adoptive mother at the time of the death of her deceased husband in case of adoption by a widow as under the old law. In case of any such adoption the adopted child cannot divest any person of any estate which vested in him or her before the adoption. Reference may be made to the Notes under Proviso (c) *post*.

Under the old law the rule that an adopted son was entitled to succeed as if he were a natural-born son, was subject to certain exceptions mentioned in § 497 at p. 559 *ante*. The effect of the rule laid down in the present section is to abrogate those exceptions and the adopted son or adopted daughter is for all purposes of succession and partition to be deemed to be the natural-born child of the adoptive parents. In matters of succession the adopted son or daughter is now entitled to the same share as an after-born natural son or natural daughter of the adoptive parents.

**Adoption by widow.**—There was difference of opinion on the question whether after coming into force of this Act, in case of adoption by a widow

the adopted son becomes the son also of the deceased adoptive father. The High Courts of Bombay (*o*1) and Allahabad (*o*2) took the view that the adoptee should be regarded as the son of the widow as well as her deceased husband. A contrary view was taken in a decision of the High Court of Madras (*o*3). In *Sitabai* v. *Ramchandra* (*o*4) decided by the Supreme Court a joint family originally consisted of two brothers D and B and the wife of B. Many years after the death of B his widow adopted a son S in 1958. Some time thereafter D died. Question was raised whether the adoptee could be regarded as the son of the widow as well as her husband B and whether he became a coparcener with D in the joint family. It was held by the Supreme Court (agreeing with the view taken by the Bombay High Court) that on his adoption S became a coparcener with D and after the death of D became entitled to possession of all the joint family property as a sole surviving coparcener. S would for all purposes be regarded as the son of B and the adoptive mother.

**Proviso (a).**—Though adoption has the effect of removing the adopted child from the natural family into the adoptive family, it does not sever the tie of blood in the family of birth in the matter of marriage. This proviso lays down the express and explicit exception to the general rule which applies for all purposes and enacts that the adoptee, despite the severance of all the ties in the natural family, cannot marry any person whom he or she could not have married in the family of his or her birth. Clause (iv) of section 5 of the Hindu Marriage Act, 1955, lays down as one of the conditions of valid Hindu marriage that "the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two". And clause (vi) of that section lays down as one of the conditions of a valid Hindu marriage that "the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two". Both these conditions are equally applicable to an adoptee and the adoptee cannot marry any person whom he or she could not have married on the ground of prohibited relationship or *sapinda* relationship, as if he or she had continued in the family of his or her birth. The Explanation to section 3 of the Hindu Marriage Act, 1955, *inter alia* states that relationship for the purpose of *sapinda* relationship and prohibited degrees of relationship includes relationship by adoption as well as by blood.

Reference may be made to the Notes under clauses (iv) and (v) of section 5 of the Hindu Marriage Act, 1955, at pp. 688-689 *ante*.

Reference may also be made to Notes under clauses (f) and (g) of section 3 of the Hindu Marriage Act, 1955, at pp. 671-681 *ante*. Reference may particularly be made to the diagrams and illustrations given at pp. 677-680 *ante*. Those illustrations are equally applicable to the case of a bride or a bridegroom who has by adoption gone out of the family of her or his birth.

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(*o*1) *Ankush* v. *Janabai* ('66) A.B. 174.
(*o*2) *Subhash Misir* v. *Thagi Misir* ('67) A.A. 148.
(*o*3) *Arumugha* v. *Valliammal* ('69) A.M. 72.
(*o*4) ('70) A.S.C. 343. Also see *Sawan Ram* v. *Kalawanti* ('67) A.S.C. 1761.

**Proviso (b).**—Adoption did not have the effect under the Bengal school of Hindu law (Dayabhaga law) of divesting any property which had vested in the adopted son by inheritance, gift, or under any power of self-acquisition prior to his adoption. As regards cases governed by the Mitakshara law there was some divergence of judicial opinion on certain aspects of the matter (§ 494). The present section lays down the clear rule that any property that might have vested in the adoptee before the adoption, continues to vest in the adoptee, subject, of course, to any obligations attaching to the ownership of such property including the obligation of the adoptee to maintain relatives in the family of his or her birth. The adopted person is not, by fact of the adoption, divested of any property already vested in him. It follows as a corollary to that rule that the fact of adoption should not operate to the prejudice of persons related to the adoptee in the natural family who had the right to claim maintenance from such adoptee.

*Illustrations*

(a) *A* has two sons *B* and *C*. *A* gives *C* in adoption to *X*. *C* is not entitled to inherit to *A* as his son. On the death of *A*1 the mother of *B* and *C* which had taken place prior to the adoption *C* had become entitled to a share (along with *A* and *B*) in the property left by her. That share which had already vested in *C* will continue to vest in him.

(b) *A* and *B*, two brothers; *A*'s sons, *C* and *D*; and *B*'s son *E*, are all of them members of a Mitakshara coparcenary. *A* gives his son *C* in adoption to *X*. *C* loses all his rights as a coparcener in his natural family. The coparcenary which consisted of five members before the adoption will be reduced after *C*'s adoption to a coparcenary of four members only.

(c) *A* and his sons *B* and *C* were members of a Mitakshara coparcenary. *A* died after the commencement of the Hindu Succession Act, 1956, leaving him surviving his two sons *B* and *C*; his daughter *D*; and his widow *A*1, the natural mother of *B*, *C* and *D*. Soon thereafter *A*1 gave *C* in adoption to *X*. By operation of section 6 of the Hindu Succession Act *A*'s interest in the coparcenary property devolved by succession in equal shares among *A*1, *B*, *C* and *D*. The effect of the adoption will not be to divest *C* of his aliquot share in the father's interest in the joint family property which became vested in him on *A*'s death. *C* will not, however, be entitled to claim his undivided interest in the joint family property. Nor will *C* be entitled to claim a share along with *B* and *D* in the property that may be left by *A*1 upon her death.

**Proviso (c): No divesting of estate vested in any person before the adoption.**—The questions of "vesting and divesting of estate" on adoption by a widow and particularly by a widow in a joint family governed by the Mitakshara law; "alienations made prior to adoption" and "surrender prior to adoption" under the old law have been dealt with in §§ 501 to 509A at pp. 563-567 *ante*. The law on some aspects of the question of divesting, it must have been seen, had created many difficulties and anomalous situations. The proviso (c) to the present section (which must be read with the relevant provisions of the Hindu Succession Act, 1956) lays down the express and explicit rule that the adoption of a son or a daughter by a male or female Hindu is not to result in the divesting of any estate vested in any person prior to the adoption. The rule laid down in the proviso does not, however, abrogate the incidents of joint family property as will be seen from the illustrations below. Nor does it have the effect of preventing the adopted son from challenging an alienation made by the adoptive mother prior to 1956 where the alienation was not for legal necessity (*o*5).

(*o*5) *Housabai* v. *Jijabai* ('72) A.B. 98.

*Illustrations*

(a) *A* a male Hindu who owns self-acquired property as well as ancestral property adopts a son *B*. The adoption does not affect *A*'s self-acquired property and he can deal with it as he likes. The rights of *B* arise on his adoption and *B* will take an interest in the ancestral property to the same extent as a natural-born son with the result that the ancestral property will be held by *A* and *B* as coparcenary property. *B* will be bound by alienations of the ancestral property made by the adoptive father prior to the adoption to the same extent as a natural-born son will be.

(b) *A* and his brother *B* and *B*'s son *C* are members of a joint Hindu family. *A* adopts a son *X*. The effect of adoption will be that the coparcenary which consisted of three members will now consist of four members and their rights will be governed by the law relating to joint family and joint family property.

(c) *A* died leaving him surviving his widow *A*1 and property both self-acquired and ancestral. On *A*'s death *A*1 had inherited the property as a Hindu widow. On the coming into force of the Hindu Succession Act, 1956, she held the property as absolute owner by operation of section 14 of that Act. *A*1 adopts a son *B* after the present Act came into force. The effect of the adoption is not to divest any of the property vested in *A*1. The position is the same if *A*1 had adopted a daughter instead of a son.

(d) *A* died after the commencement of the Hindu Succession Act, 1956, leaving him surviving his widow *A*1 and two daughters *D* and *D*1. On *A*'s death *A*1, *D* and *D*1 inherited his property in equal shares according to the provisions of sections 8 and 10 of that Act. After *A*'s death *A*1 adopts a son *B*. The adoption of *B* will have effect from the date of his adoption and *B* will not divest *A*1, *D* or *D*1 of the estate which vested in them before his adoption.

(e) *A* died before the commencement of the Hindu Succession Act, 1956, but after the commencement of the Hindu Women's Rights to Property Act, 1937, leaving him surviving his widow *A*1 and his two brothers *B* and *C*. At the time of his death *A* was a member of a Mitakshara coparcenary consisting of himself and his two brothers. The effect of section 2 of the Hindu Women's Rights to Property Act, 1937, was that *A*1 took the same interest in the coparcenary property as *A* himself had but her interest was limited interest (Hindu Women's estate). There was no partition and the family continued as before. The effect of section 14 of the Hindu Succession Act, 1956, was that the limited interest of *A* in the joint family property came to be held by her as a full owner and not as a limited owner. After the commencement of the present Act *A*1 adopts a son *S*. The adoption of *S* will have effect only from the date of his adoption and *S* will not divest *A*1, *B* or *C* of any rights or interest in any property. Nor will the adoption have the effect of introducing *S* in the coparcenary as one of its members. *S* will, however, after the date of his adoption be entitled to right of succession to the property of *A*1 as her son in case of intestacy and also to the property of the relatives of *A* and *A*1 in case succession opens and he is one of the heirs of the deceased relative under the provisions of the Hindu Succession Act, 1956.

(f) *A* died after the commencement of this Act, leaving him surviving his widow *A*1, his separated brother *B* and *B*1 and *B*2 two minor sons of *B*. *A* left considerable property and by his will directed *A*1 to take *B*1 in adoption. He expressly stated in his will that *A*1 was not to be the absolute owner of the property left by him but to take a restricted estate in the same and was only to enjoy the income of the same and to hand it over to the adopted son on his attaining majority. *A*1 duly took *B*1 in adoption. Since only a restricted estate has been prescribed for *A*1 in the will of her husband she does not take the property as full owner (Explanation to section 14, Hindu Succession Act, 1956) and *B*1 on attaining majority will be entitled to take the property. Here the adoption cannot be said to result in divesting *A*1 of any property vested in her. On adoption the ties of *B*1 in the family of *B* shall be deemed to be severed and replaced by those created in the adoptive family. On death of *B* his property will devolve by succession upon *B*2 and any other heir of his mentioned in Class I of the Schedule to the Hindu Succession Act, 1956.

Right of adoptive parents to dispose of their properties.

**13.** Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

**Right of adoptive parents to dispose of their properties.**—Under the law as previously applied a Hindu adopting a son did not thereby deprive himself of the power he had to dispose of his separate property by gift or will. There was no implied contract on the part of the adoptive father, in consideration of the gift of his son by the natural father or mother, that he would not dispose of his property by gift or will [§ 498(1)]. When, however, an adoption was made by a member of a joint family governed by the Mitakshara law, the adopted son became a member of the coparcenary from the moment of his adoption, and the adoptive father had no power either by deed or will to interfere with the rights of survivorship of the adopted son in the coparcenary property. The same principle applied where an adoption was made by a sole surviving coparcener (§ 499). It must have been noticed from section 30 of the Hindu Succession Act, 1956, that the interest of a coparcener in a Mitakshara coparcenary property can now be disposed of by him by will notwithstanding the law relating to joint family and joint family property although it is not competent to a coparcener even now to dispose of by gift his interest in the coparcenary property so as to defeat the right of survivorship.

The present section is in accordance with the law as it previously stood and as altered by section 30 of the Hindu Succession Act, 1956. The rule is simple and lays down that an adoption of a son or a daughter does not deprive the adoptive father or mother of the power to dispose of his or her (disposable) property by transfer *inter vivos* or by will. The rule does not deal with the nature of the rights of disposal of his or her property by an adoptive father or adoptive mother which must be regulated by other provisions and rules of law. It only lays down that the adoption of a son or daughter is not *per se* to have the effect of depriving the adoptive father or adoptive mother of the rights to dispose of his or her property. An agreement to the contrary made by the adoptive father or adoptive mother, that is, not to dispose of his or her property, in consideration of the gift of his son or daughter by the person giving in adoption is valid and binding on the adoptive father or adoptive mother as the case may be, though of course it would not affect the right of a transferee of the property for consideration and without notice of the right created by the agreement (*p*).

Determination of adoptive mother in certain cases.

**14.** (1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

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(*p*) Reference may be made to section 40 of the Transfer of Property Act.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

**Determination of adoptive mother in certain cases.**—It was well established under the law of adoption as applied prior to the commencement of this Act, that adoption had the effect of transferring the adopted boy from his natural family into the adoptive family. It conferred upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, except in a few cases [§ 494(1)]. It was a necessary corollary to that rule that where a person having a wife living adopted a son, the son also became a son of the adoptive mother. Where a person, having two or more wives, made an adoption in conjunction with one of them specially selected for the purpose, the wife so selected ranked as the adoptive mother, and the other wives as mere step-mothers. The adopted son acquired the right to succeed to the property of the adoptive mother as if he were a natural born son subject to certain qualifications which are not now material. There was, however, some uncertainty about the law on certain aspects of the matter.

**Sub-section (1)** lays down the express rule that where a Hindu who has a wife living adopts a son or a daughter (which must be with the consent of the wife), she shall be deemed to be the adoptive mother of the son or daughter or both as the case may be. When a statute enacts that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not otherwise have been so, the court is bound to have regard to the statutory fiction and it has to be resorted to and full effect must be given to it and it should be carried to its logical conclusion. The following statement of the principle by Lord Asquith in a decision of the House of Lords (*q*) was recently quoted with approval by the Supreme Court (*r*): "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. . . . The statute says you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

**Sub-section (2)** lays down the effect of adoption *ex parte materna quod* the adoptee where the adoptive father had more than one wife living at the time of adoption and the adoption had taken place with the consent of all of them as required by the Explanation to section 7 of the Act. In such a case only the seniormost in marriage among the wives is to be deemed to have become the adoptive mother of the adopted child and the others are to be deemed to be his step-mothers.

**Sub-section (3)** lays down the effect of adoption *ex parte materna quod* the adoptee where the adoptive father was at the time of adoption a widower

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(*q*) *East End Dwelling Co. Ltd.* v. *Finsbury Borrow Council* (1952) A.C. 109.

(*r*) *State of Bombay* v. *Pandurang* (1953) S.C.R. 773, 778, 779.

or a bachelor and subsequently gets married. The wife subsequently married by the adoptive father will not be in the position of the adoptive mother of the adoptee but is to be deemed to be only the step-mother of the adoptee.

*Illustration*

*A* a widower adopts a son *B* and subsequently marries *A*1. *A*1 dies thereafter leaving her surviving her husband *A* and *B* the adoptee. She leaves property acquired by herself. The property left by her will be inherited by *A* alone and *B* is not entitled to claim a share in it under section 15(1)(a) of the Hindu Succession Act, 1956.

**Sub-section (4)** lays down the effect of adoption where a widow or an unmarried woman adopts a child and subsequently gets married. The husband subsequently married by the adoptive mother will not be in the position of the adoptive father but is to be deemed to be only the step-father of the adoptee.

*Illustration*

*A* an unmarried woman adopts a daughter *D*. Subsequently she marries *H* and has a son *S* by him. On the death of *H* his property will devolve upon *A* and *S* to the exclusion of *D*. But the property that *A* might leave on her death thereafter will devolve upon *D* and *S* in equal shares.

**15.** No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

Valid adoption not to be cancelled.

**Valid adoption cannot be cancelled.**—This section lays down the rule that a valid adoption once made cannot be cancelled by the person taking in adoption or any other party to the same. Nor can the adopted boy or girl renounce his or her status as such and return to the family of his or her birth. The rule that prevailed under the previous law was similar (§ 493). There is nothing, however, to prevent an adoptee from renouncing his or her right of inheritance in the adoptive family in which case the inheritance would go to the next heir (*s*).

It has been held in a recent decision of the High Court of Gujarat that a *goda datta* adoption which prevails by custom in certain families is unilaterally revocable and the right of revocation is not affected by this section (*ss*).

**16.** Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

Presumption as to registered documents relating to adoption.

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(*s*) See cases cited in f.n. (*w*) at p. 556 *ante*.

('*ss*) *Daniraiji* v. *Vahuji Maharaj Chandraprabha* ('71) A. Guj. 188.

**Presumption arising from registered document relating to adoption.**—The *factum* of adoption must be proved in the same way as any other fact and there are no special rules of evidence to establish an adoption. Evidence in support of an adoption must be sufficient to satisfy the heavy burden that rests upon any person who seeks to displace the natural succession by alleging an adoption (§ 512). In practice it is not unusual to have a registered document duly executed by the person taking in adoption and the person giving in adoption. The present section lays down a rule of presumption which requires that where there is a duly registered document of this nature executed by the parties "the court shall presume" that the adoption was in compliance with the provisions of the Act "unless and until it is disproved" (*ss*1). The onus of proof may shift from one party to another as it does in case of proof of any fact under the law of evidence.

**17.** (1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

Prohibition of certain payments.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

**Prohibition of payment of consideration or reward for adoption.**—Any agreement to give consideration for giving a son or daughter in adoption is contrary to public policy as amounting to trafficking in children. The Legislature properly takes a strict view of the matter and prohibits in this section the giving and receiving of any payment or reward by any person in consideration of adoption of any person. The section renders any such transaction illegal and also renders it a penal offence to do so. Both the person who gives and the person who receives any such payment or reward are liable to punishment. Sub-section (3), however, requires that a prosecution for an offence punishable under this section can be instituted only after obtaining the requisite sanction.

## CHAPTER III

## MAINTENANCE

**18.** (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

Maintenance of wife.

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(*ss*1) For instance see *K. Laxminarayan* v. *K. Padmanau* ('73) A. Orissa 3.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

**Maintenance of wife.**—The right of a wife for maintenance is an incident of the status or estate of matrimony and a Hindu is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in character and arises from the very existence of the relation between the parties. Sub-section (1) substantially reiterates that right and lays down the general rule that a Hindu wife, whether married before or after the commencement of this Act, is entitled to be maintained by her husband during her life-time. The rule laid down in the section cannot, however, be said to be absolute although the right exists independently of the possession of any property by the husband ancestral or self-acquired. The rule laid down in this section is subject to the exceptions stated in sub-section (3) which lays down that she cannot claim separate residence and maintenance if she is unchaste or ceases to be a Hindu by conversion to another religion. The section must be read with section 23 which lays down that it shall be in the discretion of the court whether any, and if so what, maintenance shall be awarded under the provisions of this Act. The section must also be read with section 22 which relates to maintenance of dependants. A widow of a deceased Hindu is one of the dependants enumerated in section 21 and as such entitled to claim maintenance as a dependant in the circumstances set out in section 22(2). Reference may also be made to Notes under section 25 of the Hindu Marriage Act *ante*.

**Interim maintenance.**—If a *prima facie* case is made out the Court can in a case falling under this section grant interim relief. The jurisdiction of

the Court does not depend upon the acceptance or denial of the relationship or the right by the husband (*ss*2).

**Sub-section (2): Right to separate residence and maintenance.**—Prior to the passing of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, it was held in numerous decisions of courts that a wife, though normally bound to remain under the roof and protection of the husband, could claim separate residence and maintenance, if she established that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or other justifying cause, she was compelled to live apart from him (§ 555). The Act of 1946 gave a statutory recognition to this right and at the same time liberalised the law in certain respects in her favour. The text of section 2 of that enactment has been set out in §555A and it will be noticed that the grounds set out in sub-section (2) of the present section are substantially the same as under the enactment of 1946 which, in view of the present Act, is now repealed.

**Cl. (a): Desertion.**—A Hindu wife is entitled to live separately from her husband and claim maintenance, if he is guilty of desertion. The expression desertion represents a legal conception and is one very difficult to define. It has been said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably no judge would ever succeed in doing so, but among the descriptions of desertion one which has always appealed to courts trying matrimonial causes is that "desertion" is a "a withdrawal not from a place, but from a state of things." The clause aims at giving the meaning of desertion as abandonment of the wife by the husband without reasonable cause and without her consent or against her will or wilful neglect of the wife by the husband. It accords with the meaning given to the expression as used in section 10 (1) (a) of the Hindu Marriage Act, 1955, read with the Explanation to the same. A large body of case law has developed round the legal significance of the expression both in England and in India and the broad general rules deducible from the same will be of assistance and guidance in cases which fall for determination under the present section though of course opinions in the context of enactments even slightly differently worded must always be read with the caution most commonly needed in their application to cases arising in different circumstances and varied situations. It will be noticed that the language of the present clause is intended to give a wide and comprehensive import to the expression. Reference may be made to the Notes under section 10 (1) (a) of the Hindu Marriage Act, 1955, at pp. 703-715 *ante*.

**Cl. (b): Cruelty.**—A Hindu wife is also entitled to live separately from her husband and claim maintenance on the ground that he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with the husband. The legal conception of cruelty and the degree of cruelty necessary to afford a ground to the wife to claim separate maintenance and residence under the present clause, it will be noticed, has been left to be gathered from general principles and the

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(*ss*2) *Tarini Gupta* v. *Gouri Gupta* ('68) A.C. 567. Also see cases cited in this decision.

Legislature has only purported to lay stress on the criterion to be applied, viz. reasonable apprehension in the mind of the wife that it will be harmful or injurious to her to live with her husband. There is nothing in the language of the clause to show that beyond adding that criterion which has always been applied by the courts as flowing from the accepted legal conception of cruelty, any comprehensive definition has been laid down. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a definition exclusive or inclusive which will aptly meet every particular act or conduct and not fail in some circumstances. Though the clause does not in terms so state it is abundantly clear from the language used that the application of the rule must depend on the circumstances of each case. It would also seem to follow from the word "treated" that what is contemplated is a mode of dealing with or behaviour towards the wife which must be wilful. Without attempting to define cruelty it may be said that to amount to cruelty there must be such wilful treatment of the wife by the husband which causes suffering in body or mind whether in realization or apprehension in such a way as to render cohabitation harmful or injurious having regard to the circumstances of each case, keeping always in view the character and condition of the parties. It is necessary to bear in mind that the legal conception of treatment which is cruel comprises two distinct elements—firstly the ill-treatment complained of, and second the resultant danger or apprehension thereof. It would be inaccurate and liable to lead to confusion if the word 'cruelty' used in the clause is understood apart from its effect on the wife. The meaning given to "cruelty" in the present clause accords with the meaning given to the expression as used in section 10 (1) (b) of the Hindu Marriage Act, 1955. Reference may be made to the Notes under that section at pp. 715-726 *ante*.

**Cl. (c): Leprosy.**—A Hindu wife is also entitled to live separately from her husband and claim maintenance from him on the ground that he is suffering from a virulent form of leprosy. It will be noticed that the clause is worded in the present tense. It is enough that the ground exists at the date when the claim for separate maintenance and residence is made by the wife, no matter whether the disease started before or after the coming into force of the Act. Reference may be made to the Notes under section (10) (1) (c) of the Hindu Marriage Act, 1955 where the expression "suffering from a virulent form of leprosy" has been used.

**Cl. (d): Husband having another wife.**—The Hindu Marriage Act, 1955, laid down monogamy as a rule of law and a Hindu husband cannot marry another wife after the commencement of that Act. The ground laid down in this section can obviously exist only in case of any marriage solemnized before that Act came into operation (*ss*3). A bigamous marriage contracted after the coming into force of that Act would be null and void and no question of having another wife can arise. A somewhat anomalous position was, however, bound to remain in case of more than one marriage contracted by the husband prior to the coming into force of that Act. Such marriages could validly take place under the former system of law which recognized

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(*ss*3) *Annamalai* v. *Perumayee Ammal* ('65) A.M. 139, 141.

polygamy and therefore the Legislature enacted in section 13(2) of that Act that in case of any such marriage a wife should have the right to seek dissolution of marriage if any other wife was living. In any such case a wife who may not want to seek divorce and only desires to live separately from the husband is entitled to live separately from the husband and claim maintenance from him under the present clause. The claim is maintainable irrespective of the fact that the other marriage had taken place after or before the marriage of the applicant wife, provided the other wife is living. The rule laid down in this clause is absolute and it will make no difference that the applicant had acquiesced in or even consented to the other marriage. It is no answer to a claim for maintenance under this provision that the claimant wife is living separately without the consent of the husband or that there was wilful neglect of the husband by her (*ss*4).

The words "any other wife living" in this clause are of sufficiently wide connotation to include any wife other than the wife claiming maintenance under the section. The meaning is not confined to a wife junior to the wife who is the claimant (*s*1) nor is it necessary that the husband and the other wife should be living together. The word "living" here means alive and not living with the husband (*s*2).

A second wife who had abandoned her husband for no justifiable reason but not for immoral purposes would be entitled to live separately from the husband by virtue of the present clause and can claim maintenance under the present provision (*s*3). The court may, however, in any such cases, in the exercise of its discretion, fix the amount of maintenance bearing in mind the conduct of the wife who claims maintenance (*s*4).

**Cl. (e): Keeping a concubine.**—A Hindu wife is also entitled to live separately from her husband and claim maintenance from him on the ground that he keeps a concubine in the same house in which she is living or habitually resides with a concubine elsewhere.

**Cl. (f): "Ceased to be a Hindu by conversion".**—The term 'Hindu' in this clause must be understood in the wide sense given to it in section 2 as will be seen from sub-section (3) of that section. So a husband continues to be a 'Hindu' even though he may have been converted from any one to any other of the four religions Hinduism, Jainism, Buddhism and Sikhism and no relief can be granted under this clause to the wife simply on that ground. Conversion in the present context implies that the husband has voluntarily relinquished his religion and adopted another religion after formal ceremonial conversion. A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith or is an ardent admirer and advocate of such religion and its practices. But if he abdicates his religion by a clear act of renunciation and adopts the other religion he would cease to be a Hindu within the meaning of this clause. Reference may be made

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(*ss*4) *Siddegowda* v. *Parvathamma* ('65) A. Mys. 299; *Kiran Bala* v. *Bankim* ('67) A.C. 603.

(*s*1) *Jaggamma* v. *Satriyanarayanamurthi* ('58) A.A. 582.

(*s*2) *Kalamati* v. *Ratan Chand* ('60) A.A. 601.

(*s*3) *Ram Parkash* v. *Savitri Devi* ('58) A. Punj. 87.

(*s*4) *Ram Parkash* v. *Savitri Devi* *supra*. Also see *Satyanarayanamurthi* v. *Jaggamma* ('62) A. A. 439.

to the Notes under section 13(1)(ii) of the Hindu Marriage Act, 1955, at p. 745 *ante*.

**Cl. (g):**—In addition to the specific grounds mentioned in clauses (a) to (f) of sub-section (2) of the present section a Hindu wife is also entitled to live separately from her husband and claim maintenance from him if there is any cause justifying her living separately. Thus, for instance, conduct falling short of cruelty may justify the wife in leaving the husband and claiming maintenance from the husband if the court is satisfied that she was justified in the facts and circumstances of the case in living separately from the husband. If the conduct of the husband is such that in the opinion of the Court the wife has "grave and weighty" reason or a "grave and convincing reason" for withdrawal from the society of the husband the court would grant relief to the wife by making an order for maintenance under this clause. It would seem that any ground which would support an application for restitution of conjugal rights by her would afford a justifying cause to the wife for her living separately from her husband and entitle her to claim maintenance from the husband. She is not bound to ask for a decree for restitution of conjugal rights or for any other relief under that Act and may prefer for any reason of her own to claim the right of separate maintenance and residence on any of the grounds mentioned in this section.

**Sub-section (3): Unchaste wife: Wife converted to another religion.**—This sub-section lays down that a wife who is herself unchaste or who has herself renounced Hinduism by embracing any other faith cannot claim the right of separate residence and maintenance enacted in sub-section (2). It will be noted that this sub-section does not say that an unchaste wife is not entitled to any maintenance at all from the husband. What the sub-section rules is that she cannot claim separate residence and maintenance. Of course, in awarding maintenance to the wife in any such case the court would take into consideration among other factors the conduct of the wife. Under Hindu law as previously applied a wife who had been unchaste did not wholly forfeit her right to claim maintenance. If she went back to the husband and offered to live with him, his refusal to take her back entitled her to demand partition. Reference may be made to § 555 *ante*. Reference may also be made to section 24 *post*.

**Maintenance of widowed daughter-in-law.**

**19.** (1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance—

(a) from the estate of her husband or her father or mother, or

(b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

**Maintenance of widowed daughter-in-law.**—The right of a widowed daughter-in-law, when she did not succeed to her husband's property, was of considerable importance and consequence. The position and rights of a widow both under the Mitakshara and Dayabhaga law has been stated in the relevant Chapters. The rights of the three widows—one of whom was the widow of a predeceased son—mentioned in the Hindu Women's Rights to Property Act, 1937, to claim maintenance were not abolished by that Act in express terms but the effect was that there was little occasion for them to claim maintenance since they were entitled to a share on partition. There was nothing, however, in that Act to compel the widow to sue for partition where the deceased husband was a member of a joint family and she could, if she so desired, claim only maintenance without having recourse to the remedy of partition. The position and rights of a widow and particularly of a widow of a predeceased son in matters of inheritance have been materially changed by the Hindu Succession Act, 1956, and the question of the right to maintenance of the widow of a predeceased son must now be considered in the context of the provisions of that Act. She is one of the preferential heirs of the father-in-law mentioned in Class I of the Schedule to that Act and inherits simultaneously among others with the widow, son, daughter and mother of the deceased (s. 8). If her husband was a member of a Dayabhaga coparcenary her position and rights as an heir of her husband are fully recognized (s. 8). If her husband was at the time of his death a member of a Mitakshara coparcenary she becomes entitled by operation of section 6 of the Act to get a share out of the interest of the deceased husband in the coparcenary property on the footing of a notional partition deemed to have taken place immediately before his death. The same is the position in case of death of the father-in-law who at the time of his death was a member of a Mitakshara coparcenary. The rights of the widowed daughter-in-law to claim maintenance under the law as it stood prior to the Hindu Women's Rights to Property Act, 1937, under the decided cases, are considered in § 564 (2) and 564 (3) *ante*. Reference may also be made to § 35 and the Notes under the Hindu Women's Rights to Property Act, 1937, *ante*.

The present section deals with the right of maintenance of a widowed daughter-in-law whether married before or after the commencement of this Act. She can now claim maintenance from the father-in-law only *if she is unable to obtain maintenance*—

(a) out of the estate of her husband or her father or her mother (*s*5); or

(b) from her son or daughter or his or her estate.

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(*s*5) There must be a legal right to obtain maintenance from the person of mother, see f.n. (*s*6) below.

The right to claim maintenance from the father-in-law—in the circumstances stated above—is further conditional upon the father-in-law having in his possession coparcenary property (*s*6) out of which the widowed daughter-in-law had not obtained any share. Her right to claim maintenance ceases on her remarriage. It is implicit in the rule laid down in the section that a daughter-in-law whose husband is alive has no right, moral or legal, to claim maintenance from the father-in-law.

This section is prospective and not retrospective. No illegitimate child can therefore found a claim to past maintenance under this section (*s*7).

This section must be read with section 23 which lays down that it shall be in the discretion of the court whether any, and if so what, maintenance shall be awarded under the provisions of this Act. This section must also be read with section 22 *post* which relates to the right of dependants of a deceased person to claim maintenance from heirs who have inherited his estate (e.g. by a will). Section 21 (vii) mentions a widowed daughter-in-law as one of the dependants of a deceased Hindu.

Maintenance of children and aged parents.

**20.** (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or property (*s*8).

*Explanation.*—In this section "parent" includes a childless step-mother.

**Maintenance of children and aged parents.**—A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal and legal in character and arises from the very existence of the relationship between the parties. Section 18 of the present Act reiterates the right of a wife to claim maintenance and support from her husband. The present section gives statutory form to the legal obligation of a Hindu also to maintain his minor children and his aged or infirm parents. But the law laid down in the section goes further than that and rules that not merely a male Hindu—as was the law previously applicable—but a female Hindu as well is now under a legal obligation to maintain legitimate or illegitimate children and aged or infirm parents.

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(*s*6) As to where the father-in-law has both self-acquired and coparcenary property see *Jal Kaur* v. *Pala Singh* ('61) A. Punj. 391. Also see *Gurdip Kaur* v. *Ghamed Singh* ('65) A. Punj. 238 (F.B.).

(*s*7) *Mukta Bai* v. *Kamalaksha* ('60) A. Mys. 182.

(*s*8) *Samu Bai* v. *Magan Lal* ('61) A. Raj. 207.

The Hindu law as previously applicable did recognize the right of an illegitimate son of a Hindu by a Hindu woman to claim maintenance. The law on the subject was, however, not quite uniform. There was no provision in Hindu law for the maintenance of illegitimate daughters; but they could claim maintenance from the putative father under section 488 of the Criminal Procedure Code. The right created by this section and section 22 are only prospective and not retrospective. These provisions do not create any right in favour of an illegitimate daughter to claim maintenance against the estate of the father who died prior to the commencement of the Act (*s*9).

A claim for maintenance under this section can be made by an illegitimate child born of adulterous intercourse (*ss*9).

The present section lays down some very simple rules and casts the obligation of maintaining minor children legitimate or illegitimate both on the father as well as the mother and it also rules that a Hindu male and female are both under the legal obligation to maintain their aged or infirm parents. Maintenance includes provision for food, clothing, residence, education of the children and medical attendance and treatment [s. 3(b) (i)]; and in case of an unmarried daughter, also the reasonable expenses of and incident to her marriage [s. 3(b) (ii)]. The obligation to maintain parents and an unmarried daughter extends in so far as any one of the latter is unable to maintain himself or herself out of his own earnings or other property. The expression parents and children in the present context would include the adoptive father and adoptive mother as also adopted children respectively. A step-father is not entitled to claim maintenance from a step-child but a childless step-mother can claim maintenance from the step-son or step-daughter. This section must be read with section 23 which lays down that it shall be in the discretion of the court whether any, and if so what, maintenance shall be awarded under the provisions of this Act. This section must also be read with section 22 *post*.

The provision for maintenance of a mother under this section does not, of course, affect the mother's right to claim a share on partition under ordinary Hindu law (*s*10) or her rights under the Hindu Succession Act.

Sub-section (3) lays down no limitation as to the age of the unmarried daughter. It gives statutory recognition to the rule under the prior law that a Hindu male or female is under an obligation to maintain his or her unmarried daughter regardless of age so long as she is not able to maintain herself (*ss*10).

Dependants defined.

**21.** For the purposes of this Chapter "dependants" mean the following relatives of the deceased:—

(i) his or her father;

(ii) his or her mother;

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(*s*9) *Jaiwanti Mafatlal* v. *Arvind N. Mafatlal* ('68) A.B. 314.

(*ss*9) *Kalla Maistry* v. *Kanniammal* ('63) A. M. 210.

(*s*10) *Samu Bai* v. *Magan Lal* ('61) A. Raj. 207.

(*ss*10) *Wali Ram* v. *Mukhtiar Kaur* ('69) A.P.&H. 285.

(iii) his widow, so long as she does not re-marry;

(iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;

(v) his or her unmarried daughter, or the unmarried daughter of his pre-deceased son or the unmarried daughter of a pre-deceased son of his pre-deceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtained maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;

(vi) his widowed daughter: provided and to the extent that she is unable to obtain maintenance—

(a) from the estate of her husband; or

(b) from her son or daughter if any, or his or her estate; or

(c) from her father-in-law or his father or the estate of either of them;

(vii) any widow of his son or of a son of his predeceased son, so long as she does not re-marry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate, or in the case of a grandson's widow, also from her father-in-law's estate;

(viii) his or her minor illegitimate son, so long as he remains a minor;

(xi) his or her illegitimate daughter, so long as she remains unmarried.

Maintenance of dependants.

22. (1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, sub-

ject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

Sections 20, 21 and 22 may be read together.

This section is not retrospective in its operation (*s*11).

**Dependants: Maintenance of dependants.**—In the matter of persons who are entitled to claim maintenance under the present enactment the scheme is to deal in the first place with the right of maintenance of wife from her husband (s. 18); the right of maintenance of widowed daughter-in-law from her father-in-law (s. 19); the right of maintenance of minor children (legitimate or illegitimate) from the father and mother (s. 20); and the right of maintenance of aged and infirm parents from their sons and daughters (s. 20). In all these cases the right is against an existing person, husband, father-in-law, father, mother, son or daughter as the case may be. After stating the right of all these persons the Act proceeds in section 21 to define persons who are dependants of a *deceased* Hindu and in section 22 lays down rules relating to the right of maintenance of *dependants* from the heirs of a deceased Hindu or others who have inherited the estate of such deceased person. Sections 21 and 22 may also be read with section 23 which lays down that it shall be in the discretion of the court whether any, and if so what, maintenance shall be awarded under the provisions of this Act. The principal general rule laid down in the present section is that a *dependant of a male or female deceased Hindu, who has not obtained any share in the estate of the deceased (dying after the commencement of this Act), is entitled to claim maintenance from those who take the estate.*

The expression "heirs" in this section includes all persons on whom the estate has devolved upon intestacy as well as under a testamentary instrument (*s*12).

The dependants of a deceased Hindu entitled to claim maintenance as stated above are—

(i) his or her father;

(ii) his or her mother;

(iii) his widow (so long as she does not remarry);

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(*s*11) *Mukta Bai* v. *Kamalaksha* ('60) A. Mys. 182. Also see *Jaiwanti Mafatlal* v. *Arvind N. Mafatlal* ('68) A.B. 314; *Gulabchand* v. *Sheokaran* ('64) A.P. 45.

(*s*12) *Gulzara Singh* v. *Tej Kaur* ('61) A. Punj. 288.

(iv) his or her minor son;
(v) the (minor) son of his predeceased son;
(vi) the (minor) son of a predeceased son of his predeceased son;
(vii) his or her unmarried daughter;
(viii) the unmarried daughter of his predeceased son;
(ix) the unmarried daughter of a predeceased son of his predeceased son;
(x) his widowed daughter;
(xi) the widow of his predeceased son (so long as she does not remarry);
(xii) the widow of a son of his predeceased son (so long as she does not remarry);
(xiii) his or her illegitimate minor son;
(xiv) his or her illegitimate daughter, so long as she remains unmarried.

It will be noticed that a larger number of persons are included among the dependants of a male Hindu.

In case of the grandson the right to claim maintenance as a dependant and the extent of such right is conditional upon his being unable to obtain maintenance from his father's or mother's estate. In case of the great-grandson the right to claim maintenance as a dependant and the extent of such right is conditional upon his being unable to obtain maintenance from the estate of his father or mother or father's father or father's mother. In case of a granddaughter the right to claim maintenance and the extent of such right is conditional upon her being unable to obtain maintenance as a dependant from the estate of her father or mother. In case of a great-grand-daughter the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her father or mother or father's father or father's mother. In case of the widowed daughter the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; her son or daughter; or the estate of her son or daughter; or from her father-in-law or his father or the estate of either of them. In case of the widow of his son the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; or from her son or daughter; or the estate of her son or daughter. In case of the widow of the son of his predeceased son the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; or from her son or daughter; or the estate of her son or daughter, or the estate of her father-in-law.

*Widow of a deceased coparcener.*—Sections 21 and 22 are not intended to affect the general rule of Hindu law that the widow of a deceased coparcener is entitled to maintenance out of the coparcenary property held by the surviving coparceners (*s*13).

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(*s*13) *Govardhan* v. *Gangabai* ('64) A.M.P. 168.

*Sister.*—A sister is not included in the list of dependants in section 21 but that does not in any way abridge her preexisting right to claim maintenance from her brother who inherited the father's property. Her right has not been obliterated (*s*14).

*Illegitimate son of a sudra.*—Under the Mitakshara law, prior to this Act, the illegitimate son of a sudra had the right to claim maintenance as stated in § 551 *ante*. Any such right which vested in him, prior to this Act, is not stopped by these two sections. He is entitled to maintenance for life and not only during his minority, as would now be the case under section 21 (viii) and section 22 (*s*15).

*Avaruddha stri.*—These two sections are prospective and not retrospective in their operation and they do not destroy the right of an *avaruddha stri* to claim maintenance which had vested in her before the commencement of this Act, although she is not included in the list of dependants (*s*15).

**Sub-section (3).**—The liability of the persons who have taken the estate of the deceased male or female Hindu to provide maintenance for any of the dependants of the deceased is not joint and several but is proportionate to the value of the share or part of the estate received by each of such persons.

**Sub-section (4).**—A person who is himself or herself a dependant of the deceased male or female and has taken a share or part of the estate of the deceased is liable to contribute towards the maintenance of any other dependant who has not obtained any share or part in the estate of the deceased by testamentary or intestate succession. His or her proportionate contribution in any such case under sub-section (3) is, however, to be computed in such a manner that what remains with him or her of the share or part of the estate after his or her liability to make contribution is enforced, is not, in terms of money, less than what would have been awarded to him or her by way of maintenance as a dependant. The maintenance that might have been awarded to him or her if he or she had not taken a share or part of the estate would have to be assessed in terms of a gross payment for the purpose of balancing it against the value of the share or part of the estate taken by him or her. It is evident that the ascertainment of the amount of proportionate contribution by a dependant who has taken his or her share or part of the estate will not depend simply on any arithmetical calculations because the court will have to compute in terms of money the value of the amount of the notional maintenance that might have become awardable to him or her and it seems that this may present considerable difficulty in some cases.

Amount of maintenance.

**23.** (1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.

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(*s*14) *Ramabai* v. *Narayan Rao* ('67) A.M.P. 86. 1970.
(*s*15) *Gopala Rao* v. *Sitharamamma* ('65) A.S.C.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing so;

(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

(e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—

(a) the net value of the estate of the deceased after providing for the payment of his debts;

(b) the provision, if any, made under a will of the deceased in respect of the dependant;

(c) the degree of relationship between the two;

(d) the reasonable wants of the dependant;

(e) the past relations between the dependant and the deceased;

(f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

(g) the number of dependants entitled to maintenance under this Act.

**Assessment of quantum of maintenance payable under the provisions of the Act.**—This section lays down three sets of rules relating to payment of maintenance under the various provisions of the Act—

(1) It is left to the discretion of the court to decide whether any maintenance should or should not be awarded—

(a) to a wife, widowed daughter-in-law, minor son, unmarried daughter or aged or infirm parents under sections 18 to 20 of the Act; or

(b) to any dependant of a deceased male or female Hindu under the provisions contained in sections 21 and 22 of the Act.

It is also left to the discretion of the court to determine the amount of maintenance (if any) to be awarded to any such persons.

(2) In exercising its discretion in the matter of assessment of the quantum of maintenance to be awarded to a wife, children or aged parents under the provisions of sections 18 to 20 of the Act the court must have regard to the factors and circumstances set out in sub-section (2) of this section.

(3) In exercising its discretion in the matter of assessment of the quantum of maintenance to be awarded to a dependant under the provisions of sections 21 and 22 of the Act the court must have regard to the factors and circumstances set out in sub-section (3) of this section.

**Sub-section (1): Discretion of the court.**—The Act vests the court with a wide discretion in the matter of granting maintenance but the discretion is judicial and not arbitrary or capricious. It is to be guided on sound principles of law and to be exercised within the ambit of the provisions of the relevant sections and having regard to the object of the Act. In determining whether maintenance should be awarded or not the court would have regard to all the facts and circumstances of the case—including the respondent's own income and other property, if any; the income and other property of the applicant; the conduct of the parties in the matter of their family relations with one another; and all the factors set out in sub-sections (2) and (3) as are applicable to the case.

**Sub-section (2).**—The sub-section read with sub-section (1), it will be noticed, leaves the matter of fixation of the amount of maintenance to the discretion of the court while stressing that the position and status of the parties, reasonable want of the claimant, the income and property of the claimant, and the number of persons whom the respondent is bound to maintain, are among the factors and circumstances which must be taken into consideration by the court. It does not seem helpful to refer to the immense range of decisions of courts in India under the previous law on the subject of maintenance and fixation of the amount of maintenance in case of different claimants though most of the cases relate to maintenance to be awarded to wife and widow. Danger lies in phrases used aptly enough in a particular context and opinions useful in their own sphere being treated as riders to the actual statutory language now employed by the Legislature. This sub-section which must be read with sub-section (1) does not purport to lay down any rigid rule or indicate any yardstick for all cases covered by it nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court and only emphasizes that the considerations mentioned in it are essential factors to which regard must always be had. The elements and factors to be considered must include everything having legitimate bearing on present or prospective matters affecting the family relations and lives of the claimant and the respondent which are obviously not susceptible of proper enumeration. In the exercise of its discretion the court has to select or emphasize such of the factors as are appropriate to the facts of the particular case. In a leading case on the subject of fixation of maintenance the Privy Council pointed out that maintenance depended "upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of

the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living and the age, habits and wants and class of life of the parties." (*t*). What is stated above is, in general, applicable to the case of any of the claimants mentioned in this sub-section. In case of a wife in addition to these factors the mode of living of the parties in the matter of expenses while cohabitation lasted may be taken into consideration though it would not always be a reliable index because the past mode of life may have been on a penurious or miserable scale or on the other hand on an extravagant scale. But if the scale was suited to the position and status of the parties that may be a factor to be considered in the estimate where there is no reliable data on the point of income or property. It would be necessary and of primary importance to consider the overall financial position of the respondent in all cases under the sub-section, though curiously enough the sub-section omits to stress the same while it mentions the financial position and income of the claimant. Anyway, the words "position and status of the parties" in clause (a) of the sub-section are wide enough to include the financial position of both the parties as a vital consideration in the matter.

In *Kulbhushan* v. *Raj Kumari* (*t*1) the Supreme Court expressed its entire agreement with the observations of the Judicial Committee of the Privy Council quoted above and stated that this sub-section made no departure from the principles enunciated there except perhaps to a limited extent envisaged in sub-clauses (d) and (e) of the section.

One factor of primary importance in making the reasonable induction required of the Court, would obviously be the overall financial position of the respondent which would have to be determined having regard to the "free estate" and "free income" of the respondent. In the Supreme Court case referred to above the Court regarded income-tax and contributions to provident fund as legitimate deductions in arriving at the "free income" of the respondent. Of course, the financial position of both the parties must enter in the final assessment of the quantum of maintenance to be allowed by the court.

*Claimant living separately.*—A dependant, for instance a daughter, who has good reasons for living separately (from the father) is entitled to claim maintenance under this section (*t*2).

*Claimant's own earnings.*—Clause (d) does not speak of the claimant's capacity to earn but of actual earnings and existence of sources of income (*t*2).

**Sub-section (3).**—The sub-section read with sub-section (1), it will be noticed, leaves the matter of fixation of the amount of maintenance to be awarded to any *dependant* of a deceased male or female Hindu to the discretion of the court while stressing that the amount of free estate, the benefit if any that the dependant might have already taken under a will of the deceased, the closeness of relationship between the two, the past relations between the claimant and the deceased, the reasonable wants of

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(*t*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) P.C. 128.

(*t*1) ('71) A.S.C. 234.

(*t*2) *Laxmi* v. *Krishna* ('68) A. Mys. 288.

the claimant, the financial position and income of the claimant and the number of other dependants entitled to claim maintenance from the estate are among the factors and circumstances which must be taken into consideration by the court. This sub-section which must be read with sub-section (1) does not purport to lay down any rigid rule or indicate any yardstick for all cases covered by it nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court and only emphasizes that the considerations mentioned in it are essential factors to which regard must always be had. The elements and factors to be considered must include the conduct of the claimant and everything having legitimate bearing on present or prospective matters affecting the claimant as well as the estate which are obviously not susceptible of proper enumeration. In the exercise of its discretion the court must have regard among others to the prime factors mentioned above and select or emphasize such of the factors and circumstances as are appropriate to the facts of the particular case. It is out of numerous circumstances which cannot all be listed, many of them small in themselves, that assessment of what is just and reasonable maintenance for the particular dependant has to be arrived at by the court.

**Arrears of maintenance.**—The principle on which the court exercises its discretion in the matter of fixation of quantum of arrears of maintenance, particularly when the claim is for an unduly long period is well settled. In such cases the Court in the exercise of its discretion generally awards arrears of maintenance at a small rate than that fixed as the normal rate and often at a rate which is half of that normal rate (*t2*) (*supra*).

Claimant to maintenance should be a Hindu.

**24.** No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.

**Claimant to maintenance should be a Hindu.**—The Legislature has inserted in this section a general provision to the effect that the person claiming maintenance under any section of the Act (Chapter III) must be a Hindu. This also follows from section 2 of the Act which states that the Act applies to Hindus in the whole connotation given to that expression. It is a necessary corollary to the rule laid down in this section that a person who is awarded maintenance under any provision of the Act, by a decree of the court or by agreement of the parties, forfeits the right to claim future maintenance from the date of his or her ceasing to be a Hindu by conversion to any religion other than Hinduism, Jainism, Buddhism or Sikhism, and the decree or agreement becomes unenforceable. If necessary, the court will in any such case rescind any previous order for maintenance that may have been made by it.

Where a Hindu daughter is converted to another religion pending adjudication of her claim against her father for past and future maintenance she would be entitled to recover maintenance till date of conversion, though not to future maintenance (*tx*).

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(*tx*) *Sundaranbal* v. *Suppiah* ('63) A.M. 260.

**25.** The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.

Amount of maintenance may be altered on change of circumstances.

**Variation of order or agreement fixing maintenance.**—This section, it is submitted, confers ample powers on the court to vary, modify or even discharge any order fixing the amount of maintenance made by a decree of the court even though it only states that the amount of maintenance may be "altered" subsequently if there is a material change in the circumstances justifying such action. There must be some material change in the circumstances justifying the alteration. It would seem that the circumstances justifying alteration would principally be changes in the pecuniary circumstances of the parties. The section does not speak of the conduct of the parties but it would seem that the subsequent conduct of the parties may in a given case become relevant consideration for the court in determining whether there has been a material change in the circumstances justifying such alteration.

It may now be taken as settled law that a decree or agreement fixing maintenance in favour of a wife or widow or other claimant is no bar to a claim for increased maintenance under this section if the circumstances justify such alteration and it is immaterial whether the decree or agreement was before or after this Act. The claimant would be entitled to increased maintenance if there is a material change in the circumstances notwithstanding the fact that the claimant had agreed not to claim higher maintenance even in changed circumstances (*tt*1). The right conferred under this section supersedes any contract to the contrary. The fact that the rate of maintenance was fixed by a compromise decree makes no difference. The same is the position with regard to a family settlement (*tt*2).

Alteration in the amount of maintenance fixed by a decree cannot be obtained merely by making an application to the court unless there is provision in the decree granting liberty to apply to have such variation made by way of an application. Otherwise, the only way in which the variation can be sought would be by way of a suit (*tt*3). A party obtaining any such decree should take care to reserve liberty to apply.

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(*tt*1) *Gopala Rao* v. *Sitharamamma* ('65) A.S.C. 1970, 1973, 1974: See *Ambayamma* v. *Ganapathi* ('69) A.A.P. 213 and cases there cited. Also see *Binda Prasad Singh* v. *Mundrika Devi* ('68) A.P. 196. In *Veeranna* v. *Seethamma* ('69) A.A.P. 15 there was surrender of estate by widow in favour of reversioners who agreed to give her maintenance and the widow agreed not to claim enhanced maintenance in future. It was held that the agreement was binding on her.

(*tt*2) *Seshi Ammal* v. *Thaiyu Ammal* ('64) A.M. 217; *Rangamma* v. *Venkatarajalu* ('66) A.M. 428 (family settlement).

(*tt*3) *Menokabala* v. *Panchanan* ('66) A.C. 228; *Binda Prasad* v. *Mundrika Devi, supra.*

**26.** Subject to the provisions contained in section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

Debts to have priority.

**Debts payable by estate of deceased to have priority over claim for maintenance unless there is a charge created in respect of same.**—Debts contracted or payable by a deceased Hindu take precedence over the right of maintenance of any of his dependants mentioned in section 21 of the Act unless there is a valid charge created in respect of the same (s. 27). The section, it will be noticed, deals with the question of priority as between the claims of dependants of a deceased Hindu for maintenance and those of the creditors of the deceased. The position is the same even as regards the claim for maintenance of the wife, daughter-in-law, minor children or aged parents of a Hindu in cases falling under sections 18 to 20 unless the claim has been secured by a valid charge. Reference may be made to §§ 569-572 *ante*.

**27.** A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

Maintenance when to be a charge.

**Maintenance when to be a charge.**—This section reiterates the rule established by a long series of decisions under the law as previously applied —that the claim even of a widow for maintenance is not a charge upon the estate of her deceased husband whether joint or separate until it is fixed and charged upon the estate. This may be done by a decree of the court (*tt*4), or by the will of the deceased or by agreement between the widow and the holder of the estate or any portion of the estate or otherwise. Therefore, the right of maintenance of any claimant is liable to be defeated by a transfer of the property to a *bona fide* purchaser for value without notice of any such claim for maintenance. In fact, any such right for maintenance, for instance of a widow or a minor son is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists.

It is only equitable that when a Court creates a charge for maintenance in favour of a claimant it should not do so over properties far out of proportion to the quantum of maintenance decreed in favour of the claimant (*u*).

This section may be read with section 28 which deals with the effect of transfer of property on right to maintenance.

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(*tt*4) *Bhago* v. *Bachni* ('72) A.P.&H. 169 [A charge may be made by decree of court: But court cannot direct possession of property to be given in lieu of maintenance].

(*u*) *Ramaswamy* v. *Baghyammal* ('67) A.M. 457.

**28.** Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

**Effect of transfer of property on right to maintenance.**

**Effect of transfer of property on right to maintenance.**—This section may be read with section 27 above. It reiterates the rule established by a long series of decisions under the law as previously applied—that the right of maintenance of any dependant, for instance a widow, not being a charge, it is but equitable that it should not be enforced against a transferee for value without notice of the right. A transferee for value may be a purchaser or he may be a mortgagee. The provisions of section 39 of the Transfer of Property Act, 1882, are to the same effect:

> "Where a third person has a right to receive maintenance, or a provision for advancement or marriage from the profits of immovable property, and such property is transferred . . . the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Reference may be made to §§ 569-572 *ante*.

There is no reason why the words "right to receive maintenance" in the section should not include a right to claim enhanced maintenance (*u*1).

The provisions of the Act may not apply to the case of enforcement of a claim against a joint family. But the Act apart, a widow can claim enhanced maintenance and enforce her rights under a decree for maintenance, in altered circumstances, against an alienee for consideration with notice of the charge created by the decree (*u*1).

The section in terms speaks of the right of a 'dependant' and does not purport to deal with the rights of a wife or unmarried daughter who are not dependants within the meaning of section 21 and this section does not apply to their case. But it is competent to the court in exercise of its discretion to create a charge in their favour in respect of maintenance (*uu*1). The section is not exhaustive and a Hindu wife is still entitled to rely on section 39 of the Transfer of Property Act which is not abrogated by the present section (*u*2); and it is open to the court to create a charge in her favour over the property of the husband as against an alienee of the same who has purchased the same with notice of the right (*u*2).

The right to maintenance cannot, of course, be defeated by a gratuitous transfer (*u*3).

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(*u*1) *Kaveri Amma* v. *Parameswari Amma* ('71) A. Kerala 216.

(*uu*1) *Laxmi* v. *Krishna* ('68) A. Mys. 288.

(*u*2) *Ramaswamy* v. *Baghyammal* ('67) A.M. 457.

(*u*3) *Ramappa* v. *Gouruwa* ('68) A. Mys. 270. Also see *Kapur Kaur* v. *Kishan Singh* ('70) A.P. & H. 270.

The expression "such estate" must mean only such estate out of which the claimant had a right to receive maintenance and cannot include any other property out of which the claimant had no right to claim maintenance (*u*4).

## CHAPTER IV

## REPEALS AND SAVINGS

**29.** Repeals. [*Repealed*]

**30.** Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

Savings.

**Savings.**—The Act as expressly ruled in section 4 *inter alia* supersedes the law relating to adoptions as previously applicable to Hindus. But it is not intended to have retroactive operation by affecting the validity and effect of any adoption made in accordance with that law before the Act came into operation. It is a firmly established principle of interpretation that except as to matters of procedure a statute is not to be given retrospective effect so as to impair or disturb any existing rights or obligations unless it says so in express terms or unless such intendment has to be gathered from necessary implication of the language used. Moreover section 5 of the Act expressly lays down that (only) adoptions made after commencement of the Act are to be regulated by the provisions of this Act. Savings are sometimes inserted by the Legislature *ex majore cautela* as for instance by the present section which in terms states that nothing contained in the Act is to affect any adoption made before its commencement and that the validity and effect of any such adoption is to be determined in accordance with the previous law.

In the undermentioned case it has been held that the expression "effect of any such adoption" in this section contemplates and saves all the legal consequences which flow from a valid adoption made before the commencement of the Act (*v*).

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(*u*4) *Parul Bala* v. *Bangshidhar* ('71) A.C. 270. ('71) A. Guj. 188. Reference may be made to
(*v*) *Daniraiji* v. *Vahuji Maharaj Chandraprabha* Notes under section 15 *ante*.

# APPENDIX I

## THE HINDU DISPOSITION OF PROPERTY ACT, 1916.

BEING

ACT No. XV OF 1916.

[*Received the assent of the Governor-General on the 28th September* 1916.]

*An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.*

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows:—

Short title and extent.

**1.** (1) This Act may be called the Hindu Disposition of Property Act, 1916.

[a](2) It extends to the whole of India *except the State of Jammu and Kashmir*.

Dispositions for the benefit of persons not in existence.

**2.** Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

**3.** The limitations and provisions referred to in section 2 shall be the following, namely:—

(a) in respect of dispositions by transfer *inter vivos* those contained in Chapter II[b] of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.[c]

**4.** [*Omitted by the Transfer of Property (Amendment) Supplementary Act* 21 *of* 1929, *sec.* 12.][d]

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(a) This Act was extended to the whole of India except the State of Jammu and Kashmir by the Miscellaneous Personal Laws (Extension) Act XLVIII of 1959.

(b) "Chapter II" was substituted for "sections 13, 14 and 20", by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 12, which came into force on the 1st April 1930.

(c) The words and figures "sections 113, 114, 115 and 116 of the Indian Succession Act, 1925," were substituted for the words and figures "sections 100 and 101 of the Indian Succession Act, 1865," by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 12.

(d) The original sec. 4 was as follows:—4. Failure of Prior disposition. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

5. Where the State Government is of opinion that the Khoja community in the State or any part thereof desire that the provisions of this Act should be extended to such community, it may, by notification in the Official Gazette, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification and this shall thereupon have effect accordingly.

Application of this Act to the Khoja community.

Note.—The Act in the unamended form still applies to transactions before April 1930. (*Vide s.* 15 of Act XXI of 1929).

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# APPENDIX II

## HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928.

## ACT No. XII OF 1928.

*(Received the assent of the Governor-General on the 20th September 1928).*

*An Act to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.*

WHEREAS it is expedient to amend the Hindu law relating to exclusion from inheritance of certain class of heirs, and to remove certain doubts; It is hereby enacted as follows:—

1. (1) This Act may be called the Hindu *Inheritance* (*Removal of Disabilities*) *Act*, 1928.

Short title, extent and commencement.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall *not* apply to any person governed by the *Dayabhaga School of Hindu Law.*

2. Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been *from birth a lunatic* or *idiot*, shall be excluded[e] . . . . . from any right or share in joint-family property by reason only of any disease, deformity or physical or mental defect.

Persons not to be excluded from inheritance or rights in joint-family property.

3. Nothing contained in this Act shall affect any *right* which has accrued or any *liability* which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of *any religious office or service or of the management of any religious or*

Saving and exception.

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(e) The words "from inheritance or" omitted, *ibid.*

*charitable* trust which he would not have had if this Act had not been passed.

**Section not retrospective.**—If any person suffering from any *physical* defect has before passing of the Act (20th September 1928) been already excluded from inheritance or from a share on partition, the Act does not entitle him to claim the inheritance or the share on partition.

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## APPENDIX III

ACT NO. XIX OF 1929

*(Received the assent of the Governor-General on the 1st October 1929).*

*An Act to Restrain the Solemnisation of Child Marriages*

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

Short title, extent and commencement.

**1.** (1) This Act may be called the *Child Marriage Restraint Act*, 1928.

(2) It extends to the whole of India except the State of Jammu and Kashmir and it applies also to all citizens of India without and beyond India.

(3) It shall come into force on the 1*st day of April*, 1930.

Definition.

**2.** In this Act, unless there is anything repugnant in the subject or context,—

(a) "child" means a person who if a male, is under eighteen years of age, and if a female, is under fifteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnised; and

(d) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child.

**3.** Whoever, being a *male* above *eighteen* years of age and below twenty-one, contracts a *child marriage* shall be punishable with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees or with both.

Punishment for male adult above twenty-one years of age marrying a child.

**4.** Whoever, being a *male* above *twenty-one* years of age, contracts a *child marriage* shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage.

Punishment for solemnising a child marriage.

6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine:

Punishment for parent or guardian concerned in a child marriage.

Provided that no woman shall be punishable with imprisonment.

See *Ram Jash Agarwala* v. *Chand Mandal* (1937) 2 Cal. 764; *Public Prosecutor* v. *Rattayya* (1937) Mad. 854, 168 I.C. 723, ('37) A. M. 990; *Emperor* v. *Munshi Ram* (1936) 58 All. 402, 159 I.C. 1007, ('36) A.A. 11.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7. [Omitted by Act XLI of 1949]

8. .....

9. .....

10. .....

11. [Omitted by Act XLI of 1949]

12. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

Power to issue injunction prohibiting marriage in contravention of this Act.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its motion or on the application of any person aggrieved, rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in

person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or both:

Provided that no woman shall be punishable with imprisonment.

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## APPENDIX IV

### ACT NO. XXX OF 1930.

### HINDU GAINS OF LEARNING ACT, 1930.

*(Received the assent of the Governor-General on the 26th July 1930).*

*An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.*

WHEREAS it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning; It is hereby enacted as follows—

Short title and extent.

**1.** (1) This Act may be called the *Hindu Gains of Learning Act*, 1930.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

Definitions.

**2.** In this Act, unless there is anything repugnant in the subject or context,—

(a) "acquirer" means a member of a Hindu undivided family, who acquires *gains of* learning;

(b) "gains of learning" means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and

(c) "learning" means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

Gains of learning not to be held not to be the separate property of acquirer merely for certain reasons.

3. Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(a) his learning having been, in whole or in part imparted to him by any member living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

Savings.

4. This Act *shall not be deemed in any way to affect*—

(a) the terms or incidents of any transfer of property *made or affected before the commencement of this Act,*

(b) the validity, invalidity, effect or consequences of anything already suffered or done *before the commencement of this Act,*

(c) any right or liability created under a partition, or an agreement for a partition, of joint family property made *before the commencement of this Act,* or

(d) any remedy or proceeding in respect of such right or liability;

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

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## APPENDIX V

### Act No. XVIII of 1937

### *THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

*(Received the assent of the Governor-General on the 14th April 1937)*

NOTE: The provisions of the Act are set out under § 35: See pp. 92-103 *ante*.

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* This Act has now been repealed by sec. 31 of the Hindu Succession Act 30 of 1956.

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